

THE INDIAN LAW REPORTS ALLAHABAD SERIES



सत्यमेव जयते

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

2023 - VOL. V
(MAY)

PAGES 1 TO 1993

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

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(2023) 5 ILRA 10
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/S 482 No. 903 of 2023

State of U.P.	Versus	...Applicant
Mukhtar Ansari		...Opposite Party

Counsel for the Applicant:
 Shri Ratnendu Kumar Singh

Counsel for the Opposite Party:

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 307, 506 and 120-B , The Uttar Pradesh Jail Manual, 2022 - Chapter-14 - criminal prisoners categorised in two classes (1) Superior; and (2) Ordinary - Paragraph 257 - High Court may recommend a criminal prisoner to a superior class for trial, enquiry, appeal, or revision, Paragraph 258 - superior class not typically recommended for prisoners accused of serious offenses mentioned in Chapter V-A, VI, VII, VIII, Section 161, and Chapters XII, XV, XVI, XVII, and XVIII of the Indian Penal Code, as well as other enactments.(Para - 3,6)

Accused-Opposite party the known gangster - dreaded criminal and bahubali - criminal cases registered against accused-opposite party - accused of serious offenses - trial court directed Senior Superintendent of District Jail - to grant superior class to accused - taken into consideration provision of Section 287 of the Uttar Pradesh Jail Manual - said Jail Manual replaced by the Uttar Pradesh Jail Manual, 2022.(Para - 2)

HELD:-Order impugned not only without jurisdiction but also unsustainable on merits;

liable to be set aside. Impugned order passed under Sections 307, 506 and 120-B IPC set aside.**(Para - 12)**

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

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

1. The present petition under Section 482 Cr.P.C. has been filed by the State impugning the order dated 15.3.2022 passed by the First Additional Sessions Judge/Special Judge, MP/MLA, Ghazipur in Session Trial No10-A of 2010, arising out of Case Crime No.1182 of 2009, under Sections 307, 506 and 120-B IPC, Police Station Mohammadabad, District Ghazipur.

2. The learned trial court vide impugned order has directed the Senior Superintendent of District Jail, Banda to grant superior class to accused-Mukhtar Ansari. The learned trial court has taken into consideration the provision of Section 287 of the Uttar Pradesh Jail Manual. However, the said Jail Manual is replaced now by the Uttar Pradesh Jail Manual, 2022 and the corresponding provisions are incorporated in Chapter-14 of the Uttar Pradesh Jail Manual, 2022.

3. Under the Uttar Pradesh Jail Manual, criminal prisoners are categorised in two classes; (1) Superior; and (2) Ordinary. Paragraph 257 of the Uttar Pradesh Jail Manual, 2022 provides for recommendation for superior class as was under Paragraph 279 of the Old Manual by the Courts.

4. For the sake of convenience, Paragraph 257 of the Uttar Pradesh Jail Manual, 2022 reads as under:-

?257. (a) In respect of criminal prisoner who is an accused before it, whether in trial, enquiry, appeal or revision and keeping in view the provisions of rule 259, the High Court may recommend to the State Government, and a Court of Session to the District Magistrate for his admission to superior class.

(b) The High Court may, pending receipt of the order of the State Government direct the Superintendent of the jail concerned to admit the prisoner provisionally to the superior class and the Superintendent of jail shall comply with such direction.?

5. Paragraph 258, corresponding Paragraph 280 of the Old Manual prescribes conditions for grant of superior class to a prisoner, which would read as under:-

?258. (1) Superior class shall not ordinarily be given to a prisoner who has been ordered to be detained under chapter VIII of the Code of Criminal Procedure, 1973, or who has been convicted of any of the following offences-

(a) offences under Chapter V-A, VI, VII and VIII. Section 161 ; Chapters XII, XV, XVI, XVII and XVIII of the Indian Penal Code;

(b) offences under Sections 25 and 27 of the Arms Act, 1959 ;

(c) offences under the Prevention of Corruption Act, 1947 ;

(d) offences under the Unlawful Activities (Prevention) Act, 1967 ;

(e) offences under the Control of Goonda Act, 1970;

(f) offences under the Prevention of Food Adulteration Act, 1954

(g) offences of abetment of any of the offences mentioned above ;

(h) offences under Section 14 of the Foreigners Act, 1946

(i) any other offences involving violence or moral turpitude.

(j) offences against women and children.

(k) The Uttar Pradesh Gangster Act, Anti Social Activities Prevention Act, 1986.

(l) any special act dealing with terror, subversive activities or organized crime.

(2) If the District Magistrate is satisfied that the prisoners, education, character and antecedent, the nature of the offence committed and the motives thereof justifies superior class treatment to the prisoner, may, either on his own motion or as a recommendation made by the Court of Session or Magistrate under clause (a) of accord superior class ?

(a) to a prisoner not covered by sub-rule (1) and

(b) to a prisoner covered by rule (1) but in very exceptional cases.

(3) A brief note setting forth the grounds on which the superior class is accorded by the District Magistrate shall be furnished to the State Government.

(4) The State Government either on its own motion or as recommendation made by the High Court may, for reasons to be recorded in writing likewise accord superior class to a prisoner if it is satisfied that his education, character and antecedents, the nature of offence committed and the motives therefor justify the same.?

6. From perusal of Paragraph 257, it is evident that in respect of a criminal prisoner, who is an accused before the court whether in trial, enquiry, appeal or revision, the High Court may recommend to the State Government and the Court of

Sessions to the District Magistrate for admission of such prisoner to a superior class. The conditions for admission of prisoner as stated above are prescribed in Paragraph 258, which specifically says that the superior class shall not be recommended ordinarily to a prisoner, who is accused of serious offences mentioned in Chapter V-A, VI, VII and VIII. Section 161 ; Chapters XII, XV, XVI, XVII and XVIII of the Indian Penal Code besides under other enactments which are mentioned in the said Section.

7. It may also be taken note of that while considering the recommendation for providing superior class to a criminal prisoner, the State Government has to take into consideration the following facts:-

- (a) Education of the criminal prisoner ;
- (b) Character ;
- (c) Criminal antecedents ;
- (d) Nature of offence(s) committed ; and
- (e) Motive for committing the offence(s).

8. Sri Ratnendu Kumar Singh, learned AGA for the petitioner-State has advanced two fold submissions in support of the preset petition. Firstly, he submits that the order passed by the learned trial court is without jurisdiction inasmuch as the Court has only recommendatory power for grant of superior class to a prisoner and the final authority to grant or refuse the superior class is vested in the State Government as the case may be. He further submits that considering the long criminal history of the accused-opposite party of heinous offences, a known gangster and the most dreaded criminal is otherwise not entitled for superior class. He, therefore, submits that

the impugned order being without jurisdiction and also on merit the accused is not entitled for superior class looking at his long criminal history and he being an accused for offences under Chapter-XVI, he is not entitled for grant of superior class inasmuch Paragraph 258 bars granting of superior class to such a criminal.

9. Sri Upendra Upadhyayay, learned counsel for the opposite party is not in a position to dispute the legal position that the learned trial court has only recommendatory power, and the power ultimately vests with the State Government to grant or refuse the superior status for reasons to be recorded on consideration of relevant factors as mentioned in Paragraph 258 of the Jail Manual. He also can not deny that the accused-opposite party is facing the trial for offences under Chapter-XVI and if such a person is accused of offences under Chapter-XVI, ordinarily he should not be recommended for superior class.

10. I have considered the submissions advanced on behalf of the learned counsel for the parties and perused the record.

11. The accused-opposite party is the known gangster, a dreaded criminal and bahubali. Following criminal cases have been registered against the accused-opposite party:-

"1. NCR No.219 of 1978, under section 506 IPC;

2. Case Crime No.169 of 1986, under Section 302 IPC,

3. Case Crime No.106 of 1988, under Section 302 IPC,

4. Case Crime No.410 of 1988, under Sections 147, 148, 149, 302 and 307 IPC,

5. NCR No.233 of 1988, under Sections 504 and 506 IPC,

6. Case Crime No.124 of 1990, under Sections 364, 395 and 397 IPC,

7. Case Crime No.399 of 1990, under Sections 147, 148, 149 and 307 IPC,

8. Case Crime No.682 of 1990, under Sections 147 and 506 IPC,

9. Case Crime No.266 of 1990, under Sections 467, 468, 420, 120-B IPC,

10. Case Crime No.44 of 1991, under Section 302 IPC,

11. Case Crime No.172 of 1991, under Sections 147, 148 and 302 IPC,

12. Case Crime No.294 of 1991, under Sections 307 and 302 IPC,

13. Case Crime No.229 of 1991, under Sections 147, 148, 149 and 302 IPC,

14. Case Crime No.456 of 1993, under Sections 365 and 387 IPC,

15. Case Crime No.503 of 1993, under Section 5 TADA,

16. Case Crime No.834 of 1995, under Sections 353, 504 and 506 IPC,

17. Case Crime No.165 of 1996, under Sections 323, 352 and 307 IPC,

18. Case Crime No.192 of 1996, under Section 3(1) U.P. Gangster Act,

19. Case Crime No.264 of 1996, NSA,

20. Case Crime No.237 of 1996, under Sections 120, 135, 136 Lo.Pra.Adhi.;

21. Case Crime No.19 of 1997, under Sections 364A, 365, 302, 120-B and 34 IPC;

22. NCR No.19 of 1997, under Section 506 IPC,

23. Case Crime No.121 of 1997, under Section 364A IPC;

24. Case Crime No.377 of 1997, under Section 506 IPC;

25. Case Crime No.58 of 1998, NSA;

26. Case Crime No.33 of 1999, NSA;

27. Case Crime No.17 of 1999, under Section 506 IPC;

28. Case Crime No.60 of 1999, under Sections 419, 420, 109 and 120-B IPC;

29. Case Crime No.106 of 1999, under Sections 307, 302 and 120-B IPC;

30. Case Crime No.126 of 1999, under Section 506 IPC;

31. Case Crime No.428 of 1999, under Section 2/3 U.P. Gangster Act;

32. Case Crime No.66 of 2000, under Sections 147, 336, 353 and 506 IPC;

33. Case Crime No.209 of 2002, under Section 3/7/25 Arms Act;

34. Case Crime No.131 of 2003, under Sections 353, 504 and 506 IPC;

35. Case Crime No.9A of 2004, under Sections 147, 148, 149, 307 IPC;

36. Case Crime No.808 of 2004, under Sections 147, 148, 149, 393, 307, 507,

506, 504 and 342 IPC;

37. Case Crime No.493 of 2005, under Sections 302, 506 and 120-B IPC;

38. Case Crime No.589 of 2005, under Sections 147, 148, 149, 302, 307, 404,

120-B IPC and Section 7 Criminal Law amendment Act;

39. Case Crime No.1580 of 2005, under Sections 147, 148, 149, 302, 435, 436, 153A IPC;

40. Case Crime No.1051 of 2007, under Section Gangster Act;

41. Case Crime No.361 of 2009, under Sections 302, 120-B IPC and Section 7 Criminal Law Amendment Act;

42. Case Crime No.1182 of 2009, under Sections 307, 506 and 120-B IPC;

43. Case Crime No.66 of 2009, under Section 3 Makoka Act;

44. Case Crime No.1866 of 2009, under Sections 147, 148, 149, 307, 302,

325, 404, 120-B IPC and Section 7 Criminal Law Amendment Act;

45. Case Crime No.399 of 2010, under Sections 302, 307, 120-B, 34 IPC, Section 7 Criminal Law Amendment act and Section 25 Arms Act;

46. Case Crime No.482 of 2010, under Section 3(1) U.P. Gangster Act;

47. Case Crime No.891 of 2010, under U.P. Gangster Act;

48. Case Crime No.20 of 2014, under Section 147, 148, 149, 302, 307, 506, 120-B IPC and Section 7 Criminal Law Amendment Act;

49. Case Crime No.05 of 2019, under Sections 386 and 506 IPC;

50. Case Crime No.04 of 2020, under Sections 419, 420, 467, 468, 471, 120B IPC Section 30 Arms Act;

51. Case Crime No.160 of 2020, under Section 3(1) U.P. Gangster Act;

52. Case Crime No.236 of 2020, under Sections 468, 471, 120-B IPC and Section 3 Sa.Sa.Nu, Adhi;

53. Case Crime No.55 of 2021, under Section 3(1) U.P. Gangster Act;

54. Case Crime No.369 of 2021, under Sections 419, 420, 467, 468, 471, 120-B, 506, 177 IPC and Section 7 Criminal Law Amendment Act;

55. Case Crime No.121 of 2021, under Section 25/26 Arms Act;

56. Case Crime No.185 of 2021, under Sections 419, 420, 467, 468, 471 and 120-B IPC;

57. Case Crime No.287 of 2022, under Section 3(1) Gangster Act; and

58. Case Crime No.08 of 2022, under Section 3(1) Gangster Act.?

12. Considering the aforesaid facts and the legal position, I am of the view that the order impugned in the present petition is not only without jurisdiction but also

unsustainable on merits, therefore, the same is liable to be set aside.

13. Thus, the petition is allowed and the impugned order dated 15.3.2022 passed by the First Additional Sessions Judge/Special Judge, MP/MLA, Ghazipur in Session Trial No10-A of 2010, arising out of Case Crime No.1182 of 2009, under Sections 307, 506 and 120-B IPC, Police Station Mohammadabad, District Ghazipur, is hereby set aside.

(2023) 5 ILRA 14
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.04.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Application U/S 482 No. 3559 of 2023

Shabana Bano ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Shobhit Pratap Singh, Sri Mujeeb Khan,
Sri Naveen Kumar

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Sections 125 - Order for maintenance of wives, children and parents, Section 126(2) - Proceedings under section 125 may be taken against any person in any district - where he or his wife resides, The Code of Civil Procedure, 1908 - Section 11 - Res Judicata - an issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit - In the proceedings initiated by the

application under Section 125 Cr.P.C., the provisions of Section 11 of the Code of Civil Procedure i.e. principle of res judicata will apply.(Para - 25,35)

Applicant's marriage to opposite party No. 2 - husband demanded dowry - couple separated in 2013 - husband sent Talaqnama to applicant - applicant filed application under Section 125 Cr.P.C. - to maintain her and her children - rejected for lack of prosecution - applicant filed another application - again rejected by Family Court - on the principle of res judicata - same not been finally decided (i.e. on merits) - after affording opportunity of hearing to applicant - hence present application. **(Para - 3,37)**

HELD:- Principle of res judicata only applicable in second cases where the matter directly and substantially in issue has been in issue in previous applications. If the earlier case not decided finally or without merit, the second case for the same relief will be maintainable, and the principle of res judicata will not apply. Judgement and order passed by family Court under Section 125 Cr.P.C set aside, directing to pass a reasoned and speaking order within six months, after affording opportunity of hearing to the parties. **(Para -30,38)**

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

List of Cases cited:

1. Danial Latifi Vs U.O.I., (2001) 7 SCC 740
2. Capt. Ramesh Chander Kaushal Vs Veena Kaushal, AIR 1978 SC 1807
3. Chaturbhuj Vs Sita Bai, (2008) 2 SCC 316
4. Shabana Bano Vs Imran Khan, (2010) 1 SCC 666
5. Shamim Bano Vs Asraf Khan, (2014) 12 SCC 636
6. Shamima Farooqui Vs Shahid Khan, (2015) 5 SCC 705
7. Badshah Vs Sou. Urmila Badshah Godse, AIR 2014 SC 869

8. M. Nagabhushana Vs St. of Karn., (2011) 3 SCC 408

9. Nagendrappa Natikar Vs Neelamma, , AIR 2013 SC 1541

10. Jaswant Singh Vs Custodian of Evacuee Property, (2004) 3 SCC 277

11. Prem Kishore & ors. Vs Brahm Prakash & ors., 2023 SCC OnLine SC 356

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. Heard Mr. Naveen Kumar, learned counsel for the applicant, learned counsel for opposite party no.2 and learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been filed on behalf of the applicant to quash the judgement and order dated 20th May, 2022 passed by the Principal Judge, Family Court, Sonbhadra, in Criminal Case No. 387 of 2019 (Shabana Bano Vs. Aliraza), under Section 125 Cr.P.C., Police Station-Dudhi, District-Sonbhadra, whereby the application made by the applicant under Section 125 Cr.P.C. has been rejected.

The case of the Applicant

3. The factual matrix of the case in hand, which has been highlighted by the applicant is that marriage of applicant and opposite party no. 2 was solemnized on 4.5.2002 in accordance with Muslim Rites and Rituals at Dudhi, Sonbhadra and in the said marriage, about Rs. 40 lacs with Indica Car were given by applicant's family members to opposite party no. 2 for fulfilment of dowry. After marriage applicant came to her matrimonial house but after few days of her marriage, the

husband (opposite party no. 2) and his family members again demanded Rs. 20 lacs from applicant's family members. From the aforesaid wedlock, three female children and a male child was born. When the family members of the applicant did not fulfill the aforesaid additional demand of dowry at Rs. 20 lacs, the opposite party no. 2 and his family members kicked out the applicant from her matrimonial house on 18.11.2013 with her children and on 2.12.2013, opposite party no. 2 sent Talaqnama to applicant. Since the applicant is unskilled housewife/ lady, she is unable to earn livelihood for herself and her children, so she filed Criminal Misc. Application No. 21/2014

(Shabana Bano Versus Ali Raza)
Under Section 125 Cr.P.C. for maintaining her and her children but the said application was rejected by learned court below for want of prosecution on 1.3.2017. After rejection of the said application under Section 125 Cr.P.C., the applicant filed another application under Section 126 (2) Cr.P.C. before the Principal Judge, Family Court, Sonbhadra Being Criminal Misc. Application No. 138 of 2017, which has also been rejected/dismissed by learned Principal Judge Family Court, Sonbhadra for want of prosecution on 8th February, 2018. After that the applicant filed a fresh application under Section 125 Cr.P.C. before the Principal Judge Family Court, Sonbhadra, which has been numbered as Criminal Misc Application No. 387 of 2019 (Shabana Bano Vs. Ali Raza). This application filed by the applicant under Section 125 Cr.P.C. has again been rejected by the Family Court vide order dated 20th May, 2022 on the principle of *res judicata*. It is against this order that the present application has been filed.

Finding and conclusion of the Principal Judge, Family Court, Sonbhadra while passing the impugned order:

4. Before passing the impugned order, the Family Court has framed a conceptual issue whether after rejection of applications of the applicant under Sections 125 and 126 (2) Cr.P.C. for want of prosecution vide orders dated 1st March, 2017 and 8th February, 2018, fresh application under Section 125 Cr.P.C. being Criminal Misc Application No. 387 of 2019 (Shabana Bano Vs. Ali Raza) is legally maintainable or not and the applicant has the right to file a fresh application under Section - 125 of the Code of Criminal Procedure or not?

5. The Family Court has recorded in the order impugned that due to the absence of the applicant, the first application made by the applicant under Section 125 Cr.P.C. has been rejected on 01.03.2017 and the application under section 126 (2) of the Code of Criminal Procedure, has been rejected on 8th February, 2018. From the legal point of view it is apparent that all the rights have been exercised by the applicant in respect of Section-125 of the Code of Criminal Procedure before the Family Court, Sonbhadra and final decision has been taken by the Court twice. It has further been recorded that the proceedings of Section-125 of the Code of Criminal Procedure are of a semi-civil nature. The applicant got the right to apply Section 125 of the Code of Criminal Procedure under the new case after the case was rejected twice due to the absence of the applicant. In the case in question, the said conceptual question is a question of law, which is being decided on the basis of merits and demerits. The facts mentioned in the present application under Section 125

Cr.P.C. cannot be considered until the same is not legally maintainable.

6. The Principal Judge, Family Court has further recorded that the proceedings of Section-125 of the Code of Criminal Procedure are of a semi-civil nature. According to Section-36 of the Family Court Rules, 2006, an order passed under Chapter-IX of the Code of Criminal Procedure for maintenance allowance may be executed by the court by attachment of salary as provided in Section- 60 and Order - XXI of the Code of Criminal Procedure, in addition to the mode of recovery provided in sub-Section 3 of Section 125 Cr.P.C. It is also notable that the warrant for recovery of fine is also sent to the District Collector in Format No. 44 mentioned at the end of the Code of Criminal Procedure. It is also necessary to mention here that under Section-125 Cr.P.C., formal evidence can be given in affidavit. According to Order XVIII Rule-4(1) of the Code of Civil Procedure, 1908, the examination-in-chief shall be on affidavit. In this way, the provisions of Civil Procedure Code are also applicable in miscellaneous case under Section 125 Cr.P.C. Suit under Section-125 of the Code of Criminal Procedure is Semi-Civil Suit in nature. The Principal Judge, Family Court has further recorded that the order dated 1st March, 2017 rejecting the application of the applicant under Section 125 Cr.P.C. and the order dated 8th February, 2018 rejecting the application of the applicant under Section 126 (2) Cr.P.C. attract Section-11 of the Code of Civil Procedure, 1908, as in both the above-mentioned miscellaneous applications i.e under Section 125 and 126 (2) Cr.P.C. and the fresh miscellaneous application under Section 125 Cr.P.C., the parties, the court and the contentious facts are the same. On the basis of such finding, the Principal

Judge, Family Court has come to the conclusion that the fresh application under Section 125 Cr.P.C., being Criminal Miscellaneous Case No. 387 of 2019 is barred by the principle of *res judicata* embodied in Section 11 of the Code of Civil Procedure.

7. Apart from the above, the Principal Judge, Family Court has also opined that the application under Section 125 Cr.P.C. in question has been filed about one and a half years after 2018 and no explanation has been given by the applicant in her plaint for that delay and facts has also not been mentioned by the applicant. There is no legal justification to bring a new application under Section 125 Cr.P.C. before the court once her application has been rejected for seeking maintenance in Section-126 (2) of the Code of Criminal Procedure.

8. On the basis of the aforesaid findings, the Principal Judge, Family Court, Sonbhadra has held that the new application under Section 125 Cr.P.C. being Criminal Misc. Application No. 387 of 2019 (Shabana Bano Vs. Ali Raza) deserves to be dismissed as not being legally maintainable.

9. Submission of the learned counsel for the applicant

(i) It is no doubt true that the application Under Section 125 Cr.P.C. is criminal in nature but few provisions of civil procedures are applied in the case of the applicant like the principle of *res judicata*. However, as per the definition of *res judicata*, it shall only be applicable in the case when the earlier case for the same cause of action and on same ground has been finally decided/rejected. The

applications of the applicant under Section 125 Cr.P.C. and 126 (2) Cr.P.C. has not been decided on merits the same has been rejected for want of prosecution.

(ii) Through opposite party no. 2, who is holding a very high post in Judiciary and also an infallible person, is presently posted as Additional District Judge, taking advantage of his influence, he is getting the applicant's applications rejected again and again..

(iii) The first application under Section 125 Cr.P.C. filed by the applicant was rejected on the ground of non appearance but applicant being innocent housewife had no knowledge about the date in her case because of non communication by her counsel.

(iv). The applicant has no source of income and she is residing alone in her parental house from 18.11.2013 and her mother and father had also died.

(v). The learned court below has committed manifest error of law in rejecting the application of the applicant under Section 125 Cr.P.C. on the ground of maintainability.

10. In support of his case, learned counsel for the applicant has placed reliance upon following judgments of (i) the Apex Court in the case of Pritam Singh & Another Vs. The State of Punjab reported in AIR 1956 SC 415; (ii) the Apex Court in the case of Dawalsab Vs. Khajasab reported in 2009 0 Supreme (SC) 1239; and (iii) Punjab & Haryana High Court in the case of Manish Tandon Vs. Ankita Bhutani reported in 2017 LawSuit (P&H) 2449; (iv) the Delhi High Court in the case of Khem Chand Kataria VS. Shakuntala Devi reported in II (1983) D.M.C. 201; and the Rajasthan High Court in the case of Jagdish Chandra Vs. Hemlata & Others reported in 1986 LawSuit (Ra) 526.

On the cumulative strength of the aforesaid, learned counsel for the applicant submits that the order impugned passed by the Family Court cannot be legally sustained and is liable to be quashed.

Submissions of the learned A.G.A. for the State

11. On the other-hand, learned A.G.A. controverts the submissions made by the learned counsel for the applicant by submitting that any suit/case, which has been decided either on merits i.e. finally or otherwise, the second suit/case will not be maintainable on the principle of *res judicata*. In support of his plea, learned A.G.A. has placed reliance upon the judgments of (i) Patna High Court in the case of Mahanth Girjanand Bhagat & Another Vs. Bhagwan Bhagat & Others reported in 1966 SCC OnLine Pat 38; (ii) Mysore High Court Kempegowda Vs. Annegowda & Others reported in 1950 SCC OnLine Kar 42; and (iii) C. Subramanyam Vs. C. Sumathi & Another reported in 2003 (2) ALD Cri 905.

On the cumulative strength of the aforesaid, learned A.G.A. submits that there is no illegality or infirmity in the order passed by the Family Court rejecting the application of the applicant under Section 125 Cr.P.C. on the ground of *res judicata*, as such the present applicant has no merit and is liable to be dismissed.

12. I have heard the learned counsel for the applicant, learned A.G.A. for the State and have gone through the records of the present application including the order impugned.

Aim and Object of Proceedings under Section 125 Cr.P.C.

13. Before coming to the merits of the case set up by the parties firstly this Court comes on the aim and object of Section 125 Cr.P.C.

14. Section 125 of the Code of Criminal Procedure has been enacted to achieve a social object and the object is to prevent vagrancy and destitution and to provide speedy remedy to deserted or divorced wife, minor children and infirm parents in terms of food, clothing and shelter and minimum needs of one's life. The Supreme Court has been always of the view that maintenance to the wife is an issue of gender justice and the obligation of the husband is on a higher pedestal.

15. In the case of **Danial Latifi Vs. Union of India** reported in (2001) 7 SCC 740, the Apex Court has opined as follows:

"In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature

breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question."

16. In **Capt. Ramesh Chander Kaushal v. Veena Kaushal** reported in AIR 1978 SC 1807, the Hon'ble Supreme Court remarked:

"The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance."

17. In the case of **Chaturbhuaj vs Sita Bai** reported in (2008) 2 SCC 316, the Hon'ble Supreme Court expressed the view

that Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and it gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The Hon'ble Supreme Court observed:

"Section 125, Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal (1978) 4 SCC 70 falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat (2005) 3 SCC 636."

18. In **Shabana Bano v. Imran Khan** reported in (2010) 1 SCC 666 in a petition for maintenance under Section 125, one of the objections raised by the husband was that he has already divorced the wife prior to filing of petition in accordance with Muslim Law and under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 she is not entitled to any maintenance after the divorce and after the expiry of the iddat period, however, the Hon'ble Supreme Court has held that even after the disposal of application under Section 3 of the Act, the divorced wife is entitled to claim maintenance under Section 125 beyond the iddat period and till she

remarries. The same view has been followed in **Shamim Bano v. Asraf Khan** reported in (2014) 12 SCC 636.

19. Reiterating the same view, in **Shamima Farooqui Vs. Shahid Khan reported in (2015) 5 SCC 705**, the Hon'ble Supreme Court has made very following observation:

"....."

"Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125, CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar."

.....

When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal

balm, for she cannot be allowed to resign to destiny."

20. In the case of **Badshah v. Sou. Urmila Badshah Godse** reported in AIR 2014 SC 869, though related to standard of proof of legal marriage in a case under Section 125 of the Code, the Supreme Court made a very emphatic observation regarding the ambit and object of the law provided by Section 125 of the Code.

21. From the records of the present application as well as from the order impugned, it is an admitted position that earlier two applications filed by the applicant before the Principal Judge, Family Court, Sonbhadra have been rejected in default/for want of prosecution, meaning thereby that the same have not been finally decided i.e. on merits.

Framing of Issues

22. The legal issues born out from the records of the present application, which has also been admitted by the learned counsel for the parties are as under:

(a) Whether in the proceedings under Section 125 Cr.P.C., the provision of Section 11 of the Cr.P.C. i.e. principle of *res judicata* will apply or not?;

(b) Whether the principle of *res judicata* will apply in the case of the applicant under Section 125 Cr.P.C.?; and

(c) Whether fresh application under Section 125 Cr.P.C. filed by the applicant is maintainable or not, after her two applications under Sections 125 and 126 (2) Cr.P.C. have been rejected for want of prosecution.

Answer on Issue no. (a)

23. For examining the first issue in hand i.e. (a), it is necessary for this Court to discuss about the nature of the proceedings under Section 125 Cr.P.C. No doubt, it is a social legislation to protect the women/children/parents, who are in need of support. When such claim for maintenance is made under the personal law, the right is decided by the Civil Court, only with a view to have a speedy disposal of such claims for maintenance, having regard to the urgent need of the victims of desertion and neglect. While making such provision, the Parliament thought it fit to incorporate the provision to enable the victims to claim maintenance through the criminal court. Thus, though a petition/application under Section 125 (1) Cr.P.C. is made before the criminal court as defined under Section 6 Cr.P.C., the right that is decided by the said Court is purely civil in nature. Therefore, undoubtedly, the order made by the Magistrate under Section 125 (1) Cr.P.C. for maintenance is the culmination of such a civil right of an individual. But, Section 125 (3) of the Code empowers the Court to impose a sentence of imprisonment, in the event of failure to obey such order made under Section 125 (1) Cr.P.C. To this extent, the proceeding is criminal in nature. To put it comprehensively, a proceeding initiated under Section 125 Cr.P.C. is quasi-civil and quasi-criminal. The Apex Court has held so in several judgements. Regarding the procedure for making claim before the Court for maintenance, what is filed under Section 125 (1) Cr.P.C. is a pure and simple petition/application and not a complaint as defined in Section 2 (d) of the Code. This would again indicate that a proceeding under Section 125 Cr.P.C. is treated as a quasi-civil and quasi criminal proceeding.

24. In the case of **M. Nagabhushana Vs. State of Karnataka** reported in (2011) 3 SCC 408, the Apex Court has held that principle of *res judicata* will apply universally meaning thereby that the same shall apply to both civil and criminal proceedings in order to secure the interest of justice and multiple litigations. The observation of the Apex Court is reproduced herein-under:

"The principles of Res Judicata are of universal application as it is based on two age old principles, namely, 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet bis vexari, si constet curiae quod sit pro un aet eadem cause' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.

15. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of *Res Judicata* has been evolved to prevent such an anarchy. That is why it is perceived that the plea of *Res Judicata* is not a technical doctrine but a fundamental principle which sustains the

Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties."

(Emphasis supplied)

25. In view of the aforesaid, this Court is of the firm opinion that in the proceedings initiated by the application under Section 125 Cr.P.C., the provisions of Section 11 of the Code of Civil Procedure i.e. principle of *res judicata* will apply.

Answer on Issue nos. (b) & (c)

26. For examining the second and third issues i.e. (b) & (c), it is important for this Court to refer to Section 11 of the C.P.C. wherein the principle of *res judicata* has been defined, which is being quoted herein below:

"11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.-- The expression former suit shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.

Explanation II.-- For the purposes of this section, the competence of a Court shall be determined irrespective of

any provisions as to a right of appeal from the decision of such Court.

Explanation III.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.-- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.-- Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.

Explanation VI.-- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating .

Explanation VII.-- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-- An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

27. The "principle of *res judicata*" literally means a "thing adjudicated" or "an issue that has been definitively settled by judicial decision". The principle operates as a bar to try the same issue once over. It aims to prevent multiplicity of proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies and was decided and has become final, so that the parties are not vexed twice over; vexatious litigation is put an end to and valuable time of the court is saved.

28. In **Nagendrappa Natikar vs Neelamma**, reported in AIR 2013 SC 1541, the question was whether a compromise entered into by husband and wife under Order XXIII, Rule 3 of the Code of Civil Procedure (C.P.C.) agreeing for a consolidated amount towards permanent alimony and thereby giving up any future claim for maintenance, accepted by the Court in a proceeding under Section 125 of the Code of Criminal Procedure (Cr.P.C.), would preclude the wife from claiming maintenance in a suit filed under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 ? In this case, after the petition was disposed of on the basis of compromise, the respondent wife filed a Misc. Application under Section 127, Cr.P.C. before the Family Court for cancellation of the earlier order and also for awarding future maintenance. While the application under Section 127, Cr.P.C. was pending, respondent wife also filed a suit before the Family Court under Section 18 of the Hindu Adoption and Maintenance Act claiming maintenance at the rate of Rs.2,000/- per month. Both the petitions were resisted by the husband stating that the parties had already reached a compromise with regard to the claim for

maintenance. The question of maintainability was raised as a preliminary issue. The Family Court held by its order dated 15.9.2009 that the compromise entered into between the parties in a proceeding under Section 125, Cr.P.C. would not be bar in entertaining a suit under Section 18 of the Act. The suit was then finally heard on 30.9.2010 and the Family Court decreed the suit holding that the respondent is entitled to monthly maintenance of Rs.2,000/- per month from the defendant husband from the date of the filing of the suit. The High Court also confirmed the same.

29. Upholding the judgment of the High Court, the Hon'ble Supreme Court pointed out that Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a Court of Law and such an agreement is void, since the object is unlawful. **The Court held that 'Proceeding under Section 125, Cr.P.C. is summary in nature and intended to provide a speedy remedy to the wife and any order passed under Section 125, Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18(2) of the 1956 Act' and observed:**

"Section 125, Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final determination of the status and personal rights of parties, which is in the nature of a civil proceeding, though are governed by the provisions of the Cr.P.C. and the order made under Section 125,

Cr.P.C. is tentative and is subject to final determination of the rights in a civil court."

30. In **Jaswant Singh Vs. Custodian of Evacuee Property** reported in (2004) 3 SCC 277, the Apex Court has laid down a test for determining whether a subsequent suit is barred by *res judicata*:

"14....In order that a defence of res judicata may succeed it is necessary to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings."

31. In both the cases of **Nagendrappa Natikar and Jaswant Singh (Supra)**, the Apex Court has clarified that if the earlier suit is not decided on merits, meaning thereby that the same is decided on the basis of compromise without entering into the merits of the case and without affording opportunity of hearing to the claimant/applicant, the second suit/case for the same relief will be maintainable.

32. Similarly dealing with the same issue, the Apex Court in its latest judgment in the case of **Prem Kishore & Others Vs. Brahm Prakash & Others** reported in 2023 SCC OnLine SC 356, in paragraph nos. 37 and 38 has held as follows:

"37. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) of the CPC can be summarized as follows:-

(i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;

(ii) The defence made by the defendant in the suit must not be considered while deciding the merits of the application;

(iii) To determine whether a suit is barred by *res judicata*, it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and

(iv) Since an adjudication of the plea of *res judicata* requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.

(See: *Srihari Hanumandas Totala v. Hemant Vithal Kamat*. (2021) 9 SCC 99)

38. The general principle of *res judicata* under Section 11 of the CPC contain rules of conclusiveness of judgment, but for *res judicata* to apply, the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit. Further, the suit should have been decided on merits and the decision should have attained finality. Where the former suit is dismissed by the trial court for want of jurisdiction, or for default of the plaintiff's appearance, or on the ground of non-joinder or mis-joinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for

failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation, or for failure to pay additional court fee on a plaint which was undervalued, or for want of cause of action, or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision, not being on the merits, would not be *res judicata* in a subsequent suit."

33. From the deeper scrutiny of the aforesaid principle of *res judicata* and the commentary given by **Sir Dinshah Fardunji Mulla (18th Edition-2011) on Code of Civil Procedure**, this Court is of view that the principle of *res judicata* would apply only when a matter will be said to have been "heard and finally decided" notwithstanding that the earlier matter/case/suit was disposed off in any of the following ways:

"(i) *ex parte*; or

(ii) by dismissal under Order XVII, Rule 3, but not when the dismissal is under Order XVI, Rule 1 for failure to pay adjournment cost; or

(iii) by a decree on an award; or

(iv) by oath tendered under Section 8 of the Indian Oaths Act, 1873; or

(v) by dismissal owing to plaintiff's failure to adduce evidence at the hearing."

34. The principle of *res judicata* will have no application when the earlier matter/case/suit has not been heard and finally decided and the same has been dismissed:

- "(i) for want of jurisdiction; or
 - (ii) **for default of plaintiff's appearance under Order IX, Rule 8. (But, a fresh suit on the same cause of action may be barred under Order IX, Rule 9); or**
 - (iii) on the ground of non-joinder of parties, or misjoinder of parties, or multifariousness; or on the ground that the suit was badly **for default of plaintiff's appearance under Order IX, Rule 8. (But, a fresh suit on the same cause of action may be barred under Order IX, Rule 9);** framed," or on the ground of a technical mistake; or
 - (iv) for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree; or
 - (v) for failure to furnish security for costs under Order XXV, Rule 2; or
 - (vi) on the ground of improper valuation, or for failure to pay additional court-fee on a plaint which was undervalued; or
 - (vii) for want of a cause of action; or
 - (viii) for want of notice; or
 - (ix) on the ground that it is premature;
 - (x) as not pressed;
 - (xi) as having become infructuous;
 - (xii) as having been settled, or ended by virtue of compromise."
- "Emphasis supplied"

35. Section 11 of the Code of Civil Procedure itself **provides that an issue heard and finally decided by a Court of limited** jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit.

Conclusion

36. In view of the aforesaid, it is apparent that the principle of *res judicata* will only be applicable in second case/application in which the matter directly and substantially in issue has been directly and substantially in issue in the former applications {under Sections 125 and 126 (2) Cr.P.C.} between the same parties i.e. Shabana Bano and Ali Raza under which the applicant claimed maintenance allowance, in a Court competent to try such subsequent application/case in which such claim has been subsequently raised, and has been heard and finally decided by such Court, but if earlier case has not been decided finally or without merits or affording opportunity of hearing to the applicant, second case/application for the same relief i.e. maintenance allowance will be maintainable and the principle of *res judicata* will not apply.

37. It is an admitted position that the earlier two cases filed by the applicant under Sections 125 Cr.P.C. and 126 (2) Cr.P.C. being Criminal Misc. Application No. 21 of 2014 and Criminal Misc. Application No.138 of 2017 respectively have been rejected for want of prosecution and the same have not been finally decided after affording opportunity of hearing to the applicant. As such, this Court is of the firm opinion that even though fresh application filed by the applicant under Section 125 Cr.P.C. being Criminal Misc. Application No. 387 of 2019 filed for the same relief/cause of action but the same is maintainable as the principle of *res judicata* will not apply therein. Both the issues are answered accordingly.

38. Consequently, the judgement and order dated 20th May, 2022 passed by the Principal Judge, Family Court, Sonbhadra,

in Criminal Case No. 387 of 2019 (Shabana Bano Vs. Aliraza), under Section 125 Cr.P.C., Police Station-Dudhi, District-Sonbhadra cannot be legally sustained and hereby set aside. Criminal Misc. Application No. 387 of 2019 (Shabana Bano Vs. Ali Raza) is restored to its original number. The Principal Judge, Family Court, Sonbhadra is directed to consider and decide the same afresh on merits, in accordance with law, by means of a reasoned and speaking order, after affording opportunity of hearing to the parties concerned, preferably within a period of six months from the date of production of a certified copy of this order, without granting any unnecessary adjournment to either of the parties, if possible on day to day basis.

39. The present application succeeds and is allowed subject to the observations made herein-above. There shall be no order as to costs.

(2023) 5 ILRA 27
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.04.2023

BEFORE

THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.

Application U/S 482 No. 5500 of 2023

Asif Ahmad Siddiqui **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:
 Dr. C.P. Upadhyay

Counsel for the Respondents:
 G.A., Sri Harbansh Prasad Pandey, Sri
 Pradeep Kumar Mishra

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections - 323, 363, 328, 376 Gha (Ka), 377, 504, 506, The Protection of Children From Sexual Offences Act, 2012 - Section 5/6 - evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings - If a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding. (Para - 11,23)

(B) The Code of Criminal Procedure, 1973 - Sections 161,164,173(2), 200, 202, 319 & 190 (1)(b) - Cognizance of offences by Magistrates - upon a police report of such facts - Upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused.(Para - 21)

Statement of victim recorded under Section 164 Cr.P.C. - accused-applicant summoned - Magistrate ruled on de facto complainant's independent application - finding sufficient material for applicant's complicity - despite not appearing on charge-sheet - Magistrate summons individuals - upon offence cognizance - examining available materials to determine involvement - beyond police reports, charge sheets, or F.I.R. **(Para - 31)**

HELD:-Adjudication on disputed questions of fact, can be handled by the trial court. It is not proper to have a pre-trial before the trial begins. Truth of the prosecution case must be established at the trial, according to law. Not a case where the prosecution should be scuttled at the threshold in exercising powers under Section 482 of the Code. **(Para - 30,32)**

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

List of Cases cited:

1. Nahar Singh Vs St. of U.P. , (2022) 5 SCC 295
2. Mohd. Allauddin Khan Vs The St. of Bihar & ors., 2019 0 Supreme (SC) 454
3. Rajeev Kaurav Vs Balasahab & ors. , 2020 0 Supreme (SC) 143
4. St. of Har. Vs Bhajan Lal , 1992 AIR 604
5. Neeharika Infrastructure (P) Ltd. Vs St. of Maha., (2021) SCC OnLine 315
6. Mahendra K.C. Vs St. of Karn. & ors. , AIR 2021 SC 5711
7. Shafiya Khan @ Shakuntala Prajapati Vs St. of U.P., (2022) 4 SCC 549
8. Parbatbhai Ahir Vs St. of Guj. , (2017) 9 SCC 641
9. Ramveer Upadhyay & anr. Vs St. of UP & anr., 2022 SCC online SC 484
10. Nahar Singh Vs The St. of U.P. & anr., (2022) 5 SCC 295

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Dr. C.P. Upadhyay, learned counsel for the applicant, Mr. Pradeep Kumar Mishra, Advocate holding brief of Mr. Harbansh Prasad Pandey, learned counsel for the informant and Mr. Amit Singh Chauhan, learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 30.01.2023 passed by Additional District and Sessions Judge/Special Judge, POCSO Act, Allahabad in Special Sessions Trial No.2/2023 arising out of Case Crime No.173 of 2022, under Sections 323, 363, 328, 376Gha(Ka), 377, 504, 506 IPC and Section 5/6 POCSO Act, Police Station - Shankargarh, District - Prayagraj.

3. The brief facts as enumerated in the writ petition are as follows:-

i) an FIR was lodged on 26.06.2022 at about 19:23 hrs. by Akbar Ali under Sections 366, 504 IPC, which was registered as Case Crime No.0173 of 2022 against three persons, namely, Nazim, Hashim and Khurshid with the allegations that the informant's minor daughter, 15 years old, was enticed away by Nazim son of Samsuddin, resident of Nari Bari, Mobile No.9198997737 on 21.06.2022. Since the aforesaid date, Nazim was not available at his residence and his mobile number was also switched off. When the informant went to Nazim's house, his brother; Hashim and brother-in-law; Khurshid, used abusive words and also spoke ill about the informant's daughter. After making efforts for tracing her daughter, an application was given on which the present FIR has been lodged.

ii) during investigation, the statement of the victim u/s 161 Cr.P.C. was recorded on 25.08.2022, which finds place at C.D. Parcha No.6 (after more than two months of the FIR), wherein she herself has stated that her father's name is Akbar Ali and she is resident of Surval Chandel, Nari Bari, P.S.Shankargarh, Prayagraj. She is aged about 19 years old and for fighting with her brother and sister, she was scolded by her mother and being annoyed, she left her house on 22.06.2022 at about 01:00 o'clock and went to Ajmer Sharif. Thereafter, she talked to her sister on telephone and got to know that FIR has been lodged by her father, hence she returned back, by herself, to Prayagraj.

iii) Subsequently, the victim Nazia was medically examined on 27.08.2022 and during course of medical examination, she has stated before the doctor that the co-accused Nazim came to

her house on 22.06.2022, when she was sleeping, she was made to smell some intoxicating substance due to which she fainted and after regaining her conscious, she found herself at Allahabad where a person named Asif was also present. She also stated that both the persons, i.e. Nazim and Asif, who have forcefully committed rape upon her for two days, later on, she was taken to Jammu where she was kept for two months and forcefully, physical relationship was established with her by them. The victim was dropped to Allahabad on 25.08.2022 by Nazim and three unknown persons and she was left near police station.

iv) Thereafter, the statement of the victim under Section 164 Cr.P.C. was recorded on 30.08.2022, which finds place in CD Parcha No.7, wherein she has stated that she is 15 years old. While she was sleeping at her house on 22.06.2022 in the night at about 02:00 a.m., Asif Siddiqui, resident of Nari Bari and Khurshid came there and made her smell some intoxicating substances due to which she became unconscious and after regaining conscious, she found herself at Allahabad where she was locked in a room and the aforesaid persons forcefully established physical relationship with her. Thereafter, Asif and Nazim fully aware and conscious did wrongful act with her. They, also beat and forcibly establish natural and unnatural physical relationship with the victim. She was kept for two days at Allahabad, thereafter, Nazim threatening the victim, took her to Jammu, where he committed rape upon her for two months relentlessly. She was also threatened by Nazim for her life and her father's life in case of denying to fulfill his wish. As she fell ill due to repeated forceful sexual assault, the accused-Nazim left her at Allahabad, whereafter she was taken by Niyaz

Khurshid to Sankargarh police station, who left her there. After recording the statement under Section 164 Cr.P.C., the victim was handed over to her father as is evident from page 47 of the application.

v) Subsequently, the statement of mother of victim, Gudiya (wife of the informant) recorded on 06.09.2022, which finds place in CD Parcha No.IX, wherein she has stated that her 15 years old daughter was enticed away by Asif Siddiqui son of Kamal, resident of Nai Bazar, Karma, P.S.-Ghoorpur, District-Prayagraj and Khurshid son of Abdul Razzak, resident of Badokhar, P.S.-Koraon, District-Prayagraj on 22.06.2022 at about 02:00 in the night. The victim was made to smell some intoxicating substance due to which she became unconscious and, thereafter, she was taken to Naribari market, where she was offered tea in which some intoxicating substance was mixed, after consuming which, she became unconscious. She was then taken to Allahabad where she was locked in a room and forceful physical relationship was established by Asif Siddique and Nazim, son of Samsuddin, resident of Nari Bari, P.S. Sankargarh, Prayagraj. They beat her and forcibly established natural and unnatural physical relationship with the victim. She was kept for two days in Allahabad and, thereafter, she was taken by Nazim to Jammu, where Nazim did wrongful act with her for two months, after threatening to kill her and her father, in case she does not permit him to do the wrongful act. After repeatedly being sexually exploited by Nazim, when she became ill, she was dropped by Nazim to Allahabad, from where Khurshid took her to Police Station-Sankargarh and left there. It has also been stated that all the aforesaid facts about the incident was narrated by the victim to her mother.

vi) After investigation, first charge sheet has been submitted as Charge Sheet No.188 of 2022 by the police against Khurshid only, whereas investigation continued for the other accused persons. Thereafter, the co-accused Nazim was arrested by the Police. In the meantime, the informant has approached before this Court by means of filing a criminal writ petition No.19896 of 2022 for fair and partial investigation wherein the co-ordinate bench of this court vide order dated 20.12.2022 was pleased to direct the respondents therein for expeditiously fair and partial investigation.

vii) Thereafter, the Investigating Officer requested for CDR of the aforesaid accused persons including the applicant as is evident from S.C.D. Parcha No.VI dated 16.12.2022.

viii) An application was moved by the applicant before the Investigating Officer mentioning therein that the contradictions in the statement of the victim under Section 164 Cr.P.C., the mother of the victim and all the facts about the CDR as detailed in parcha no.VI dated 16.12.2022. On the aforesaid application of the applicant, second statement of the mother of the victim was recorded on 17.12.2022, which finds place in S.C.D. Parcha no.VII, wherein the specific question was raised by the Investigating Officer regarding statement of the victim under Section 164 Cr.P.C., in which the victim has stated about Asif Siddiqui, Nari Bari, whereas the victim's mother in her statement stated that Asif Siddique son of Kamal, resident of Nari Bazar, Karma, Police Station-Ghoorpur, Prayagraj. The question, as to how the victim's mother recognized Asif and on what basis, she has stated the address as Karma, in place of Nari Bari, she has stated that she does not know Asif and she has narrated everything

as has been told by her husband about Asif. She has also specifically stated that Asif is not related to her, she has given the address of Asif as told by her husband. Her husband's nephew Mohd. Akhtar resides at Nai Bazar, Karma.

ix) Subsequently, the Second charge sheet being charge sheet no.188A of 2022 dated 27.12.2022 has been submitted against Nazim and Hasim. Hence all the three accused named in the FIR has been chargesheeted. The applicant was not charge sheeted in the present case as there was no evidence against him for his involvement in the aforesaid offence.

x) After submission of the aforesaid charge sheet against all the accused named in the FIR, an application was moved by the informant before the Additional District and Sessions Judge, Prayagraj under Section 190(1)(B) CrPC for summoning the accused-applicant stating therein that on the basis of statement of the victim under Section 164 CrPC, the involvement of the applicant is clear and *prima facie* case is established against the applicant. The concerned Magistrate without applying his judicial mind and solely relying upon the statement of the victim under Section 164 Cr.P.C. has summoned the applicant passing a non-speaking and unreasoned order dated 30.01.2023. Hence the present case has been filed.

4. Learned counsel for the applicant has challenged the summoning order as well as the entire proceedings on the following grounds:-

i) the impugned summoning order dated 30.01.2023 has been passed without application of judicial mind, solely relying upon the statement of the victim under Section 164 Cr.P.C.

ii) from the material collected by the Investigating Officer, no *prima facie* case is made out against the applicant.

iii) the court concerned proceeded to summon the applicant, without appreciating the contradictions with respect to date of incident, identity of the applicant while giving his address at Nari Bari as well as change in her version, while narrating the incident.

iv) the applicant is not named in the FIR, his name does not find place in the statement of the victim under Section 161 Cr.P.C. and it is for the first time, while giving her statement before the doctor, that too as Asif, without disclosing his parentage and address his involvement in the incident has been narrated.

v) the name of the applicant is disclosed in the victim's statement under Section 164 Cr.P.C. as Asif Siddiqui of Nari Bari, thus from the aforesaid, the involvement of the applicant, who is resident of Nai Bazar, Chak Ghan Shyamdas, Post-Karma, Police Station-Ghoorpur, cannot be proved.

vi) in order to falsely implicate the applicant and meet out the deficiency, first statement of the victim's mother was recorded on 06.09.2022, wherein for the first time, proper name, parentage and address of the applicant has been disclosed as told by the victim to her mother, whereas in her second statement, she stated that she does not know the applicant nor is he related to her and she has further stated that she has disclosed about the applicant as told by Akbar Ali (her husband).

vii) the involvement of the applicant is also not established in the C.D.R. details as collected by the Investigating Officer.

viii) the charge-sheet has been submitted against the persons, who are named in the FIR and the applicant has

been exonerated, there being no evidence against him but on the informant's application u/s 190 (1)(b) CrPC, the applicant has been summoned, which is against settled position of law.

5. Learned counsel for the applicant further submits that while entertaining the final report as submitted against the accused persons, wherein the applicant was exonerated, there are two remedies provided to the informant, either to move protest petition for further investigating or move an application u/s 319 Cr.P.C. for summoning of the applicant after the examination of the prosecution witnesses. The concerned Magistrate has entertained the informant's application u/s 190(1)(b) Cr.P.C. and summoned the applicant without considering the aforesaid fact.

6. Learned counsel for the applicant further submits that the concerned Magistrate has summoned the applicant, without entering into genesis of the fact, evaluating the evidence, and has only relied upon the statement of the victim under section 164 Cr.P.C.

7. Learned counsel for the applicant further submits that in case, statement of the victim u/s 164 Cr.P.C. is believed in totality then the name of the accused-applicant Asif of Nari Bari, P.S.Sankargarh, Prayagraj would come into picture in place of applicant, who is resident of Nai Bazar, Karma, P.S.Ghoorpur, Prayagraj, therefore, the applicant's involvement in the aforesaid case cannot be proved.

8. He further submits that seeing the variations at different places, there is nothing on record to prove that the applicant is the person whose involvement is found in the incident and that too solely

relying upon the statement under Section 164 Cr.P.C. Placing relying upon the judgment of the Apex Court in the case of **Nahar Singh vs. State of U.P.** reported in (2022) 5 SCC 295, he submits that Magistrate is not empowered to take cognizance on an offence on the basis of police report in terms of section 190(1)(b) Cr.P.C. and issue summons to the persons, who are not arraigned as accused in the charge sheet and only on the basis of material as collected by the investigating officer.

9. Learned counsel for the applicant, therefore, submitted that the present criminal proceedings initiated against the applicant are not only malicious but also an abuse of the process of the court of law. On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicant that the proceedings of the above mentioned criminal case are liable to be quashed by this Court.

10. *Per contra*, learned AGA for the State as well as learned counsel for the informant submits that the contention regarding the fact that there are variations with respect to name of the applicant, who is not named in the FIR as well as regarding his address and parentage and there is no evidence in this regard to prove that the applicant is the person, who has committed the offence, it is submitted that the victim is very clear with respect to the fact that she has been sexually exploited by the applicant Asif Siddiqui about whom she has stated in her statement under Section 164 Cr.P.C. as well as the statement before the doctor, hence minor contradictions cannot go to prove that the applicant is innocent. They further submits that at the stage of taking cognizance by the

Magistrate as per the provisions contained in Section 190(1)(b) CrPC, the concerned Magistrate has to see as to whether *prima facie* case is being made out against the applicant. In the instant case, the concerned Magistrate has rightly allowed the application of the informant after considering the statement of the victim u/s 164 Cr.P.C. as well as the evidences collected by the Investigating Officer including the statements of the witnesses. They further submits that all other contentions raised by the applicants' counsel relate to disputed questions of fact.

11. Lastly, the learned A.G.A. as well as learned counsel for the informant states that the High Court may not quash the entire criminal proceedings under Section 482 Cr.P.C. at the pre-trial stage, for which he has relied upon the judgment of the Apex Court in the case of **Mohd. Allauddin Khan Vs. The State of Bihar & Others** reported in 2019 0 Supreme (SC) 454, wherein the Apex Court has held that the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 Cr.P.C. because whether there are contradictions or/and inconsistencies in the statements of the witnesses is an essential issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. However, in the present case the said stage is yet to come. They have further relied upon the judgment of the Apex Court in the case of **Rajeev Kaurav Vs. Balasahab & Others** reported in 2020 0 Supreme (SC) 143, wherein the Apex Court has held that it is no more *res integra* that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet

constitutes the ingredients of the offence/offences alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any law or Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings. It is clear from the law laid down by this Court that if a *prima facie* case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.

12. On the cumulative strength of the aforesaid submissions, learned A.G.A. as well as the learned counsel for the informant states that this Court may not exercise its inherent power under Section 482 Cr.P.C. in the present case, and hence the present application is liable to be rejected.

13. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

14. Before proceedings further, it is apposite to give reference of Section 190 Cr.P.C., which is as under:-

"190. Cognizance of offences by Magistrates.--

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf

under sub-section (2), may take cognizance of any offence--

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

15. After the close scrutiny of the aforesaid Section, the Court finds that section 190(1)(b) CrPC does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused.

16. This Court finds substance in the contention raised by the learned counsel for the opposite party no.2 as well as learned A.G.A. that *prima facie* case for the alleged offence is made out against the applicant. In the statement of the victim u/s 164 Cr.P.C. as well as the statement before the doctor, there is specific allegation against the applicant regarding sexually assaulting the victim.

17. As regards the first contention raised by the learned counsel for the

applicant regarding the contradictions in the name of applicant, his address and parentage, the Court observed that the victim with whom such an incident has happened, is in a sense of shock and not in a state of mind to tell the details of incident in a proper manner. There are minor contradictions, which cannot be seen here. The applicant shall have ample opportunity to prove his innocence during trial as such the allegation made against him cannot be sifted at this stage. At the time of taking cognizance, the Magistrate has only to see whether *prima facie* there are cogent reasons for issuing the process.

18. With respect to the second submission that the Magistrate cannot summon the other accused at the time of taking cognizance, even though the material exists has no force and the same has been reiterated by the Apex Court in the case of *Nahar Singh (supra)* upon which learned counsel for the applicant has relied, where while discussing the divergent views of different Benches of this Court, it has been held that the question of summoning the persons, who are not arrayed as an accused in the charge-sheet or police report, cannot be determining factor for summoning such persons and does not constrict exercise of such power of the Court taking cognizance in respect of persons such categories.

19. It is not disputed by the learned counsel appearing for the parties that the Magistrate is empowered to take cognizance under Section 190(1) CrPC in either of the three contingencies namely:-

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

20. The cognizance of the offence can be taken on the basis of the police reports as envisaged in Clause (b) of Section 190(1) CrPC irrespective of the opinion of the Investigating Officer that *prima facie* no case is made out, if the material collected and the statements of the witnesses recorded under Section 161 CrPC, in the opinion of the Magistrate, are sufficient to make out a *prima facie* case against the accused persons.

21. Thus the position is very clear and well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issuance of process to the accused. ***Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused.*** The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for

taking cognizance of a case under Section 190(1)(a), though, it is open to him to act under Section 200 or Section 202 also.

22. The legal position is quite clear. Once a final report is submitted against some body and simultaneously a charge sheet is submitted against the others, if the Magistrate takes cognizance on the basis of the charge sheet and accepts the final report, a protest petition will lie and if such protest petition has all the ingredients mentioned in Section 2(d) of the Code of the Criminal Procedure, it can be treated as a complaint and proceedings of complaint case may go on involving Sections 200 and 202 CrPC. The Magistrate can then pass an order according to law. In other cases, where the charge-sheet has been submitted against few accused and others have been exonerated, the Magistrate is not bound by the conclusion of the Investigating Officer and he, after applying his judicial, mind can proceed to issue process on the de facto complainant's application.

23. This Court comes on the issue whether it is appropriate for this Court being the Highest Court to exercise its jurisdiction under Section 482 Cr.P.C. to quash the charge-sheet and the proceedings at the stage when the Magistrate has merely issued process against the applicant and trial is to yet to come only on the submission made by the learned counsel for the applicant that present criminal case initiated by opposite party no.2 are not only malicious but also abuse of process of law. It is no more *res integra* that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence(s) alleged. Interference by the High Court under Section 482 CrPC is to prevent

the abuse of process of any law or Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is clear from the law laid down by the Apex Court that if a *prima facie* case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.

24. In the case of ***State of Haryana Vs. Bhajan Lal reported in 1992 AIR 604***, the Apex Court in paragraph 102 has enumerated 7 categories of the cases where power under Section 482 Cr.P.C. can be exercised by this Court, which are quoted below:-

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

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do

not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and

with a view to spite him due to private and personal grudge."

25. The principles laid down by the Apex Court in the aforesaid case, have consistently been followed in the recent judgement of three-Judge Bench of the Apex Court in the case of ***Neeharika Infrastructure (P) Ltd. vs. State of Maharashtra reported in (2021) SCC OnLine 315*** wherein it has been held that there is no denial of the fact that power under Section 482 Cr.P.C. is very wide, but as observed by this Court in catena of decisions, referred to hereinabove, conferment of wide power requires the court to be more cautious and it casts an onerous and more diligent duty on the court. Therefore, in exceptional cases, when the High Court deems it fit, regard being had to the parameters of quashing and the self-restraint imposed by law, may pass appropriate interim orders, as thought apposite in law, however, the High Court has to give brief reasons which will reflect the application of mind by the court to the relevant facts.

26. It is trite law that the power of quashing criminal proceedings should be exercised with circumspection and that too, in the rarest of rare cases and it was not justified for this Court in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the Final report or the complaint. A finding on the veracity of a material relied on by the prosecution in a case where the allegations levelled by the prosecution disclose a cognizable offence, is not a consideration for the High Court while exercising its power under Section 482 Cr.P.C. This view is fortified by the decision of the Apex Court in ***Mahendra***

K.C. v. State of Karnataka and Ors. Reported in AIR 2021 SC 5711.

27. In recent relevant judgement of the Apex Court in the case of **Shafiya Khan @ Shakuntala Prajapati vs. State of U.P., reported in (2022) 4 SCC 549**, it was observed as under;-

"16. It is no doubt true that the power of quashing of criminal proceedings should be exercised very sparingly and with circumspection and that too in rarest of the rare cases and it was not justified for the Court in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the inherent powers do not confer any arbitrary jurisdiction on the Court to act according to its whims and fancies."

28. The Apex Court in the case of **Parbatbhai Ahir Vs. State of Gujarat reported in (2017) 9 SCC 641**, referring to various caases has summarized following principles to govern powers of High Court under Section 482 Cr.P.C.:-

"15 The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender

and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

29. In another judgment of the Apex Court in the case of **Ramveer Upadhyay and Another Vs. State of UP and another reported in 2022 SCC online SC 484**, it has been held as under:-

39. In our considered opinion criminal proceedings cannot be nipped in the bud by exercise of jurisdiction under

Section 482 of the Cr.P.C. only because the complaint has been lodged by a political rival. It is possible that a false complaint may have been lodged at the behest of a political opponent. However, such possibility would not justify interference under Section 482 of the Cr.P.C. to quash the criminal proceedings. As observed above, the possibility of retaliation on the part of the petitioners by the acts alleged, after closure of the earlier criminal case cannot be ruled out. The allegations in the complaint constitute offence under the Atrocities Act. Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. The Complaint Case No.19/2018 is not such a case which should be quashed at the inception itself without further Trial. The High Court rightly dismissed the application under Section 482 of the Cr.P.C."

30. In view of the aforesaid, this Court finds that the submissions made by the learned counsel for the applicant call for adjudication on pure disputed questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. The prayer for quashing the entire proceedings is refused as I do not see any abuse of the Court's process either.

31. In the present case, the name of the accused-applicant has come into light from the statement of the victim recorded under Section 164 Cr.P.C. While summoning the applicant, on the basis of the statement under Section 164 Cr.P.C., the Magistrate acted on the basis of an independent application filed by the de facto complainant and found that there was sufficient material before him showing complicity of the applicant in the aforesaid case although his name did not find place in the charge-sheet. Thus, for summoning persons upon taking cognizance of an offence, the Magistrate has to examine the materials available before him for coming to the conclusion that apart from those sent up by the police, some other persons are involved in the offence. These materials need not remain confined to the police report, charge sheet or the F.I.R. The statement made under Section 164 of the Code could also be considered for such purpose as has been held by the Apex Court in the case of *Nahar Singh vs. The State of U.P. and Another reported in (2022) 5 SCC 295*.

32. This Court, however, may clarify that whatever is said in this judgment is purely tentative and limited to the purpose of judging the worth of the prayer to quash proceedings as well as impugned orders. It is and ought not be regarded by the Trial Court as any kind of a comment or evaluation about evidence, which is yet to surface during trial. The truth of the prosecution case has to be established beyond doubt at the trial in accordance with law. However, this Court is of opinion that this is not a case, where the prosecution ought to be scuttled at the threshold in the exercise of powers under Section 482 of the Code.

33. With the aforesaid observations, the present application under Section 482 Cr.P.C. is, accordingly, **dismissed**.

(2023) 5 ILRA 39
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.04.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI
(THAKUR), J.

Application U/S 482 No. 11661 of 2018

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

Counsel for the Applicants:

Sri Amrendra Nath Rai, Sri Sanjay Singh

Counsel for the Opposite Parties:

G.A., Sri Abhinav Gaur, Sri Anoop Trivedi,
 Sri Vibhu Rai

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Negotiable instruments Act, 1981 - Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the accounts - If on the face of the documents which are beyond suspicion or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court - To promote justice or to prevent injustice or abuse of process the Court may examine significant materials at the prima facie stage.(Para - 21)

Applicant no.1 resigned from Company before issuance of cheque - cheque did not bear their signatures - applicants were mere shareholders - no active participation in Company's day-to-day business - Complaint does not specify applicants' responsibility or in-charge for the accused company's business conduct. **(Para - 23)**

HELD:- Record shows that applicants' participation in the company's daily functioning

is absent. Therefore, it would be travesty of justice to drag persons to face prosecution who are not connected to the issuance of the cheque or its dishonor. Applicants summoned for trial under Section 138 of Negotiable Instruments Act violate Apex Court mandate. Summoning order quashed. **(Para - 23,24,25)**

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

List of Cases cited:

1. Smt. B Devi (Basanti Devi) Vs St. of U.P., 2016 (94) ACC 90
2. Sunita Palita & ors. Vs M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019]
3. S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla, (2005) 8 SCC 89,
4. Harshendra Kumar D. Vs Rebatilata Koley & ors., (2011) 3 SCC 351
5. Pooja Ravinder Devidasani Vs St. of Maha. & anr., (2014) 16 SCC 1

(Delivered by Hon'ble Mrs. Sadhna Rani
(Thakur), J.)

1. Heard learned counsel for the applicants, learned counsel for opposite party no.2 and perused the record.

2. By moving this application under Section 482 Cr.P.C., the prayer is made to quash summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad in C.C. No.70/2016 under Section 138 Negotiable Instruments Act and also to set aside order dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in Criminal Revision No.19 of 2017.

3. As per facts of the case, a complaint was filed by opposite party no.2 on 13.10.2016 against the applicants and six

other persons with the version that opposite party no.2 was a limited Company registered under Companies Act and Vijay Kumar son of late Sri Satpal was authorized to filed complaint on behalf of the Company. The opposite party no.2 was indulged in the business of purchasing, selling and the construction of properties. Opposite party no.1 (in the complaint) M/S C.S.K. Infrastructure Pvt. Ltd. was a registered Company. Opposite parties no.2 to 6 were its Directors and officers and opposite parties no.7 to 9 were the Company's authorized representatives. Opposite party nos.2 to 9 were responsible for all the day to day business and transactions of opposite party no.1, M/S C.S.K. Infrastructure Pvt. Ltd.

4. The opposite parties (in the complaint) had assured the complainant/opposite party no.2 herein that they would make available a land to the complainant/opposite party no.2 at a reasonable price. Having faith in the opposite parties the complainant/ opposite party no.2 on 16.08.2014 paid Rs. 5,00,00,000/- to the opposite parties, which were received by the opposite parties. When as per their assurance the opposite parties could not arrange the land for the complainant/opposite party no.2 and the complainant gave them a threat of lodging FIR, then opposite parties promised to pay Rs. 7,00,00,000/- in pursuance of the principal amount of Rs. 5,00,00,000/- with interest. Opposite parties issued a cheque of Rs.1,00,00,000/- in favour of the complainant/ opposite party no.2. This Cheque No.000285 valued Rs.1,00,00,000/- dated 30.07.2016 got dishonoured despite of the assurance of opposite parties that it would get encashed. The information of which was received by the complainant/opposite party no.2 on

29.08.2016 and after due procedure, a complaint under Section 420 I.P.C. was filed by the complainant/opposite party no.2 against the nine accused persons including the Company itself.

5. After the statements under Sections 200 Cr.P.C. and 202 Cr.P.C., the trial court vide order dated 25.11.2016 summoned all the nine accused persons to face trial under Section 138 of Negotiable Instruments Act 1881. Against this order dated 25.11.2016, three of the opposite parties/ present applicants named Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi, filed a revision before the Sessions Court, which was rejected vide order dated 22.02.2018.

6. Feeling aggrieved by the summoning order dated 25.11.2016 and revisional court's order dated 22.02.2018, the present application has been moved by the applicants Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi only with the version that the applicant no.1, who was earlier the Director of M/S C.S.K. Infrastructure Pvt. Ltd. had resigned from his post on 26.09.2014, much prior to the issuance of the cheque no.000285 dated 30.07.2016 to the opposite party no.2. He has filed a certified copy of the form DIR-12 (earlier known as Form 32) to this effect. He had neither signed the cheque nor the amount was received in his bank account, thus, applicant no.1 is the ex-director in the accused Company. Applicant nos.2 and 3 are the mother and sister of the applicant no.1. They had no relation with the functioning of the accused company in any manner. They could not be the in-charge and responsible for the conduct and the business of the Company. Without any specific averment that what role they have played in the functioning and the business of the accused Company they can not be

implicated for the offence under Section 138 N.I. Act. The summoning order has been passed without considering section 141 of N.I. Act, hence, the prayer is made accordingly.

7. Counter affidavit has been filed on behalf of the opposite party no.2, wherein it has been mentioned that all the applicants alongwith co-accused persons are the shareholders of the Company and belong to the one and the same family. The present applicant Prashant Tyagi is the son of Ram Sevak Tyagi, applicant no.2 Smt. Neeta Tyagi is the wife of Ram Sevak Tyagi and applicant no.3 Smt. Shweta Tyagi, is the wife of Gaurav/ daughter of Ram Sevak Tyagi and Ram Sevak, is the person who is the authorized representative of the accused company and had issued the cheque in favour of the complainant/ opposite party no.2 on 30.07.2016. When an annual general meeting was called on 30.08.2013 the shares of all the shareholders in the disputed Company were as under:-

8. Ram Sewak Tyagi was having 20000 shares, Prashant Tyagi applicant no.1 was having 25000, Smt. Neeta Tyagi was having 20000 and Smt. Shweta Tyagi was having 10000 and Ram Kishan is said to have 5000 shares, thus, all the applicants here are the shareholders of the accused Company.

9. All the applicants are the blood relatives of Ram Sevak Tyagi and Ram Kishan, is the brother-in-law of Ram Sevak, who is the master mind of the aforesaid fraud. Ram Sevak was handling the financial as well as accounts affairs of the Company alongwith other Directors and the shareholders of the Company and was acting as authorized signatory of the Company on behalf of the Directors,

authorized representatives as well as other shareholders of the Company. All the applicants are the over all incharge of the day to day business of the Company. A revision of the applicants was also rejected by the trial court. Applicant no.1 is a Joint Director of the Company and still a Director of the Company and for a very short time he was not there on the Board of Directors. All the applicants looking after the day to day business/ functions of the Company and being the authorized representatives of the Company are liable for the offence, hence, cognizance has been rightly taken by the court.

10. The applicants filed a rejoinder affidavit wherein the version of the counter affidavit was denied and the version of the complaint was reiterated.

11. Learned counsel for the applicants has argued that the trial court has not gone through the Section 141 of N.I. Act, which deals with the offences by the companies. Without going through this section the impugned order cannot be said to be a complete and affective order.

12. It is further submitted that the applicant no.1 had resigned on 26.09.2014, while impugned cheque is said to have been issued on 30.07.2016. Regarding his resignation Form DIR-12 has been filed, which is a public document. Applicant nos.2 and 3 are the mere shareholders in the Company and are the ladies. Their participation cannot be said to be active in the Company and in the complaint there is bald averment that the accused nos.2 to 6 being the Directors and shareholders of the Company are responsible for the day to day business of the accused Company. Accused No.7 to 9 including applicant no.2 and 3 are the authorized representatives of the

Company and thus all the accused persons including all the three applicants are responsible for all the transactions and overall business of the Company. But no particulars or the specific role of the persons, which must be explained in the complaint, has been explained. Admittedly the cheque was not issued by any of the applicants. The applicant no.2, the mother of the applicant no.1 is a senior citizen. Hence, the prayer is made accordingly.

13. While, learned counsel for the opposite party no.2 opposed the version of the learned counsel for the applicants and submitted that the applicants are the shareholders in the Company and family members of Ram Sevak, who is said to have issued the impugned cheque and being the wife, son and daughter of the person issuing cheque all the applicants must have knowledge of the works done by Ram Sevak Tyagi, accused no.7 in the complaint. As the whole fraud/ cheating has been done with the consent and connivance of the applicants, so with the help of section 141 of the N.I. Act all the applicants would be liable for the acts done by the Company. The defence of the applicants cannot be adjudicated at this stage of summoning. Liability of the applicants can only be decided after the evidence, because as per sub-section 2 of Section 141 of the Act if the offence is found to be **proved** committed with the consent or connivance of the applicants they shall also be liable for the same and punished accordingly. Thus for proving the offence of the applicants evidence of the parties is to be adduced and at this nascent stage the liability of the applicants cannot be fixed.

14. Placing reliance over the judgment of this Court in *Smt. B Devi (Basanti Devi) Versus State of U.P., 2016 (94) ACC 90*, it

is argued by the learned counsel for opposite party no.2 that at the stage of summoning, defence of the accused which they may adduce subsequently cannot be seen since there was no occasion to look into such probable defence, which may come when the accused would appear and place their case before the magistrate. At the stage of issuing summons Court has to see whether a prima facie commission of offence has been shown and appropriate material has come justifying summoning of the accused persons against whom complaint has been made. The role assigned to the applicants in clear and specific words is referred in paragraph 4 of the complaint, that all the accused persons are responsible for the day to day business and functioning of the Company.

15. On the basis of this judgment, it is further argued that all the officers of the Company are responsible for the acts done in the name of Company and are sought to be made personally liable for the acts which resulted in criminal action being taken against the Company. Thus, it is claimed that all the applicants are liable to face trial under the aforesaid sections.

16. Learned counsel for the applicants drew the attention of the Court towards the judgment in ***Sunita Palita & Others Versus M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019], decided on 01.08.2022*** and the judgment in ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89***, mentioned therein wherein para-10 the Apex Court held that-

"every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for

conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status."

17. The attention of the Court is further drawn towards judgment in ***Harshendra Kumar D. Versus Rebatilata Koley & Others, (2011) 3 Supreme Court Cases 351*** wherein it was held by the Apex Court that as dishonour of the cheques through the complainant banker was subsequent to his resignation so the applicant no.1 could not be said to have any concern with the Company at that time.

18. It is further argued by the learned counsel for the applicants that mere bald averment in the complaint that the "applicants are looking after the day to day business of the Company, hence, they are liable for the offence committed" is not enough to prove the offence. This averment is devoid of any particulars.

19. In judgment ***Pooja Ravinder Devidasani Versus State of Maharashtra***

& Anr., (2014) 16 SCC 1, the Apex Court held that to fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company.....Every person connected with the Company will not fall into the ambit of the provision.

20. Thus, it is argued that the applicant no.1 was not a Director of the Company on the date when the cheque was issued and regarding his resignation Form DIR-12 has been placed on record. Applicant nos.2 and 3 are admittedly mere shareholders in the Company. They cannot be said to actively participate in the working of the Company.

21. So far as the argument of the learned counsel for the opposite party no.2 that a defence of the applicants shall be seen at the time of arguments is concerned in this regard, the Apex Court opined in judgment **Harshendra Kumar D. Versus Rebatilata Koley & Others (supra)** that if on the face of the documents which are beyond suspicion or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. If we go through the judgment in **Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)** placed by the learned counsel for opposite party no.2, the facts of that case

are different from the facts of the present case, wherein as per facts of that case the cheques were issued in the presence of the petitioner and other Directors, while in the present case cheques were never issued in the presence of the complainant rather till then applicant no.1 had resigned from the Company. While as per facts of the case of **Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)** the resignation and the documents with regard to the resignation were alleged to be the forged documents, but in the case in hand resignation of applicant no.1 has not been challenged, hence, the counsel for the opposite party no.2 cannot take benefit of the judgment of this Court, in the presence of various Apex Court judgments placed above by the counsel for the applicants.

23. Thus on the basis of the discussion and the judgments placed above, it is found that applicant no.1 had resigned from the Company much prior to the issuance of the cheque in question. Admittedly, the cheque did not bear the signatures of any of the applicants. On the date of issuance of the cheque the applicants were mere the shareholders of the Company. There was no active participation of the applicants in the day to day business and transactions of the Company and in the complaint itself, it is not mentioned that as to how and in what manner the applicants were in-charge or were responsible to the accused Company for the conduct of its business. Thus, in the opinion of the Court, as on the face of the record, participation of the applicants is not found in the day to day functioning of the Company, hence, on the basis of the version that the defence would be seen at the time of evidence, it would be travesty of justice to drag the persons to face the prosecution who are no way connected with the issuance of the cheque or its being dishonour thereof.

24. On the basis of above discussion, the summoning of the applicants to face trial under Section 138 of Negotiable Instruments Act is found to be against the mandate of law laid down by the Apex Court in above mentioned judgments.

25. The summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad and the judgment dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in criminal revision are quashed.

26. The application under Section 482 Cr.P.C. is, hereby, **allowed**.

(2023) 5 ILRA 45
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.04.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI
(THAKUR), J.

Application U/S 482 No. 11749 of 2018

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

Counsel for the Applicants:
 Sri Amrendra Nath Rai, Sri Sanjay Singh

Counsel for the Opposite Parties:
 G.A., Sri Abhinav Gaur, Sri Anoop Trivedi,
 Sri Vibhu Rai

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Negotiable instruments Act, 1981 - Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the accounts - If on the face of the documents which are beyond suspicion or doubt - placed by the

accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court - To promote justice or to prevent injustice or abuse of process the Court may examine significant materials at the prima facie stage.(Para - 21)

Applicant no.1 resigned from Company before issuance of cheque - cheque did not bear their signatures - applicants were mere shareholders - no active participation in Company's day-to-day business - Complaint does not specify applicants' responsibility or in-charge for the accused company's business conduct. **(Para - 23)**

HELD:- Record shows that applicants' participation in the company's daily functioning is absent. Therefore, it would be travesty of justice to drag persons to face prosecution who are not connected to the issuance of the cheque or its dishonor. Applicants summoned for trial under Section 138 of Negotiable Instruments Act violate Apex Court mandate. Summoning order quashed. **(Para - 23,24,25)**

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

List of Cases cited:

1. Smt. B Devi (Basanti Devi) Vs St. of U.P., 2016 (94) ACC 90
2. Sunita Palita & ors. Vs M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019]
3. S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla, (2005) 8 SCC 89,
4. Harshendra Kumar D. Vs Rebatilata Koley & ors., (2011) 3 SCC 351
5. Pooja Ravinder Devidasani Vs St. of Maha. & anr., (2014) 16 SCC 1

(Delivered by Hon'ble Mrs. Sadhna Rani
 (Thakur), J.)

1. Heard learned counsel for the applicants, learned counsel for opposite party no.2 and perused the record.

2. By moving this application under Section 482 Cr.P.C., the prayer is made to quash summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad in C.C. No.68/2016 under Section 138 Negotiable Instruments Act and also to set aside order dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in Criminal Revision No.16 of 2017.

3. As per facts of the case, a complaint was filed by opposite party no.2 on 13.10.2016 against the applicants and six other persons with the version that opposite party no.2 was a limited Company registered under Companies Act and Vijay Kumar son of late Sri Satpal was authorized to file complaint on behalf of the Company. The opposite party no.2 was indulged in the business of purchasing, selling and the construction of properties. Opposite party no.1 (in the complaint) M/S C.S.K. Infrastructure Pvt. Ltd. was a registered Company. Opposite parties no.2 to 6 were its Directors and officers and opposite parties no.7 to 9 were the Company's authorized representatives. Opposite party nos.2 to 9 were responsible for all the day to day business and transactions of opposite party no.1, M/S C.S.K. Infrastructure Pvt. Ltd.

4. The opposite parties (in the complaint) had assured the complainant/opposite party no.2 herein that they would make available a land to the complainant/opposite party no.2 at a reasonable price. Having faith in the opposite parties the complainant/ opposite party no.2 on 16.08.2014 paid Rs.

5,00,00,000/- to the opposite parties, which were received by the opposite parties. When as per their assurance the opposite parties could not arrange the land for the complainant/opposite party no.2 and the complainant gave them a threat of lodging FIR, then opposite parties promised to pay Rs. 7,00,00,000/- in pursuance of the principal amount of Rs. 5,00,00,000/- with interest. Opposite parties issued a cheque of Rs.1,00,00,000/- in favour of the complainant/ opposite party no.2. This Cheque No.000284 valued Rs.1,00,00,000/- dated 15.07.2016 got dishonoured despite of the assurance of opposite parties that it would get encashed. The information of which was received by the complainant/opposite party no.2 on 29.08.2016 and after due procedure, a complaint under Section 420 I.P.C. was filed by the complainant/opposite party no.2 against the nine accused persons including the Company itself.

5. After the statements under Sections 200 Cr.P.C. and 202 Cr.P.C., the trial court vide order dated 25.11.2016 summoned all the nine accused persons to face trial under Section 138 of Negotiable Instruments Act 1881. Against this order dated 25.11.2016, three of the opposite parties/ present applicants named Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi, filed a revision before the Sessions Court, which was rejected vide order dated 22.02.2018.

6. Feeling aggrieved by the summoning order dated 25.11.2016 and revisional court's order dated 22.02.2018, the present application has been moved by the applicants Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi only with the version that the applicant no.1, who was earlier the Director of M/S C.S.K. Infrastructure Pvt. Ltd. had resigned from

his post on 26.09.2014, much prior to the issuance of the cheque no.000284 dated 15.07.2016 to the opposite party no.2. He has filed a certified copy of the form DIR-12 (earlier known as Form 32) to this effect. He had neither signed the cheque nor the amount was received in his bank account, thus, applicant no.1 is the ex-director in the accused Company. Applicant nos.2 and 3 are the mother and sister of the applicant no.1. They had no relation with the functioning of the accused company in any manner. They could not be the in-charge and responsible for the conduct and the business of the Company. Without any specific averment that what role they have played in the functioning and the business of the accused Company they can not be implicated for the offence under Section 138 N.I. Act. The summoning order has been passed without considering section 141 of N.I. Act, hence, the prayer is made accordingly.

7. Counter affidavit has been filed on behalf of the opposite party no.2, wherein it has been mentioned that all the applicants alongwith co-accused persons are the shareholders of the Company and belong to the one and the same family. The present applicant Prashant Tyagi is the son of Ram Sevak Tyagi, applicant no.2 Smt. Neeta Tyagi is the wife of Ram Sevak Tyagi and applicant no.3 Smt. Shweta Tyagi, is the wife of Gaurav/ daughter of Ram Sevak Tyagi and Ram Sevak, is the person who is the authorized representative of the accused company and had issued the cheque in favour of the complainant/ opposite party no.2 on 15.07.2016. When an annual general meeting was called on 30.08.2013 the shares of all the shareholders in the disputed Company were as under:-

8. Ram Sewak Tyagi was having 20000 shares, Prashant Tyagi applicant

no.1 was having 25000, Smt. Neeta Tyagi was having 20000 and Smt. Shweta Tyagi was having 10000 and Ram Kishan is said to have 5000 shares, thus, all the applicants here are the shareholders of the accused Company.

9. All the applicants are the blood relatives of Ram Sevak Tyagi and Ram Kishan, is the brother-in-law of Ram Sevak, who is the master mind of the aforesaid fraud. Ram Sevak was handling the financial as well as accounts affairs of the Company alongwith other Directors and the shareholders of the Company and was acting as authorized signatory of the Company on behalf of the Directors, authorized representatives as well as other shareholders of the Company. All the applicants are the over all incharge of the day to day business of the Company. A revision of the applicants was also rejected by the trial court. Applicant no.1 is a Joint Director of the Company and still a Director of the Company and for a very short time he was not there on the Board of Directors. All the applicants looking after the day to day business/ functions of the Company and being the authorized representatives of the Company are liable for the offence, hence, cognizance has been rightly taken by the court.

10. The applicants filed a rejoinder affidavit wherein the version of the counter affidavit was denied and the version of the complaint was reiterated.

11. Learned counsel for the applicants has argued that the trial court has not gone through the Section 141 of N.I. Act, which deals with the offences by the companies. Without going through this section the impugned order cannot be said to be a complete and affective order.

12. It is further submitted that the applicant no.1 had resigned on 26.09.2014, while impugned cheque is said to have been issued on 15.07.2016. Regarding his resignation Form DIR-12 has been filed, which is a public document. Applicant nos.2 and 3 are the mere shareholders in the Company and are the ladies. Their participation cannot be said to be active in the Company and in the complaint there is bald averment that the accused nos.2 to 6 being the Directors and shareholders of the Company are responsible for the day to day business of the accused Company. Accused No.7 to 9 including applicant no.2 and 3 are the authorized representatives of the Company and thus all the accused persons including all the three applicants are responsible for all the transactions and overall business of the Company. But no particulars or the specific role of the persons, which must be explained in the complaint, has been explained. Admittedly the cheque was not issued by any of the applicants. The applicant no.2, the mother of the applicant no.1 is a senior citizen. Hence, the prayer is made accordingly.

13. While, learned counsel for the opposite party no.2 opposed the version of the learned counsel for the applicants and submitted that the applicants are the shareholders in the Company and family members of Ram Sevak, who is said to have issued the impugned cheque and being the wife, son and daughter of the person issuing cheque all the applicants must have knowledge of the works done by Ram Sevak Tyagi, accused no.7 in the complaint. As the whole fraud/ cheating has been done with the consent and connivance of the applicants, so with the help of section 141 of the N.I. Act all the applicants would be liable for the acts done by the Company. The defence of the

applicants cannot be adjudicated at this stage of summoning. Liability of the applicants can only be decided after the evidence, because as per sub-section 2 of Section 141 of the Act if the offence is found to be **proved** committed with the consent or connivance of the applicants they shall also be liable for the same and punished accordingly. Thus for proving the offence of the applicants evidence of the parties is to be adduced and at this nascent stage the liability of the applicants cannot be fixed.

14. Placing reliance over the judgment of this Court in **Smt. B Devi (Basanti Devi) Versus State of U.P., 2016 (94) ACC 90**, it is argued by the learned counsel for opposite party no.2 that at the stage of summoning, defence of the accused which they may adduce subsequently cannot be seen since there was no occasion to look into such probable defence, which may come when the accused would appear and place their case before the magistrate. At the stage of issuing summons Court has to see whether a prima facie commission of offence has been shown and appropriate material has come justifying summoning of the accused persons against whom complaint has been made. The role assigned to the applicants in clear and specific words is referred in paragraph 4 of the complaint, that all the accused persons are responsible for the day to day business and functioning of the Company.

15. On the basis of this judgment, it is further argued that all the officers of the Company are responsible for the acts done in the name of Company and are sought to be made personally liable for the acts which resulted in criminal action being taken against the Company. Thus, it is claimed that all the applicants are liable to face trial under the aforesaid sections.

16. Learned counsel for the applicants drew the attention of the Court towards the judgment in ***Sunita Palita & Others Versus M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019]***, decided on 01.08.2022 and the judgment in ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89***, mentioned therein wherein para-10 the Apex Court held that-

"every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status."

17. The attention of the Court is further drawn towards judgment in ***Harshendra Kumar D. Versus Rebatilata Koley & Others, (2011) 3 Supreme Court Cases 351*** wherein it was held by the Apex Court that as dishonour of the cheques through the complainant banker was

subsequent to his resignation so the applicant no.1 could not be said to have any concern with the Company at that time.

18. It is further argued by the learned counsel for the applicants that mere bald averment in the complaint that the "applicants are looking after the day to day business of the Company, hence, they are liable for the offence committed" is not enough to prove the offence. This averment is devoid of any particulars.

19. In judgment ***Pooja Ravinder Devidasani Versus State of Maharashtra & Anr., (2014) 16 SCC 1***, the Apex Court held that to fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company.....Every person connected with the Company will not fall into the ambit of the provision.

20. Thus, it is argued that the applicant no.1 was not a Director of the Company on the date when the cheque was issued and regarding his resignation Form DIR-12 has been placed on record. Applicant nos.2 and 3 are admittedly mere shareholders in the Company. They cannot be said to actively participate in the working of the Company.

21. So far as the argument of the learned counsel for the opposite party no.2 that a defence of the applicants shall be seen at the time of arguments is concerned in this regard, the Apex Court opined in judgment ***Harshendra Kumar D. Versus Rebatilata Koley & Others (supra)*** that if on the face of the documents which are

beyond suspicion or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. If we go through the judgment in ***Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)*** placed by the learned counsel for opposite party no.2, the facts of that case are different from the facts of the present case, wherein as per facts of that case the cheques were issued in the presence of the petitioner and other Directors, while in the present case cheques were never issued in the presence of the complainant rather till then applicant no.1 had resigned from the Company. While as per facts of the case of ***Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)*** the resignation and the documents with regard to the resignation were alleged to be the forged documents, but in the case in hand resignation of applicant no.1 has not been challenged, hence, the counsel for the opposite party no.2 cannot take benefit of the judgment of this Court, in the presence of various Apex Court judgments placed above by the counsel for the applicants.

23. Thus on the basis of the discussion and the judgments placed above, it is found that applicant no.1 had resigned from the Company much prior to the issuance of the cheque in question. Admittedly, the cheque did not bear the signatures of any of the applicants. On the date of issuance of the cheque the applicants were mere the shareholders of the Company. There was no active participation of the applicants in the day to day business and transactions of the

Company and in the complaint itself, it is not mentioned that as to how and in what manner the applicants were in-charge or were responsible to the accused Company for the conduct of its business. Thus, in the opinion of the Court, as on the face of the record, participation of the applicants is not found in the day to day functioning of the Company, hence, on the basis of the version that the defence would be seen at the time of evidence, it would be travesty of justice to drag the persons to face the prosecution who are no way connected with the issuance of the cheque or its being dishonour thereof.

24. On the basis of above discussion, the summoning of the applicants to face trial under Section 138 of Negotiable Instruments Act is found to be against the mandate of law laid down by the Apex Court in above mentioned judgments.

25. The summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad and the judgment dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in criminal revision are quashed.

26. The application under Section 482 Cr.P.C. is, hereby, **allowed**.

(2023) 5 ILRA 50

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 03.04.2023

BEFORE

**THE HON'BLE MRS. SADHNA RANI
(THAKUR), J.**

Application U/S 482 No. 11753 of 2018

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

Counsel for the Applicants:

Sri Amrendra Nath Rai, Sri Sanjay Singh

Counsel for the Opposite Parties:

G.A., Sri Abhinav Gaur, Sri Anoop Trivedi,
Sri Vibhu Rai

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Negotiable instruments Act, 1981 - Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the accounts - If on the face of the documents which are beyond suspicion or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court -To promote justice or to prevent injustice or abuse of process the Court may examine significant materials at the prima facie stage.(Para - 21)

Applicant no.1 resigned from Company before issuance of cheque - cheque did not bear their signatures - applicants were mere shareholders - no active participation in Company's day-to-day business - Complaint does not specify applicants' responsibility or in-charge for the accused company's business conduct. **(Para - 23)**

HELD:-Record shows that applicants' participation in the company's daily functioning is absent. Therefore, it would be travesty of justice to drag persons to face prosecution who are not connected to the issuance of the cheque or its dishonor. Applicants summoned for trial under Section 138 of Negotiable Instruments Act violate Apex Court mandate. Summoning order quashed. **(Para - 23,24,25)**

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

List of Cases cited:

1. Smt. B Devi (Basanti Devi) Vs St. of U.P., 2016 (94) ACC 90

2. Sunita Palita & ors. Vs M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Cr.) No.10396 of 2019]

3. S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla, (2005) 8 SCC 89,

4. Harshendra Kumar D. Vs Rebatilata Koley & ors., (2011) 3 SCC 351

5. Pooja Ravinder Devidasani Vs St. of Maha. & anr., (2014) 16 SCC 1

(Delivered by Hon'ble Mrs. Sadhna Rani
(Thakur), J.)

1. Heard learned counsel for the applicants, learned counsel for opposite party no.2 and perused the record.

2. By moving this application under Section 482 Cr.P.C., the prayer is made to quash summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad in C.C. No.69/2016 under Section 138 Negotiable Instruments Act and also to set aside order dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in Criminal Revision No.17 of 2017.

3. As per facts of the case, a complaint was filed by opposite party no.2 on 13.10.2016 against the applicants and six other persons with the version that opposite party no.2 was a limited Company registered under Companies Act and Vijay Kumar son of late Sri Satpal was authorized to filed complaint on behalf of the Company. The opposite party no.2 was indulged in the business of purchasing, selling and the construction of properties. Opposite party no.1 (in the complaint) M/S C.S.K. Infrastructure Pvt. Ltd. was a registered Company. Opposite parties no.2 to 6 were its Directors and officers and opposite parties no.7 to 9 were the Company's authorized representatives. Opposite party nos.2 to 9 were responsible for all the day to day business and

transactions of opposite party no.1, M/S C.S.K. Infrastructure Pvt. Ltd.

before the Sessions Court, which was rejected vide order dated 22.02.2018.

4. The opposite parties (in the complaint) had assured the complainant/opposite party no.2 herein that they would make available a land to the complainant/opposite party no.2 at a reasonable price. Having faith in the opposite parties the complainant/ opposite party no.2 on 16.08.2014 paid Rs. 5,00,00,000/- to the opposite parties, which were received by the opposite parties. When as per their assurance the opposite parties could not arrange the land for the complainant/opposite party no.2 and the complainant gave them a threat of lodging FIR, then opposite parties promised to pay Rs. 7,00,00,000/- in pursuance of the principal amount of Rs. 5,00,00,000/- with interest. Opposite parties issued a cheque of Rs.1,00,00,000/- in favour of the complainant/ opposite party no.2. This Cheque No.000282 valued Rs.1,00,00,000/- dated 15.06.2016 got dishonoured despite of the assurance of opposite parties that it would get encashed. The information of which was received by the complainant/opposite party no.2 on 29.08.2016 and after due procedure, a complaint under Section 420 I.P.C. was filed by the complainant/opposite party no.2 against the nine accused persons including the Company itself.

5. After the statements under Sections 200 Cr.P.C. and 202 Cr.P.C., the trial court vide order dated 25.11.2016 summoned all the nine accused persons to face trial under Section 138 of Negotiable Instruments Act 1881. Against this order dated 25.11.2016, three of the opposite parties/ present applicants named Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi, filed a revision

6. Feeling aggrieved by the summoning order dated 25.11.2016 and revisional court's order dated 22.02.2018, the present application has been moved by the applicants Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi only with the version that the applicant no.1, who was earlier the Director of M/S C.S.K. Infrastructure Pvt. Ltd. had resigned from his post on 26.09.2014, much prior to the issuance of the cheque no.000282 dated 15.06.2016 to the opposite party no.2. He has filed a certified copy of the form DIR-12 (earlier known as Form 32) to this effect. He had neither signed the cheque nor the amount was received in his bank account, thus, applicant no.1 is the ex-director in the accused Company. Applicant nos.2 and 3 are the mother and sister of the applicant no.1. They had no relation with the functioning of the accused company in any manner. They could not be the in-charge and responsible for the conduct and the business of the Company. Without any specific averment that what role they have played in the functioning and the business of the accused Company they can not be implicated for the offence under Section 138 N.I. Act. The summoning order has been passed without considering section 141 of N.I. Act, hence, the prayer is made accordingly.

7. Counter affidavit has been filed on behalf of the opposite party no.2, wherein it has been mentioned that all the applicants alongwith co-accused persons are the shareholders of the Company and belong to the one and the same family. The present applicant Prashant Tyagi is the son of Ram

Sevak Tyagi, applicant no.2 Smt. Neeta Tyagi is the wife of Ram Sevak Tyagi and applicant no.3 Smt. Shweta Tyagi, is the wife of Gaurav/ daughter of Ram Sevak Tyagi and Ram Sevak, is the person who is the authorized representative of the accused company and had issued the cheque in favour of the complainant/ opposite party no.2 on 15.06.2016. When an annual general meeting was called on 30.08.2013 the shares of all the shareholders in the disputed Company were as under:-

8. Ram Sewak Tyagi was having 20000 shares, Prashant Tyagi applicant no.1 was having 25000, Smt. Neeta Tyagi was having 20000 and Smt. Shweta Tyagi was having 10000 and Ram Kishan is said to have 5000 shares, thus, all the applicants here are the shareholders of the accused Company.

9. All the applicants are the blood relatives of Ram Sevak Tyagi and Ram Kishan, is the brother-in-law of Ram Sevak, who is the master mind of the aforesaid fraud. Ram Sevak was handling the financial as well as accounts affairs of the Company alongwith other Directors and the shareholders of the Company and was acting as authorized signatory of the Company on behalf of the Directors, authorized representatives as well as other shareholders of the Company. All the applicants are the over all incharge of the day to day business of the Company. A revision of the applicants was also rejected by the trial court. Applicant no.1 is a Joint Director of the Company and still a Director of the Company and for a very short time he was not there on the Board of Directors. All the applicants looking after the day to day business/ functions of the Company and being the authorized representatives of the Company are liable for the offence, hence, cognizance has been rightly taken by the court.

10. The applicants filed a rejoinder affidavit wherein the version of the counter affidavit was denied and the version of the complaint was reiterated.

11. Learned counsel for the applicants has argued that the trial court has not gone through the Section 141 of N.I. Act, which deals with the offences by the companies. Without going through this section the impugned order cannot be said to be a complete and affective order.

12. It is further submitted that the applicant no.1 had resigned on 26.09.2014, while impugned cheque is said to have been issued on 15.06.2016. Regarding his resignation Form DIR-12 has been filed, which is a public document. Applicant nos.2 and 3 are the mere shareholders in the Company and are the ladies. Their participation cannot be said to be active in the Company and in the complaint there is bald averment that the accused nos.2 to 6 being the Directors and shareholders of the Company are responsible for the day to day business of the accused Company. Accused No.7 to 9 including applicant no.2 and 3 are the authorized representatives of the Company and thus all the accused persons including all the three applicants are responsible for all the transactions and overall business of the Company. But no particulars or the specific role of the persons, which must be explained in the complaint, has been explained. Admittedly the cheque was not issued by any of the applicants. The applicant no.2, the mother of the applicant no.1 is a senior citizen. Hence, the prayer is made accordingly.

13. While, learned counsel for the opposite party no.2 opposed the version of the learned counsel for the applicants and submitted that the applicants are the shareholders in the Company and family

members of Ram Sevak, who is said to have issued the impugned cheque and being the wife, son and daughter of the person issuing cheque all the applicants must have knowledge of the works done by Ram Sevak Tyagi, accused no.7 in the complaint. As the whole fraud/ cheating has been done with the consent and connivance of the applicants, so with the help of section 141 of the N.I. Act all the applicants would be liable for the acts done by the Company. The defence of the applicants cannot be adjudicated at this stage of summoning. Liability of the applicants can only be decided after the evidence, because as per sub-section 2 of Section 141 of the Act if the offence is found to be proved committed with the consent or connivance of the applicants they shall also be liable for the same and punished accordingly. Thus for proving the offence of the applicants evidence of the parties is to be adduced and at this nascent stage the liability of the applicants cannot be fixed.

14. Placing reliance over the judgment of this Court in **Smt. B Devi (Basanti Devi) Versus State of U.P., 2016 (94) ACC 90**, it is argued by the learned counsel for opposite party no.2 that at the stage of summoning, defence of the accused which they may adduce subsequently cannot be seen since there was no occasion to look into such probable defence, which may come when the accused would appear and place their case before the magistrate. At the stage of issuing summons Court has to see whether a prima facie commission of offence has been shown and appropriate material has come justifying summoning of the accused persons against whom complaint has been made. The role assigned to the applicants in clear and specific words is referred in paragraph 4 of the complaint, that all the accused persons

are responsible for the day to day business and functioning of the Company.

15. On the basis of this judgment, it is further argued that all the officers of the Company are responsible for the acts done in the name of Company and are sought to be made personally liable for the acts which resulted in criminal action being taken against the Company. Thus, it is claimed that all the applicants are liable to face trial under the aforesaid sections.

16. Learned counsel for the applicants drew the attention of the Court towards the judgment in **Sunita Palita & Others Versus M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019], decided on 01.08.2022** and the judgment in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89**, mentioned therein wherein para-10 the Apex Court held that-

"every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and

responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status."

17. The attention of the Court is further drawn towards judgment in ***Harshendra Kumar D. Versus Rebatilata Koley & Others, (2011) 3 Supreme Court Cases 351*** wherein it was held by the Apex Court that as dishonour of the cheques through the complainant banker was subsequent to his resignation so the applicant no.1 could not be said to have any concern with the Company at that time.

18. It is further argued by the learned counsel for the applicants that mere bald averment in the complaint that the "applicants are looking after the day to day business of the Company, hence, they are liable for the offence committed" is not enough to prove the offence. This averment is devoid of any particulars.

19. In judgment ***Pooja Ravinder Devidasani Versus State of Maharashtra & Anr., (2014) 16 SCC 1***, the Apex Court held that to fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company.....Every person connected with the Company will not fall into the ambit of the provision.

20. Thus, it is argued that the applicant no.1 was not a Director of the Company on the date when the cheque was issued and regarding his resignation Form DIR-12 has

been placed on record. Applicant nos.2 and 3 are admittedly mere shareholders in the Company. They cannot be said to actively participate in the working of the Company.

21. So far as the argument of the learned counsel for the opposite party no.2 that a defence of the applicants shall be seen at the time of arguments is concerned in this regard, the Apex Court opined in judgment ***Harshendra Kumar D. Versus Rebatilata Koley & Others (supra)*** that if on the face of the documents which are beyond suspicion or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. If we go through the judgment in ***Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)*** placed by the learned counsel for opposite party no.2, the facts of that case are different from the facts of the present case, wherein as per facts of that case the cheques were issued in the presence of the petitioner and other Directors, while in the present case cheques were never issued in the presence of the complainant rather till then applicant no.1 had resigned from the Company. While as per facts of the case of ***Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)*** the resignation and the documents with regard to the resignation were alleged to be the forged documents, but in the case in hand resignation of applicant no.1 has not been challenged, hence, the counsel for the opposite party no.2 cannot take benefit of the judgment of this Court, in the presence

of various Apex Court judgments placed above by the counsel for the applicants.

23. Thus on the basis of the discussion and the judgments placed above, it is found that applicant no.1 had resigned from the Company much prior to the issuance of the cheque in question. Admittedly, the cheque did not bear the signatures of any of the applicants. On the date of issuance of the cheque the applicants were mere the shareholders of the Company. There was no active participation of the applicants in the day to day business and transactions of the Company and in the complaint itself, it is not mentioned that as to how and in what manner the applicants were in-charge or were responsible to the accused Company for the conduct of its business. Thus, in the opinion of the Court, as on the face of the record, participation of the applicants is not found in the day to day functioning of the Company, hence, on the basis of the version that the defence would be seen at the time of evidence, it would be travesty of justice to drag the persons to face the prosecution who are no way connected with the issuance of the cheque or its being dishonour thereof.

24. On the basis of above discussion, the summoning of the applicants to face trial under Section 138 of Negotiable Instruments Act is found to be against the mandate of law laid down by the Apex Court in above mentioned judgments.

25. The summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad and the judgment dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in criminal revision are quashed.

26. The application under Section 482 Cr.P.C. is, hereby, **allowed**.

(2023) 5 ILRA 56

REVISIONAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 02.05.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Civil Revision No. 12 of 2023

Syed Mohammad Manzar ...Revisionist
Versus
U.P. Waqf Tribunal Jawahar Bhawan IIIrd
Floor Lucknow & Ors. ...Opposite Parties

Counsel for the Revisionist:

Sabir Ali, Mohd. Mansoor

Counsel for the Opposite Parties:

Syed Aftab Ahmad, Mohammad Ehtesham Khan, SAA Rizvi

Civil Law – Civil Procedure Code, 1908 - Order 43 - Rule 1, (5(1), - Waqf Act, 1995 - Sections 83 & 83(9): - Civil Revision - Challenging the order - in a Waqf case - whereby tribunal rejected the Application filed by plaintiff-revisionist for grant of temporary injunction - preliminary objection - regarding maintainability of Revision u/s 83(9) of Act, 1995 by relying on various judgments - because of, impugned order is interlocutory in nature as no appeal or revision is maintainable - Court observed that, considering the aspects and importance of a provision to an enactment, it is thus evident that the judgment rendered earlier in the cases of Hafiz Abdullah & ors. and Shakil Ahmad (relied upon by the opposite party) have not considered the aspect of proviso in section 83(9) of the Act, cannot be said to be a binding precedent on that aspect - since, it is evident that, an application granting or rejecting temporary injunction would have the trapping of finality with regard to question determined by Tribunal - held, a Revision under section 83(9) of the Act, would therefore be maintainable before this Court - order on its merit accordingly - Revision is allowed.

(Para - 10, 27, 38)

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

would remain confined to raising challenge to order dated 12.12.2022.

List of Cases cited:

1. Union of India & ors. Vs Priyanka Sharan & anr. (AIR 2009 (SC) Supp. 972),
2. Shah Babulal Khmji Vs Jayaben Kania (AIR 1981 SC 1786),
3. Shahan Shan & ors. Vs Civil Judge (SD) Sand Kabir Nagar & ors. (2012 SCC Online All 2881),
4. Mauli Moinuddin & ors. Vs Maqbool Hasan & ors. (2008 SCC Online All 193),
5. Hafiz Abdullah & anr. Vs Akbar Ali & ors. (2002 (5) AWC 3829),
6. UP Sunni Central Board of Waqf Vs Shakil Ahmad & ors. (2004 (2) AWC 1768 (LB),

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard Mr. Mohd. Mansoor, learned counsel for revisionist, Mr. A. A. Rizvi, learned counsel for opposite parties no.1,2, 3 and 4 and Mr. Mohd. M.E. Khan, learned counsel for opposite party no.5.

2. Civil revision has been filed against order dated 12.12.2022 passed in Waqf Case No.113 of 2020 whereby application for grant of temporary injunction has been rejected.

3. Learned counsel for revisionist submits that although prayer has been made for quashing of order dated 31.07.2019 and 26.02.2020 passed by the U.P. Shia Central Board of Waqf, Lucknow but since the aforesaid orders are already under challenge before Waqf Tribunal, he is not pressing his relief with regard to the aforesaid orders and the revision as such

4. At the very outset, learned counsel for opposite parties have raised preliminary objection regarding maintainability of revision under section 83 (9) of the Waqf Act, 1995 to submit that the order impugned being interlocutory in nature, no appeal or revision is maintainable there against.

5. For the purposes of determination of maintainability of revision, the provisions of Section 83 (9) of the Waqf Act 1995 are required to be considered and are as follows:-

"Section 83(9) in The Waqf Act, 1995:-

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit."

6. With regard to aforesaid, learned counsel for parties have placed reliance on various judgments rendered by Coordinate

Benches of this Court which at first glance appear to be contradictory.

7. In the case of ***U.P. Sunni Central Board of Waqf versus Shakil Ahmad & Ors. reported in 2004 (2) AWC 1768 (LB)***, it has been held that a revision under section 83 (9) of the Act of 1995 would be maintainable only in case a dispute, question or other matter has been determined by the Tribunal. In the said case, revision was held not to be maintainable but subsequently in the case of ***Mauli Moinuddin and Ors. versus Maqbool Hasan and Ors reported in 2008 SCC Online All 193*** and ***Shahen Shah & Ors versus Civil Judge (S.D.) Sant Kabir Nagar and Ors. reported in 2012 SCC Online All 2281*** revision against grant or rejection of temporary injunction have been held to be maintainable.

8. It is a relevant fact that while considering the aspect of maintainability of revision in the judgments of ***Mauli Moinuddin and Ors. versus Maqbool Hasan and Ors and Shahen Shah & Ors versus Civil Judge (S.D.) Sant Kabir Nagar and Ors.***, the earlier judgment rendered by this Court in the case of ***Shakil Ahmad*** (supra) has not been considered.

9. It is also noticed that in another judgment rendered in the case of ***Hafiz Abdullah & Anr. versus Akbar Ali & Ors. reported in 2002 (5) AWC 3829*** also, revision was held not to be maintainable against an interlocutory order.

10. Upon consideration of the aforesaid judgments on the point, it transpires that in the case of ***Hafiz Abdullah & Ors*** (supra) revision had been filed against an order allowing interim injunction pending decision on the application for temporary injunction, which according to learned judge was only interlocutory in nature and therefore revision was held not to be maintainable.

11. In the case of ***Shakil Ahmad*** (supra) learned judge has adverted to the fact that order impugned in the revision pertained to grant of temporary injunction which was extended from time to time. Thereafter provisions of Section 83(9) of the Waqf Act have been quoted alongwith proviso but subsequently it has been held as follows:-

"7. For the maintainability of the revision under Section 83(9), there must be an impugned order, by which any dispute, question or other matter has been determined by the Tribunal. I find that by the impugned order, the dispute between the Mutawalli and the Waqf Board has not been determined."

12. In the entire body of judgment, it appears that emphasis has been laid only on the primary provision under Section 83(9) of the Waqf Act, 1995 without adverting to the proviso contained therein and therefore it has been held that for maintainability of a revision there must be an impugned order whereby any disputed question or other matter has been determined.

13. It is thus quite evident that the order passed in **Shakil Ahmad** (supra) despite noticing the proviso, adverts only to the primary clause of Section 83 (9) of the Act.

14. The aforesaid aspect however has been considered in detail in judgments rendered by Coordinate Benches of this Court in the case of **Mauli Moinuddin and Ors. versus Maqbool Hasan and ors. reported in 2008 SCC Online All 193** in the following manner:

"6. The other point is that revision against interim order is not maintainable. In this regard, an authority of this Court reported in 1991 AWC 620U.P. Sunni Central Board of Waqf v. Abdul Rashid and Ors. has been cited. However, in the said case, revision was directed against an order through which an earlier order had been recalled by the tribunal. Similarly, in the other authority reported in 2002 AWC 1430 Hafeez Abdulla v Akbar Ali also temporary injunction had not finally been decided by the tribunal. Last sentence of Para-6 of the said authority is quoted below:

The order is totally interlocutory and the question whether the operation of the order should be stayed or not is still to be decided by the trial court.

7. Under Section 83(9) of the Waqf Act, 1995, revision is directed against determination by the tribunal of any dispute, question or other matter. In my opinion, final disposal of temporary injunction application is such determination, which is amenable to revisional jurisdiction of the High Court under the aforesaid section."

15. In the case of **Shahen Shah and others versus Civil Judge (S.D.) Sant Kabir Nagar & Ors.** coordinate bench of this Court has considered the provision of Revision under section 76 of the Act of 1960 as compared to the ambit of Section 83 of the Act of 1995 and has thereafter concluded that the scope of Section 83(9) of the Act of 1995 is much wider than the provision of Revision under the Act of 1960.

16. Learned counsel for opposite parties has also adverted to judgment and order dated 13.06.2022 passed in Civil Revision No.23 of 2022 holding that the order granting interim relief is purely interlocutory order which does not suffer from any jurisdictional or legal error so as to warrant interference in exercise of revisional power under section 83 (9) of the Waqf Act 1995.

17. It appears that the aforesaid judgment does not take into account any of the judgments rendered by Coordinate benches passed prior thereto. Even otherwise the judgment does not appear to be a proposition that an interlocutory order granting interim relief would not be amenable to revisional jurisdiction of this Court but on the contrary has declined revisional interference on the ground that the order is not only purely interlocutory in nature but also does not suffer from any jurisdictional or legal error. The corollary of the aforesaid judgment may be that an interlocutory order which suffers from jurisdictional or legal error may be reviseable under section 83(9) of the Act of 1995.

18. It is thus quite evident that the earlier judgments in the cases of **Hafiz Abdullah & Ors** (supra) and **Shakil Ahmad** (supra) cannot be said to be a proposition that revision under section 83 (9) of the Waqf Act, 1995 would not be maintainable against an order allowing or rejecting an application for temporary injunction.

19. The aspect of maintainability of revision against grant or rejection of temporary injunction would be quite evident from a perusal of proviso to Section 83(9) which on first principles clearly indicates jurisdiction of a High Court to examine records relating to any dispute, question or other matter which has been determined by the Tribunal. The provision itself clearly indicates power of High Court akin to revisional jurisdiction with regard to not only any dispute but question or other matter as well which has been determined by the Tribunal. The aspect of not only a dispute but a question or other matter having been determined by the Tribunal is a relevant provision required to be understood in that perspective.

20. The question as to when the grant or rejection of an application for temporary injunction can be said to amount to a 'judgment' has been dealt with by **Hon'ble the Supreme Court in the case of Shah Babulal Khimji vs. Jayaben Kania** reported in AIR 1981 SC 1786 in the following manner:-

"113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the

reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-section (2) of Section 2 cannot be physically imported into the definition of the word 'judgment' as used in clause 15 of the letters patent because the letters patent has advisedly not used the terms 'order' or 'decree' anywhere. The intention, therefore, of the givers of the letters patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the letters patent. It seems to us that the word 'judgment' has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds:-

1. A final Judgment: A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves, nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

2. A preliminary judgment: this kind of a judgment may take two forms (a)

where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the trial Judge is concerned and, therefore, appealable to the larger Bench, (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g. bar of jurisdiction, resjudicata, a manifest defect in the suit, absence of notice under Section 80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench.

3. Intermediary or interlocutory judgment: Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43, Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43, Rule 1 but which also possess

the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote.

115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment."

21. The aforesaid judgment is a leading proposition of law on the point that even interlocutory orders possessing characteristics and trappings of finality or affecting valuable rights of a party or deciding important aspects of a trial in main or in an ancillary proceedings, would be 'judgment'.

22. Upon applicability of aforesaid judgment, it is evident that an application granting or rejecting temporary injunction would amount to final determination of a question referred to the Tribunal for its adjudication and since such an order would have the effect of adversely affecting one party to the dispute with regard to a valuable right with such effect being direct and immediate rather than indirect or remote, would possess the characteristics

and trappings of finality so far as that question is considered. In that sense, even an application granting or rejecting temporary injunction clearly has the trappings of finality and would therefore amount to a dispute or question or other matter having been determined by the Tribunal.

23. It is also relevant to indicate that while first part of Section 83(9) of the Act pertains to non-maintainability of appeal against any decision or order whether interim or otherwise by the Tribunal but it is the proviso which indicates powers of High Court akin to revisional jurisdiction.

24. It is settled law that a proviso though required to be seen and read along with the main portion of an enactment carves out an exception to the main provision and that the ordinary and proper function of a proviso coming after a general enactment is to limit the applicability of general enactment. The concept of proviso therefore clearly is separate and distinct from the main enactment, though required to be read in the same terms, but carves out an exception to the main enactment.

25. Hon'ble the Supreme Court in the case of **Union of India & Ors versus Priyankan Sharan & Anr. reported in AIR 2009 SC (Supp) 972** has held as follows with regard to a proviso :

"12. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be

within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey [1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A. N. Sehgal and Ors. v. Raje Ram Sheoram & Ors. (AIR 1991 SC 1406), Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. (AIR 1991 SC 1538) and Kerala State Housing Board and Ors v. Ramapriya Hotels (P) Ltd. and Ors. (1994 (5) SCC 672)."

26. Considering the aspects and importance of a proviso to an enactment, it

is thus evident that the judgments rendered earlier in the cases of **Hafiz Abdullah & Ors** (supra) and **Shakil Ahmad** (supra) having not considered the aspect of proviso in section 83(9) of the Act, cannot be said to be a binding precedent on that aspect.

27. In view of discussion made hereinabove, since it is evident that an application granting or rejecting temporary injunction would have the trappings of finality with regard to question determined by Tribunal, it is held that a revision under section 83 (9) of the Act would therefore be maintainable before this Court.

28. With regard to merits of the case, learned counsel for revisionist submits that initially the property pertaining to Gata No.491 having an area of one bigha eight biswa related to creation of Waqf by the name of Waqf Qarbala Abdullapur Akbarpur. It is submitted that the aforesaid Waqf was registered with Shia Waqf Board as Waqf No.2018. Attention has been drawn to the fact that father of opposite party no.5, Syed Ameer Hasan was one of the Waqif of the deed. It is submitted that inadvertently revenue records did not reflect the correct name of Waqf which was recorded in the individual name of Mutwali and therefore a report dated 26.01.1988 was submitted for correction of the name of Waqf in the revenue records particularly indicating that vide earlier order dated 31.12.1987, the aforesaid Waqf has been wrongly entered in the revenue records as Waqf Qarbala Kabristan Shia Sadaat. It is submitted that the aforesaid report was reiterated by the subsequent report dated 30.03.2018 by the Lekhpal concerned but the actual corrections as recommended in the reports were not made and vide

subsequent order dated 13.05.2022 passed by Sub Divisional Magistrate in Case No.03816 of 2018, the incorrect name of Waqf was expunged but instead of indicating the correct name, only the name of Mutwali i.e. Syed Ameer Hasan was indicated.

29. It is submitted that in the meantime, one Naseem Bano was appointed Mutwali of the Waqf, which was challenged by opposite party no.4 before the Tribunal and arising out of the said proceedings, Civil Revision No.37 of 2019 was filed before this Court in which vide order dated 08.05.2019, it was directed that no third party right including tenancy rights would be created by either of the parties. It is submitted that in the meantime vide order dated 31.07.2019, the Waqf Board modified the nature of the Waqf from Waqf ALAL- Khair to Waqf ALAL-Aulad, a fact brought to the notice of this Court, which in its order dated 07.11.2019 noticed the same and recorded the submission of learned counsel for Waqf Board that the order dated 31.07.2019 had been passed without knowledge of interim directions issued by this Court and therefore his submission that the said order would be revisited was also recorded.

30. It is submitted that in pursuance to the submissions advanced before this Court, the order dated 31.07.2019 was thereafter cancelled vide order dated 14.11.2019. In pursuance thereof, the aforesaid revision was also disposed of.

31. It is submitted that upon disposal of aforesaid civil revision, the Waqf Board

vide its resolution dated 26.02.2020 again revived the earlier order dated 31.07.2019, which was challenged by the revisionist before the Waqf Board which although initially granted interim order but subsequently by means of impugned order dated 12.12.2022 has rejected application for interim injunction with time being granted for filing of written statement.

32. Learned counsel for revisionist as such submits that once it was admitted that the Waqf has been registered with the Waqf Board in a particular name, the same could not have been changed by the Board without indicating cogent reason for the same. It is submitted that reliance placed in the impugned order on the sale-deed dated 16.04.1968 allegedly in favour of father of opposite party no.5 was in itself misplaced since the father of opposite party no.5 as Waqif was well aware of the nature of Waqf being created by the Waqf deed and never set up a case of his individual rights by means of the aforesaid sale-deed, which was produced and relied upon by answering opposite party only in the year 2018.

33. Learned counsel appearing on behalf of answering opposite party no.5 has refuted submissions advanced by learned counsel for revisionist with the submission that the Waqf deed itself indicates its nature to be that of ALAL-Aulad since a narration in the Waqf deed clearly stipulates that the beneficiaries of the Waqf would be successors of initial beneficiaries and therefore the wrong name indicated in the Waqf deed is only an omission and the intention of the deed has to be seen from the aforesaid narration in the Waqf deed. It is in that context that he submits that the

deed was required to be treated as ALAL-Aulad particularly in view of the sale-deed dated 16.04.1968 in favour of father of opposite party no.5.

34. It is also submitted that the impugned order has rightly recorded the fact that the aforesaid sale-deed is a registered document, which has not been challenged by any person till date and as such a presumption regarding its genuineness has been correctly drawn in terms of the Evidence Act.

35. Upon consideration of submissions advanced by learned counsel for parties and perusal of material available on record, it is an admitted fact that Waqf was created with regard to Gata No.491 having an area of one bigha, eight biswa. It is also admitted that the Waqf deed clearly indicates the name of Waqf as Waqf Qarbala Abdullapur Akbarpur. Neither of the parties are denying the execution of aforesaid Waqf deed. It is also an admitted fact that the said deed is recorded with the Board as Waqf No.2018. The report of revenue authorities also indicates the fact that the name of Waqf was wrongly recorded inadvertently in the revenue records and therefore recommendation was made for their correction. However no concrete order has been passed on the aforesaid recommendations and by means of subsequent order dated 13.05.2022 passed in Case No.3816 of 2018, while expunging the name of Waqf as Waqf Qarbala Kabristan Shia Sadaat, the name of Mutwali was recorded.

36. Upon perusal of impugned order, it does not evidence as to the material which

was before the Waqf Board from which it could deduce at this stage that the Waqf deed inadvertently omitted it to be indicated as Waqf ALAL-Aulad. The aforesaid contradiction in Waqf deed is required to be proved before the Tribunal by leading of evidence and at this stage the prima facie finding recorded by the Tribunal does not appear to be supported by any evidence.

37. It also appears that Tribunal has given considerable weight to the fact that a sale-deed was executed in favour of father of opposite party no.5 on 16.04.1968 which was a registered deed and has not been challenged by any one. The said aspect also, would require corroboration and substantiation by evidence. The Tribunal as such was required to take into consideration the prima facie contradiction in the Waqf deed and the aforesaid sale-deed and at this stage, it appears to have wrongly placed heavy reliance on the aforesaid fact pertaining to the sale-deed without adverting to the fact that there did not appear to be any material on record, at the stage of grant of interim injunction by which it would be deemed that the Waqifs of the Waqf deed deliberately or by omission recorded a wrong name and purpose of Waqf.

38. In view aforesaid facts and circumstances, the order impugned dated 12.12.2022 passed by Waqf Tribunal, Lucknow in Waqf Case No.113 of 2020, being apparently against the material on record, is set aside. The aspect of validity of Waqf deed, the sale-deed and revenue entries would definitely be subject to evidence being led during course of proceeding.

39. It is observed that the narration of events and facts as indicated in the body of

this order would be subject to evidence being led before the Tribunal.

40. The revision as such succeeds and is **allowed**. Parties to bear their own costs.

(2023) 5 ILRA 65

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 05.05.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Revision No. 16 of 2023

Ram Ratan

...Revisionist

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Revisionists:

Sri Vijay Bahadur Shivhare, Sri Ram Lalit Chaudhary, Sri Vijay Kumar Singh

Counsel for the Opposite Parties:

G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - The Food Safety and Standards Act, 2006 - Section 97 (4) - Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or Orders after the expiry of a period of three years from the date of the commencement of this Act - Prevention of Food Adulteration Act, 1954 (repealed) ,Prevention of Food Adulteration Act, 2006 - Section 2(m), 2(n), 2(ia)(m), 7/16, 13(2) , 16, Section 13 - Report of public analyst , Section16A - Power of court to try cases summarily, Probation of the Offenders Act,1958 - Section 4.

(B) The General Clauses Act, 1897- Section 6 - mandate - to leave the pending proceedings unaffected which commence under the unrepealed provisions, unless contrary intention is expressed , Section 6(c) - objective of Section 6(c) of the General Clauses Act - to ensure protection of any right or privilege acquired under the repealed Act - exception - legislative intention to the contrary - repealing Act may expressly provide or it may impliedly provide against continuance of such right, obligation or liability.(Para - 13)

Sample of milk found adulterated - not up to prescribed standard - fat contents of milk were found 13 percent below the prescribed standard - cognizance taken by magistrate - Magistrate ruled - sample was filled on 03.03.2010 - court took cognizance on 17.08.2010 - within 3 years of the Act's commencement - trial court concluded - Prevention of Food Adulteration Act, 2006 was within jurisdiction - Food Safety and Standards Act's provisions not applicable - accused convicted for charge under Section 7/16 P.F. Act - accused revisionist appealed Trial Court's verdict of guilt and sentencing - which was affirmed by Sessions Judge - present revision preferred against concurrent judgments **(Para -2,3,4)**

HELD:-Case falls within the purview of Section 2(m) of the Act . Sample did not correspond to prescribed standard as adulterated within meaning of Section 2(ia)(m). Section 97(4) saves cognizance within 3 years of Act of 2006 commencement. Court of first instance cognizance is not illegal or barred under law. Trial and Appellate Courts did not make any factual or legal errors in recording guilt verdicts or judgments, leading to dismissals and affirmed orders. Section 16(A) of the Act allows revisionists to apply provisions of Section 262 and 265 of the Code of Civil Procedure to summary trials of offences under sub-Section 1. Trial court's conviction affirmed. Revisionist's sentence modified to 3 months imprisonment. **(Para -17,20,21,22,29,31)**

Revision partly allowed. (E-7)

List of Cases cited:

1. Avinash Chandra Bajpai & anr. Vs St. of U.P. 2019 (1) FAC 497
2. Rupesh Kumar & anr. Vs St. of U.P. 2011 (2) FAC 33
3. Ambalal Sarabhai Enterprises Lt. Vs Amrit Lal & Co. (2001) 8 SCC 397
4. Gurcharan Singh Baldev Singh Vs Yashwant Singh A.I.R. 1992 SC 1186
5. Nemi Chand Vs St. of Raj. (2018) 17 SCC 448
6. T. Barai Vs Henry Ah Hoe & anr. 1983(1) SCC 177

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Instant criminal revision under Section 397/401 Cr.P.C. has been filed against judgment and order dated 20.12.2022 passed by Addl. Sessions Judge Court No. 8, Kanpur Nagar, in Criminal Appeal No. 106/2019 (Ram Ratan Vs. Vivek Kumar and Another), whereby the conviction and sentence passed by learned Metropolitan Magistrate on 28.06.2019 in Case No. 3872 of 2010 against accused appellant Ram Ratan for charge under Section 7/16 Prevention of Food Adulteration Act has been affirmed. The judgment and order of trial court dated 28.06.2019 has also been challenged.

2. The brief facts of the case relevant from present criminal appeal are that on 05.03.2010, the complainant Food Inspector working on orders of local Health Officer intercepted a milk vendor at 09:15 hours near Police Station- Bhidnu, Gathampur road, District- Kanpur Nagar, who was taking milk in his bicycle in 4 containers each having around 20 ltrs of milk, therefore he was carrying a total of 80

Its of mixed milk of cow and buffalo. The Food Inspector purchased 1500 ml milk for Rs. 36 as sample and received an acknowledgement from the vendor/ present accused. The complainant tried to enjoin local witnesses but they neither disclosed their name nor agreed to be a witness. The sample were kept in 3 dry and empty small bottles in equal amount and was duly sealed, labelled and tagged and signature of the vendor was taken on each bottle of the sample. The copies of Form 7 were prepared and one set of sample was sent for examination to Public Analyst, Lucknow through speed post. The report of Public Analyst was received in the office of Local Health Officer, Kanpur on 04.06.2010 as Test Report No. 3518 dated 17.04.2010, wherein the sample of milk was found adulterated. The complainant Food Inspector, Vivek Kumar received sanction for prosecution from the D.M., Kanpur Nagar, Sri Mukesh Meshram and filed the present complaint. In report of Public Analyst, the sample was found short of 13 percent milk fat and the sample was not found up to prescribed standard and thus, held to be adulterated. The learned Magistrate took cognizance of the offence after filing of a complaint by Food Inspector, the statement of the accused was recorded and substance of accusation was explained to him which he denied and claimed to be tried. In prosecution evidence, P.W.-1 Shri Vivek Kumar, the complaint (Food Inspector), P.W.- 2 Om Ji Srivastava, Food Clerk were examined and 8 documents were accepted during evidence. The accused had not adduced any oral evidence during trial. Learned Magistrate after considering submissions of learned counsel for the parties and on appreciation of evidence on record, observed that in present case, the sample was filled up on 05.03.2010 and

cognizance of the case was taken by the Court on 17.08.2010 which is within 3 years from the date of commencement of the Act, as provided under Section 97 (4) of Food Safety and Standards Act. Therefore, in the opinion of learned Trial Court, the court was well within its jurisdiction to take cognizance of the offence under Prevention of Food Adulteration Act, 2006 and on facts of the case the provisions of Food Safety and Standards Act were not applicable.

3. Learned Trial Court dispelled the submission of learned counsel for the accused that the District Magistrate granted sanction for prosecution in mechanical manner and did not perused any documents submitted along with the application for grant of sanction. The learned Trial Court also observed that District Magistrate granted sanction for prosecution after perusing the relevant documents and as well as in the light of report of Public Analyst. He found no reason to disbelieve the testimony of P.W.-1, who stated in cross-examination that accused had told him that he is milk vendor and was going to sell milk. He also dispelled proposition of the accused side that the sample was not taken in accordance with rules and there was no occasion to disbelieve the testimony of the complainant, Food Inspector only on ground that no public witness was enjoined in inspection and process of sampling on this part. The accused was served notice under Section 13(2) P.F. Act within 3 days of filing of complaint dated 17.08.2010 and notice is found lawful. There is nothing to be held that notice was sent to the accused on wrong address. Learned Trial Court, after considering evidence of P.W.1, Food Inspector and P.W.-2 Om Ji Srivastava, Food Clerk, on issuing of notice and

placing reliance on documentary evidence submitted as a proof during trial, held that prosecution has been successful to prove the charge levelled against the accused beyond reasonable doubt and recorded conviction of the accused for charge under Section 7/16 P.F. Act, and sentenced him 6 months simple imprisonment and Rs. 5,000/- fine with default stipulation.

4. Feeling aggrieved by the verdict of guilt and sentencing awarded by learned Trial Court, the accused revisionist preferred criminal appeal before the Court of Sessions which was decided by Addl. Sessions Judge, Court No. 8 Kanpur Nagar by impugned judgment dated 20.12.2022 who examined the record and in the light of evidence on record and addressed legal submissions raised by learned counsel for the appellant, expressed his concurrence with finding and judgment of learned Trial Court and affirmed the impugned judgment and order passed by learned Trial Court. Present revision has been preferred by the accused against concurrent judgments of Courts below.

5. Heard learned counsel for the revisionist, learned A.G.A. for the State and perused the material on record.

6. Learned counsel for the revisionist submitted that the accused is held in jail custody since passing of impugned judgment dated 20.12.2022 by Appellate/ Sessions Court, thereby he is held in jail custody for more than 4 months as a convict in the case from which present revision has arisen. The judgment and orders passed by learned Courts below are

against the provisions of law and strength of evidence on record.

7. The prosecution failed to prove its case beyond reasonable doubt on basis of evidence adduced during trial, as no offence is made out against the revisionist under Section 16 of Prevention of Food Adulteration Act. Both the learned Courts below misappreciated the evidence on record while recording the verdict of guilt against accused revisionist and their findings are not sustainable as after commencement of Food Safety Standards Act, 2006, the Prevention of Food Adulteration Act was repealed and in present case cognizance under Section 7/16 Food Adulteration Act, was itself barred under law. Therefore, the revision is liable to the allowed and impugned orders passed by Courts deserve to be set aside.

8. Per contra, learned A.G.A. appearing for the State opposite party No. 1, submitted that there is nothing on record which may warrant interference in present criminal revision against concurrent findings of both the Courts below in which verdict of guilt has been recorded against accused appellant. The learned Trial Court has awarded minimum punishment of imprisonment pursuant under law against accused, therefore, neither the conviction nor sentence are liable to be interfered in present criminal revision.

9. Learned counsel for the revisionist cited and placed reliance of judgment **Avinash Chandra Bajpai and Another Vs. State of U.P. 2019 (1) FAC 497** which is related to cognizance/ summoning order

for charge under Section 7/16 P.F.A. Act, 1954 in that case sample of Chole/ Chana Masala (Bhola Indis) is alleged to have taken from the shop of the revisionist on 09.02.2011 on basis of which a complaint under Section 7/16 P.F. Act was filed against him and the learned Magistrate took cognizance of the offence on the criminal complaint filed by the Food Inspector. This Court held in that case that prevention of Food Adulteration Act, 1954 has been repealed with effect from 29.07.2010 while notification in Extraordinary Gazette of India copy at Annexure No. 2; that the Food Safety and Standards Act, 2006 has come into force with effect from 29 July, 2010 and after repeal of old Act, i.e. Prevention of Food Adulteration Act, 1954, the complaint under Section 07/16 Act of Prevention of Food and Adulteration Act was not maintainable and no cognizance could have been taken by the Magistrate under the old and already repealed Act. This Court held that Magistrate has passed impugned order of cognizance without due application of mind to the facts and has acted wrongly issued process against the revisionist for an offence under non-existing Act. After enforcement of Food Safety and Standards Act, 2006; the procedure under the new Act has to be adopted against the revisionist and no cognizance of offence under the old and already repealed Act may be taken. The impugned order of cognizance was wrong and illegal and must be allowed to stand.

10. With regard to legal plea raised by the accused side consistently from Court of first instance to present revisional Court, the provisions of repeal clause of Food Safety and Standards Act are liable to be examined. The object and reason of Food Safety and Standards Act, 2006 states as

"an Act to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate the manufacture, storage, distribution, sell and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto.

11. The different sections of the Act were brought in force on different dates. Section 97 of the Act was brought into force on 29.07.2010 vide S.O. 1855 (E dated 29.07.2010) issued by Central Government. Section 97 provides as under

97. Repeal and savings.-

(1) With effect from such date as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed: Provided that such repeal shall not affect:-

(i) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder; or

(iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and Orders under repeal; or

(iv) any investigation or remedy in respect of any such penalty, forfeiture or punishment, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may

be imposed, as if this Act had not been passed:

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if such provisions of the State law had been repealed.

(3) Notwithstanding the repeal of the aforesaid enactment and Orders, the licences issued under any such enactment or Order, which are in force on the date of commencement of this Act, shall continue to be in force till the date of their expiry for all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or Orders after the expiry of a period of three years from the date of the commencement of this Act.

12. In **Rupesh Kumar and Another Vs. State of U.P.** 2011 (2) FAC 33, applicants premises were raided on 25.04.2011 and on that date the Food Safety and Standard Act, 2006 stood enforced and as such the applicant could not be prosecuted only under the provisions of The Food Safety and Standard Act, 2006. The complaint was filed on 27.06.2011 in the P.F. Act, 1954 and summoning order was issued on 27.06.2011. This Court quashed the summoning order dated 27.06.2011 as all the proceedings in the matter were taken

after enforcement of Act of 2006. This Court observed that after enforcement of Act of 2006, the applicant could be prosecuted only under the provisions of Act, 2006. While this Court quashing the summoning order passed against the accused by Trial Court granted liberty to the respondents to proceed against the revisionist under the provisions of the Act of 2006.

13. The mandate of Section 6 of the General Clauses Act is simply to leave the pending proceedings unaffected which commence under the unrepealed provisions, unless contrary intention is expressed. **"Ambalal Sarabhai Enterprises Lt. Vs. Amrit Lal and Company (2001) 8 SCC 397 in Gurcharan Singh Baldev Singh Vs. Yashwant Singh A.I.R. 1992 SC 1186**, Honb'le Apex Court while considering scope of Section 6 General Clauses Act 1897, which deals with effect of repeal of a Central Act or regulation held that *the objective of Section 6(c) of the General Clauses Act is to ensure protection of any right or privilege acquired under the repealed Act. The only exception to it is legislative intention to the contrary. That is, the repealing Act may expressly provide or it may impliedly provide against continuance of such right, obligation or liability.*

14. In the present case, P.W.1 Vivek Kumar, the complainant has proved factual aspects of the case by his evidence as P.W.1, during trial of complaint case before Court below. P.W.2, Om Ji Srivastava the Food Clerk has stated in his evidence that on 16.09.2013, Local Health Authority sent sample No. KN-2010/362/VS-7 along with

report of Public Analyst to the accused, he proved receipt of registry as exhibit K-4 and LHA Form No. 13 (2) as exhibit K-9. Thus, it cannot be held in present case that the provisions of Section 13(2) of Prevention of Food Adulteration Act, 1954 were not complied with. **Section 13 provides as under:**

13. Report of public analyst.--

(1) The public analyst shall deliver, in such form as may be prescribed, a report to the Local (Health) Authority of the result of the analysis of any article of food submitted to him for analysis. --3[(1) The public analyst shall deliver, in such form as may be prescribed, a report to the Local (Health) Authority of the result of the analysis of any article of food submitted to him for analysis."

(2) On receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the persons from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under section 14A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory.

(2A) When an application is made to the court under sub-section (2), the

court shall require the Local (Health) Authority to forward the part or parts of the sample kept by the said Authority and upon such requisition being made, the said Authority shall forward the part or parts of the sample to the court within a period of five days from the date of receipt of such requisition.

(2B) On receipt of the part or parts of the sample from the Local (Health) Authority under sub-section (2A), the court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and the signature or thumb impression, as the case may be, is not tampered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis.

(2C) Where two parts of the sample have been sent to the court and only one part of the sample has been sent by the court to the Director of the Central Food Laboratory under sub-section (2B), the court shall, as soon as practicable, return the remaining part to the Local (Health) Authority and that Authority shall destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the court: Provided that where the part of the sample sent by the court to the Director of the Central Food Laboratory is lost or damaged, the court shall require the Local (Health) Authority to forward the part of the sample, if any, retained by it to the court and on receipt thereof, the court shall proceed in the manner provided in sub-section (2B).

(2D) Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the court shall not continue with the proceedings pending before it in relation to the prosecution.

(2E) If, after considering the report, if any, of the food inspector or otherwise, the Local (Health) Authority is of the opinion that the report delivered by the public analyst under sub-section (1) is erroneous, the said Authority shall forward one of the parts of the sample kept by it to any other public analyst for analysis and if the report of the result of the analysis of that part of the sample by that other public analyst is to the effect that the article of food is adulterated, the provisions of sub-sections (2) to (2D) shall, so far as may be, apply.]

(3) The certificate issued by the Director of the Central Food Laboratory under sub-section (2B)] shall supersede the report given by the public analyst under sub-section (1).

(4) Where a certificate obtained from the Director of the Central Food Laboratory [under sub-section (2B)] is produced in any proceeding under this Act, or under sections 272 to 276 of the Indian Penal Code (45 of 1860), it shall not be necessary in such proceeding to produce any part of the sample of food taken for analysis.

(5) Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section (3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under sections 272 to 276 of the Indian

Penal Code (45 of 1860): [Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory [not being a certificate with respect to the analysis of the part of the sample of any article of food referred to in the proviso to sub-section (1A) of section 16] shall be final and conclusive evidence of the facts stated therein.] [Explanation.--In this section, and in clause (f) of sub-section (1) of section 16, "Director of the Central Food Laboratory" shall include the officer for the time being in charge of any Food Laboratory (by whatever designation he is known) recognised by the Central Government for the purposes of this section.]

15. Therefore, on perusal of above statutory provisions, in the light of evidence of P.W.2, it appears that the accused has been given an opportunity to get the sample of article of food kept by Local Health Authority Analysed by the Central Food Laboratory, but accused failed to avail the opportunity.

16. Section 7 of the Act provides for violations which will be punishable under Section 16 of the Act. Under Section 2 [(i) "adulterant" means any material which is or could be employed for the purposes of adulteration;]

4 [(ia)] "adulterated"--an article of food shall be deemed to be adulterated--

(a) if the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice, or is not of the nature, substance

or quality which it purports or is represented to be;

------(m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health: Provided that, where the quality or purity of the article, being primary food, has fallen below the prescribed standards or its constituents are present in quantities not within the prescribed limits of variability in either case, solely due to natural causes and beyond the control of human agency, then, such article shall not be deemed to be adulterated within the meaning of this sub-clause.

17. Thus, the present case falls within the purview of Section 2(m) of the Act, as the main charge in the present case against the accused is that the milk sample taken from him was found short of prescribed standards as the fat contents of milk were found 13 percent below the prescribed standard, and as the sample did not correspond to prescribed standard it was held as adulterated within meaning of Section 2(ia)(m).

18. In present case, Section 2(ia)(m) attracts which is punishable under Section 16(1) of the Act for which a minimum punishment of 6 months imprisonment, which may extend to 3 years and fine not less than Rs. 1,000/- is prescribed. In the present case, the District Magistrate has passed the sanction order for prosecution of the accused which has been proved by P.W.1. The District Magistrate has passed sanction order in discharge of his official

duty and genuineness of said order is presumed.

19. So far as the argument of learned counsel that in view of repeal of Prevention of Food Adulteration Act, 1954 after enactment of Food Safety and Standards Act, 2006 and assailing the cognizance order in the present case by the appellant is concerned. Section 97(1) of the Act of 2006 provides that with effect from such date as the Central Government may appoint in this behalf, the enactment and orders specified in the second schedule shall stand repealed. The date envisaged in sub-Section 1 of Section 97 has been specified as 5.08.2011 vide notification No. F.No.P-15025/41/2011-DFQC -dated 4th August, 2011, meaning thereby the Food Adulteration Act, 1954 shall stand repealed on 05.08.2011. The provisions of Section 97 (2) were itself brought into force on 29.07.2010 which deals with repeal and savings. In the present case, the date of offence is mentioned and proved as on 05.03.2010, when accused was intercepted by P.W.1 and sub-standard milk was found in his possession and complaint was filed after investigation in the case against accused for his prosecution under Section 7/16 of P.F. Act. Thus, the proceedings, sampling and inspection under repealed Act were already initiated prior to repeal of the Act which took place on 05.08.2011. Even the cognizance in the case was taken by Court below on 17.08.2010, prior to the date when the P.F. Act, stood repealed. Therefore, this argument of revisionist side can also not be countenanced that the cognizance in the case was barred under law. Even Section 97(4) of The Food Safety and Standards Act, 2006, provides as under:

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or Orders after the expiry of a period of three years from the date of the commencement of this Act

Section 97 seeks to repeal the enactment or orders specified in second schedule immediately with the effect from the date on which the Act is enacted and comes into force, provided that such repeal shall not affect

(i) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder;

Or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred under any of the enactment or Orders under repeal; or

(iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and Orders under repeal; or

(iv) any investigation or remedy in respect of any such penalty, forfeiture or punishment and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed:

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if such

provisions of the State law has been repealed.

20. Thus, in view of Section 97(4) also, the cognizance in the case shall be saved as the same was taken within a period of 3 years from the date of commencement of the Act of 2006.

21. Thus, in opinion of this Court, cognizance in the case by the Court of first instance is in no manner illegal or barred under law.

22. The revision is devoid of merit and no factual or legal error or misappropriation of evidence is found on the part of learned Trial Court as well as Appellate Court while recording verdict of guilt against accused for charge levelled against him as well as in judgment of appellate court whereby the appeal was dismissed and order of Trial Court was affirmed.

23. So far as, sentence is concerned, learned counsel for the revisionist referred to the pleadings made in supplementary affidavit filed on behalf of the revisionist on 07.04.2023 and further submitted that as per report of Public Analyst, only the fat content in the sample of milk was found to be less than 13% of prescribed limit and same sample was not injurious to human health. The notice under Section 13(2) of Food Adulteration Act, was never served on revisionist/ accused, the process of sampling was not carried out in accordance with provisions of Section 7 of the Act. The revisionist is not having any prior criminal

history, hence, at least his case may be treated with some leniency, so far as, sentencing is concerned, he is held in jail custody since 20.12.2022 from date of impugned judgment of Appellate Court, he may be given benefit of Section 4 of Probation of the Offenders Act, or Section 360 Cr.P.C., as the case may be. He submitted that the sentence awarded to the revisionist may be reduced to the period undergone as he has already spent substantial portion of the sentence awarded in impugned judgment.

24. Learned counsel for revisionist cited judgment of Hon'ble Apex Court in **Nemi Chand Vs. State of Rajasthan (2018) 17 SCC 448**, in Criminal Appeal No. 214 of 2016.

25. I have gone through the judgment of Hon'ble Apex Court in **Nemi Chand Vs. State of Rajasthan (supra)** in that case, the appellant was tried and convicted for offence under Section 7/16 P.F. Act by the Trial Court and was sentenced to undergo 6 months rigorous imprisonment as well as fine of Rs. 1,000/- and in default further rigorous imprisonment for one month. This order was challenged by the appellant by filing appeal before the Sessions Judge, which was dismissed on 11.09.1996, thereby affirming the order of the Trial Court. Hon'ble Apex Court observed that it is not in dispute that the charge against the appellant was only of sub-standardization of goods. It was observed that in judgment of this Court in **T. Barai vs Henry Ah Hoe And Another 1983(1) SCC 177**, this Court held that since the amendment of Prevention of Food Adulteration Act, Section 16 A was added in the P.F. Act through Central Act 34 of 1976 and it was

beneficial to the accused persons, it can be applied even with respect to earlier cases as well which are pending in the Court.

26. Hon'ble Apex Court in Nemi Chand case extended the benefit of newly added Section 16(A) to accused convicted and modified his sentence to the extent that he was awarded fine of Rs. 50,000/- and the substantive sentence of 6 months imprisonment awarded to him by Trial court and affirmed by first Appellate court was quashed.

27. In present case also, although Trial Court adopted procedure of summons trial in the case for convicting and sentencing the accused, the provisions of Section 16(A) of Prevention of Food Adulteration Act, 1954 cannot be lost sight which provide as under:

16A. Power of court to try cases summarily --

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under sub-section (1) of section 16 shall be tried in a summary way by a Judicial Magistrate of the first class specially empowered in this behalf by the State Government or by a

Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trial:

Provided that in the case of any conviction in a summary trial under this

section, it shall be lawful for the magistrate to pass a sentence of imprisonment for a term not exceeding one year:

Provided further that when at the commencement of, or in the course of, a summary trial under this section it appears to the magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other

reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and

proceed to hear or rehear the case in the manner provided by the said Code

28. Present offence is also punishable under Section 16(1)(a)(i). There is neither allegation that the sample in question of beverage (milk) collected from the accused, was in any manner injurious to health of its consumer. The offence is itself of technical nature as the fat content of milk was found only 13 percent below than prescribed standard. Thus, in this case also the main charge against the accused appellant was that only of sub-standardization of the beverage (milk) which was allegedly carried by him for selling on the date and time of inspection by P.W.1.

29. Therefore, in the light of judgment of Hon'ble Apex Court in **Nemi Chand Vs. State of Rajasthan (supra)**, the benefit of Section 16(A) of the Act, is liable to be extended to the revisionist, in the case which provides that all the offences under sub-Section 1 of Section 16 shall be tried in a

summary way and provisions of Section 262 and 265 (both inclusive) of the said Code of Civil Procedure shall as far as may be applied to such trial. Section 262 (2) provides that in summary trials, the procedure specified in this Code for the trial of summons- case shall be followed except as hereinafter mentioned and no sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

30. As the case of accused revisionist is covered under Section 16(1) of the Act of P.F. Act, in respect of fact that Court did not adopt procedure of summary trial in the case, he deserves to be extended benefit of provisions of Section 16(A) of the Act, which was existing on the date of the offence and keeping in view the provision of Section 262(2) Cr.P.C. his substantive sentence is liable to be reduced with 3 months as provided therein.

31. In view of the above, the revision is **partly allowed**. The conviction recorded by trial court against revision is affirmed. The sentence imposed upon the revisionist is modified and simple 3 months imprisonment is awarded to him, however, fine of Rs. 5,000/- awarded by the Court below will remain intact. As the revisionist had already undergone this modified sentence of 3 months imprisonment, he will be released from jail custody immediately in respect of present case, if he pays the fine awarded in impugned judgment or undergoes the sentence awarded in default of payment of fine, as the case may be.

32. Let a copy of this order be sent to Trial Court concerned for compliance.

(2023) 5 ILRA 77
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.05.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Criminal Revision No. 523 of 2023

Sandeep Kumar ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sudhir Kumar Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision , Section 319 - Power to proceed against other persons appearing to be guilty of offence - power under section 319 of Cr.P.C. can be invoked and exercised before the pronouncement of the order of sentence.(Para -13)

Plea has been raised - challenging trial court's erroneous summoning of accused-revisionist - under section 319 of Cr.P.C. before sentence.(Para - 12)

HELD:-Court finds that the trial court has jurisdiction under section 319 of Cr.P.C. before the pronouncement of the judgment. Trial court exercised its jurisdiction before the order of sentence, indicating no erroneousess in the impugned judgment and order. **(Para -13)**

Revision dismissed. (E-7)

List of Cases cited:

Sukhpal Singh Khaira Vs St. of Punj., 2023 (1)
SCC 289

(Delivered by Hon'ble Shree Prakash
Singh, J.)

1. Heard Sri Sudhir Kumar Singh, learned counsel for the revisionist, Sri Girijesh Dwivedi, learned A.G.A. for the State and perused the material placed on record.

2. By means of the present application, prayer has been made to quash the impugned order dated 31.03.2023, passed by Additional Session Judge, court no. 4, Barabanki, Session Trial No. 273/2012, State of U.P. versus Rakesh, up to the extent of summoning of revisionist under section 319 of Criminal Procedure Code and to stay the operation and implementation of impugned order dated 31.03.2023, passed by the Kamal Kant Srivastava, Additional Session Judge, court no. 4, Barabanki, Session Trial No. 273/2012, State of U.P. versus Rakesh up to the extent of summoning of revisionist under section 319 of Criminal Procedure Code.

3. Since, pure legal question is involved in this matter, thus, notice to the opposite party no. 2 is hereby dispensed with.

4. Learned counsel appearing for the revisionist submits that initially the first information report was lodged against the present revisionist, including the other co-accused persons, wherein, after the investigation, the present revisionist was not found involved in committing offence and thus, his name has been expunged. He next added that thereafter, the trial

commenced and at the time of conclusion of trial, on the date of the pronouncement of the judgment, the learned trial court while invoking its jurisdiction under section 319 of Cr.P.C. has summoned the present revisionist though, there was no substantial material against the revisionist to summon him under section 319 of Cr.P.C.

5. Adding his arguments, he submits that during the course of the trial in the year only P.W.-1, P.W.-2 and P.W.-5 have named the present revisionist. He next added that in a very hurriedly manner and without recording the degree of satisfaction, the present revisionist has been summoned though, he was never involved in committing any offence and there is no material, which could show that there was more than prima facie or much stronger case is available against the revisionist.

6. In support of his submission, he has drawn attention towards judgment reported in **2023 (1) Supreme Court Cases 289 Sukhpal Singh Khaira v. State of Punjab** and has referred paragraph 39(1) and added that the constitutional bench of the Apex Court while answering a reference has held that power under section 319 of Cr.P.C. is to be invoked and exercised before the pronouncement of the order of sentence, where there is a judgment of conviction of the accused. It has further been held that if the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such, summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.

7. Paragraph 39 (1) is quoted herein under:-

Whether the trial court has the power under Section 319 CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?

The power under Section 319 CrPC is to be invoked and exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused. In the case of acquittal, the power should be exercised before the order of acquittal is pronounced. Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.

8. Referring the aforesaid, he submits that since there is no substantial evidence against the revisionist and the facts and circumstances for invoking the jurisdiction under section 319 of Cr.P.C. has not been discussed in the order impugned and therefore, the judgment and order passed dated 31.03.2023 is against the law enunciated by the Apex Court.

9. Further, submission is that the impugned order dated 31.03.2023 may be set aside to the extent of summoning the

revisionist-accused under section 319 of Cr.P.C.

10. Learned counsel appearing for the State has vehemently opposed the submissions aforesaid and submits that the learned trial court has summoned the present revisionist under section 319 of Cr.P.C., after discussing in detail the facts and circumstances which itself is evident from the judgment and order dated 31.03.2023 started from internal page 22 of the judgment itself. He added that law is very clear on this point that the trial court can invoke its jurisdiction under section 319 of Cr.P.C. for summoning the accused, prior to the order of sentence, where, there is judgment of conviction of the accused. He also added that the case in hand is that the revisionist-accused has been summoned under section 319 of Cr.P.C. prior to the order of sentence. He has also drawn attention towards the constitution bench judgment in *Sukhpal Singh Khaira v. State of Punjab* Supra and added that while answering the reference, the Apex Court has also held that power under section 319 of Cr.P.C. can be invoked and exercised before the pronouncement of the order of sentence where, there is judgment of conviction of accused. He submits that the case aforesaid also supports the version of the prosecution.

11. Concluding his arguments, he submits that there is no perversity or unlawfulness in the judgment and order dated 31.03.2023 and therefore, no interference is warranted.

12. Having heard counsels for the parties and after perusal of material placed on record it transpires that a plea has been

raised challenging the order dated 31.03.2023 that the learned trial court has erroneously invoked its jurisdiction under section 319 of Cr.P.C. while summoning the accused-revisionist. From perusal of the judgment and order, it transpires that prior to the order of sentence, the learned trial court while discussing the facts and circumstances on internal page 22 onwards of the judgment, has summoned the accused-revisionist under section 319 of Cr.P.C. The first set of argument of learned counsel for the revisionist was that on the date of the pronouncement, the trial court is not empowered to invoke its jurisdiction under section 319 of Cr.P.C. and the second set of argument is that there was no material evidence against the revisionist which could show that there was much stronger case to summon the revisionist while invoking its jurisdiction under section 319 of Cr.P.C.

13. When this Court examines the first set of argument of learned counsel for the revisionist that the learned trial court has no jurisdiction to invoke its power under section 319 of Cr.P.C., at the time of pronouncement of the judgment, it is very much evident from the law propounded by the Apex Court in case of **Sukhpal Singh Khaira v. State of Punjab**, which was answered in paragraph 39(I) that power under section 319 of Cr.P.C. can be invoked and exercised before the pronouncement of the order of sentence and so far as the present revisionist's case is concerned, the learned trial court has exercised its jurisdiction under section 319 of Cr.P.C., prior to the order of sentence and thus, there is no erroneousness in the impugned judgment and order.

14. So far as the second set of argument with respect to the non-

15. Resultantly, the instant revision has no merit and is hereby **dismissed**.

(2023) 5 ILRA 80
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.05.2023

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Ranjit Singh **...Revisionist**
Versus
State of U.P. & Anr. **...Opposite Parties**

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Indian Penal Code, 1860 - Sections 323, 504 & 304 part-1 - court not permitted to sit in revision review or recall

FIR was filed by first informant – allegation - their brother was playing a match with accused - During match, an altercation occurred - attacked with a cricketing bat - causing him to die - session trial began on a chargesheet filed under Sections 302, 323, 504 IPC - session court framed a charge under Sections 302/34, 323/34, and 504 IPC - accused persons applied for a conversion of charge to Sections 323, 504, and 34 IPC- session judge concluded - prima facie offence was made out under Sections 323, 504, and 304 part-1 IPC. **(Para -3)**

HELD:- Trial court can alter a charge based on new evidence, but cannot re-appraise the evidence without a change in circumstances. This is not permissible under Section 362 of Cr.P.C, as it creates disorder and chaos in judicial proceedings. While good grounds may exist, it cannot be construed as a prohibition against altering charges for good reasons. (Para -8)

Revision allowed. (E-7)

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

1. Heard Sri Lalit Kumar Shukla, learned counsel for the revisionist and Sri O.P. Mishra, learned A.G.A. for the State. None responds for respondent no. 2 despite service of notice.

2. By means of this criminal revision, a judgment and order dated 22.11.2022 passed by Additional Session Judge/Special Judge (POCSO Act), Mathura in S.C. No. 740 of 2022 (State vs. Jeetu @ Jitendra) arising out of Case Crime No. 57 of 2022, under Sections 323, 504, 304 part-1 IPC, Police Station Farah, District Mathura has been challenged.

3. The relevant facts are as below:-

An FIR naming Jeetu, Jagveer and certain others was filed by the first informant (the instant revisionist herein) alleging that his brother Manverndra was playing a match with the accused persons; during the match some altercation ensued between the two sides; the accused persons Jeetu and Jagveer attacked his brother Manvendra with a cricketing bat on his head and he later died of the injury sustained by him; the session trial began on the basis of a chargesheet admittedly filed under Sections 302, 323, 504 IPC; the learned session court framed a charge under Sections 302/34, 323/34 and 504 IPC, thereafter on the basis of an application moved on behalf of the accused persons that no offence under Section 302 IPC is made out and that the charge may be converted into one under Sections 323, 504 and 34 IPC, the learned session judge heard both the sides and came to the conclusion that prima facie offence under Section 323, 504, 304 part-1 IPC is made out and fixed the case for framing of charge under those sections only.

4. It is contended on behalf of the revisionist (first informant) that in this case, the learned trial court took cognizance under Sections 323, 504 and 302 IPC and framed charge under those sections; Thereafter on the basis of a mere application moved on behalf of accused the learned session judge altered the charge from Section 302 to 304(1) IPC.

5. Certain facts have been pointed out by the revisionist which are part of the case diary; it is contended on the basis of the statements given by certain persons that the attack was done in a well planned manner and with premeditation, hence it cannot be

said that there was no intention to cause death.

6. In my view when the court decided to take cognizance for the offence under Section 302 IPC and thereafter proceeded to frame a charge under Sections 302 IPC and several other sections, it may be presumed that the competent court has perused the evidence on record and has drawn a conclusion that prima facie such and such offences are made out; admittedly neither cognizance order nor the order of framing of charge was ever challenged by any of the side before the revisional court; The charge has been altered on the basis of a simple application moved by the defence side; In my firm view, the court is not permitted to sit in revision review or recall of its own order under the garb of provisions of Section 216 that charge can be altered at any stage of the case.

7. In my opinion, at this juncture, there is no need to go into the minute details of the allegations or the evidence recorded under Section 161 Cr.P.C. and attending facts and circumstances of the case with regard to settle the instant controversy before this court. The moot point involved is whether the court can review or recall or **set aside** its own order.

8. I find substance in the contention that once charge has been framed, it shall be presumed that the learned trial court did so after going through all the evidence on record and drawing a conclusion that prima facie offence under certain sections is made out; Though the trial court has ample power to alter the charge on the basis of suitable

material coming before it during the course of trial but without finding any change in circumstances or any material in between, the trial court can not re-appraise the evidence on record for drawing a different conclusion. Such a course of action is clearly not permissible by implication under the provisions of Section 362 of Cr.P.C. If such a course of action is permitted it shall create disorder and chaos in judicial proceedings and certainly shall be a cause for judicial indiscipline. It may also be noted that there may be certain good grounds for alteration of charge but the same may be considered at the proper stage after recording of evidence. In my view, the alteration of charge in this manner is not permissible in law. This may not be construed to mean that the trial court cannot exercise its powers to alter the charge for some good reason which may pop up at any subsequent stage, on the basis of any new material/evidence coming before it during the course of trial.

9. On the basis of above discussion the impugned order dated 22.11.2022 is hereby, **set aside** and the revision is **allowed**.

The learned trial court shall proceed with the case on the basis of earlier charge.

(2023) 5 ILRA 82
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.02.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.

Criminal Revision No. 991 of 2015

Pradeep Kushwaha **...Revisionist**
Versus
State of U.P. & Ors. **...Opposite Parties**

Counsel for the Revisionist:

Sri Shailesh Kumar Yadav, Sri Atul Kumar Shahi

Counsel for the Opposite Parties:

Govt. Advocate, Sri Ashok Kumar Tripathi, (Now, Sri Kartikeya Shukla, Sri S.P.K. Tripathi, Sri Sanjay Kumar Shukla

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Section 125 - Order for maintenance of wives, children and parents, The Hindu Adoptions and Maintenance Act, 1956 - Section 20(3) - right of a minor girl for maintenance from parents after attaining majority till her marriage is recognized in Section 20(3) of the Hindu Adoptions and Maintenance Act. (Para - 14)

Maintenance case filed by applicant No.1(Opposite party Nos.2 herein) - against her husband (revisionist) - Opposite party Nos.2 and her two minor daughters were awarded maintenance - plea of revisionist - unable to provide maintenance due to job loss - Respondent No.3 not entitled to maintenance due to majority attainment during pendency under Section 125 Cr.P.C.- revisionist and private respondents residing in same house - earns livelihood by some odd jobs like driving tempo and earns in meager amount - not disclosed real income before court below - several defaults in payment of maintenance awarded by court below. **(Para -2 to 12,15)**

HELD:-Revisionist being able bodied , is obliged towards to earn by legitimate means and maintain his wife and the minor child. Revisionist loses job, cannot maintain wife and children, not tenable. Respondent No.3 (daughter of revisionist) will not be denied maintenance due to attaining majority during pendency. Court considers modifying the maintenance order for respondent No.2 to 4 due

to changed circumstances and the revisionist's loss of job. **(Para -11,15)**

Revision petition disposed of. (E-7)

List of Cases cited:

1. Anju Garg & anr. Vs Deepak Kumar Garg, Criminal Appeal No.1693 of 2022 (arising out of SLP(Crl.) No.10353 of 2018)

2. Jagdish Jugtawat Vs Manju Lata & ors. in SLP (Criminal) No.905 of 2001

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard learned counsel for the revisionist, learned AGA for the State and perused the material placed on record.

2. Instant criminal revision has been preferred against the impugned judgement order dated 21.1.2015, passed by Principal Judge, Family Court, Gorakhpur, in Misc. Case No.526 of 2011 (Vinita Maurya vs. Pradeep) under Section 125 Cr.P.C., Police Station Shahpur, District Gorakhpur whereby the opposite party Nos.2 Vinita Maurya and her two minor daughters were awarded maintenance to the tune of Rs.7000/- and 4000/- per month respectively, which is payable on 10th of each month from the date of order.

3. Feeling aggrieved by the impugned order, the revisionist, who was opposite party in said maintenance case against whom the maintenance was awarded filed present criminal revision on 13.2.2015, wherein an interim order was issued by this Court that "*subject to the condition that revisionist deposits entire arrears of maintenance as awarded by the court below to be calculated @ Rs. 8000/- per month which may be due till today within a period of one month from today and continues to deposit the current monthly*

maintenance amount @ Rs. 8000/- by 10th of each month, no coercive action shall be taken against him during the pendency of the said revision. The said amount shall be paid to O.P. Nos. 2 to 4 after due verification by the trial court. It is made clear that in default of making payment, as directed above, the present interim order shall stand automatically vacated."

4. The factual matrix of the case relevant for present criminal revision are that the applicant No.1 (opposite party No.1 herein) had filed a maintenance case under Section 125 Cr.P.C. on behalf of her and her two minor daughters namely, Vanshika and Niharika against her husband, who is revisionist herein with averment that her marriage with opposite party was solemnized on 5.2.1998 according to the Hindu rites and rituals, in which her parents had given gifts and dowry as per their financial status. She was sent off to her matrimonial home after marriage and out of her conjugation with opposite party, two daughters were born. Her husband was working abroad at that time and used to come back home once in a year. In absence of husband of the applicant, her family members used to harass and torture her due to non-fulfilment of demand of additional dowry. The opposite party No.1 is an agriculturist and earns Rs.1 lac from his job abroad. The behaviour of opposite party No.1 also worsened towards the applicant during passage of time and he used to beat and torture her and subjected her to physical and mental cruelty for last six years and ultimately she was driven out of her matrimonial home in the year 2011. Her husband is Post Graduate and did diploma in Air Conditioning from Chandigarh. Applicant is also Graduate. She worked as an Agent in LIC in the year 2011 for some time but thereafter her agency terminated

her. The amount earned by her in Agency of LIC was meagre and was not sufficient to cater her needs. The opposite party appeared and filed written statement wherein he stated that the applicant is falsely levelling charges against him, which are unfounded. The applicant misled by her parents and she was herself coercing him physically and mentally. In fact the applicant No.1 and her mother intend that parents of the opposite party leave his home in the city and shift to village, so that the applicant alongwith her mother rule her matrimonial home. The opposite party resides in his own home. In course of hearing, the statement of applicant No.1 was recorded as AW-1 and that of opposite party (present revisionist) as OPW-1, wherein, applicant supported her pleadings and she stated that her husband was working in Portugal and his annual income is Rs.5 lacs. In cross-examination, she has stated that she had never studied or taught in R.P.M., Gorakhpur. Her husband did not sent any money to her after going abroad. Her father-in-law suffered brain haemorrhage and presently she is residing in her matrimonial home. A land was purchased in Gorakhpur prior to her marriage. The house in which she is residing was constructed after her marriage. She is residing in that house alongwith her husband and parents-in-law. The expenses of the applicant and her children is not metted out by income of her husband. She is taking loans from her maternal uncle Indradeo Prashad Kushwaha since 2012. The OPW-1 stated in his evidence that he is working as a labourer in Portugal. He has filed an Encashed Certificate on 25.11.2008 as paper No.16-Kha. He had taken an insurance policy from HDFC Bank in the name of his father, which annual premium is 99999. However, that policy is now closed, as its premium was paid only for

three years. He has not contracted any marriage in Portugal. When he was living in Portugal, his wife changed school of his children. Her wife is not willing to reside with his parents. His father has excluded him from his property. He is now residing with his father in his house. He also resides at same village for some time. He is not aware of the fee structure of his daughters.

5. Considering the evidence adduced during hear and appreciating the evidence in the light of pleadings of the parties, the learned Principal Judge, Family Court, Gorakhpur allowed the maintenance petition of the applicants for Rs.15,000/-, which was disbursed to the tune of Rs.7,000/-, Rs.4,000/- and Rs.4,000/- amongst the applicant No.1, 2 and 3, respectively as monthly maintenance awardable to them by opposite party No.1, who is present revisionist before this Court vide impugned order dated 21.1.2015.

6. Feeling aggrieved by the impugned order, the revisionist has taken stand in present revision that he was working as a labourer in Portugal on contract basis and when he had knowledge about the fact that his family members were being harassed by his wife, he came back to his home breaking his job agreement abroad and now he is jobless and lives in his parental home doing agricultural working. He is not in a position to pay Rs.15,000/- per month as monthly maintenance to his wife and children.

7. Learned counsel for the revisionist submitted that the revisionist is presently jobless. He earns his livelihood by driving auto and doing some odd jobs. His passport has been surrendered by him in the Court with regard to criminal case. Court below vide order dated 2.11.2021, after passing of maintenance order, issued a realization

warrant of Rs.553,000/- for realization of outstanding maintenance amount and on 30.6.2022, on an application of the applicant (18-Ka) realization warrant to the tune of Rs.6,30,000/- was issued against the revisionist, a copy thereof is filed with the rejoinder affidavit. In compliance of the intem order of this Court, the revisionist has deposited entire amount of arrear at the rate of Rs.8,000/- per month and has further deposited Rs.8,000/- since 27.4.2015. He had also filed a divorce petition under Section 13 of Hindu Marriage Act, against which first appeal is pending before this Court. Opposite party No.3 Niharika, the daughter of revisionist and opposite party No.1 had attained age of majority and now she is 21 years. She is not eligible for maintenance and for that reason, applicant had filed copy of the application and copy of execution petition filed by the applicant No.1 Smt. Vineeta Maurya as Annexure No.5 to the affidavit, which shows age of Vanshika as around 21 years and of Niharika as 15 years. Opposite party No.2(Vinita Maurya) also works on the post of Block Community Manager at CSC, Kushinagar and receives a salary of Rs.40,000/- per month. The revisionist has filed a copy of contract employee of CSC, Hata, Kushinagar in rejoinder affidavit, in which name of opposite party No.2 Vinita Maurya is mentioned as contract employee on the post of B.C.P.M.

8. Per contra, learned counsel appearing on behalf of the opposite party Nos.2 to 4 submitted that both the daughters of opposite party No.1 are still dependent on her and therefore, they are in need of maintenance from the revisionist. The opposite party No.2 got a job on BCPM at CSC, Hata after passing of impugned order by court below and said job terminated in August, 2022. The

revisionist does not drive auto but he plies auto rickshaws. There is no infirmity, irregularity or illegality in impugned order passed by court below and same is liable to be affirmed in present revision. The court below has not accepted the plea of disinheritance taken by the revisionist from his father. The opposite party No.2 herself bears tuition fee of her children.

9. Having regard to the plea of revisionist that due to loss of job in Portugal, in lieu of want of regular employment, the revisionist is not in a position to provide maintenance ordered by the learned court below. The law is well settled in recent judgement of Apex Court dated 28.9.2022 in the case of **Anju Garg and Another vs. Deepak Kumar Garg, Criminal Appeal No.1693 of 2022 (arising out of SLP(Crl.) No.10353 of 2018)**, whereby the high Court dismissed the revision application filed by the appellants challenging the order passed by District Judge, Family Court-1, Faridabad, Haryana in a petition under Section 125 Cr.P.C. observed in paragraph No.9 and 10 of the judgment as under:-

9) At the outset, it may be noted that Section 125 of Cr.P.C. was conceived to ameliorate the agony, anguish and financial suffering of a woman who is required to leave the matrimonial home, so that some suitable arrangements could be made to enable her to sustain herself and the children, as observed by this Court in Bhuwan Mohan Singh vs. Meena & Ors. 1. This Court in the said case, after referring to the earlier decisions, has reiterated the principle of law as to how the proceedings under Section 125 Cr.P.C have to be dealt with by the Court. It held as under:

"In *Dukhtar Jahan v. Mohd. Farooq* [(1987) 1 SCC 624 :

1987 SCC (Cri) 237] the Court opined that : (SCC p. 631, para 16)

16. "... Proceedings under Section 125 [of the Code], it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner."

8. A three-Judge Bench in *Vimala (K.) v. Veeraswamy (K.)* [(1991) 2 SCC 375 : 1991 SCC (Cri) 442] , while discussing about the basic purpose under Section 125 of the Code, opined that : (SCC p. 378, para 3)

3. "Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing, and shelter to the deserted wife." 1 (2015) 6 SCC 353

9. A two-Judge Bench in *Kirtikant D. Vadodaria v. State of Gujarat* [(1996) 4 SCC 479 : 1996 SCC (Cri) 762] , while advertng to the dominant purpose behind Section 125 of the Code, ruled that : (SCC p. 489, para 15)

15. "... While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents, etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and

destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."

10. In *Chaturbhuj v. Sita Bai* [(2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356] , reiterating the legal position the Court held : (SCC p. 320, para 6)

6. "... Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in *Capt. Ramesh Chander Kaushal v. Veena Kaushal* [(1978) 4 SCC 70 : 1978 SCC (Cri) 508] falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in *Savitaben Somabhai Bhatiya v. State of Gujarat* [(2005) 3 SCC 636 : 2005 SCC (Cri) 787] ."

11. Recently in *Nagendrappa Natikar v. Neelamma* [(2014) 14 SCC 452 : (2015) 1 SCC (Cri) 407 : (2015) 1 SCC (Civ) 346] , it has been stated that it is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children".

10) This Court had made the above observations as the Court felt that

*the Family Court in the said case had conducted the proceedings without being alive to the objects and reasons, and the spirit of the provisions under Section 125 of the Code. Such an impression has also been gathered by this Court in the case on hand. The Family Court had disregarded the basic canon of law that it is the sacrosanct duty of the husband to provide financial support to the wife and to the minor children. The husband is required to earn money even by physical labour, if he is an able-bodied, and could not avoid his obligation, except on the legally permissible grounds mentioned in the statute. In *Chaturbhuj vs, Sita Bai*², it has been held that the object of maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy and destitution of a deserted wife, by providing her food, clothing, and shelter by a speedy remedy. As settled by this Court, Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children. It also falls within the Constitutional sweep of Article 15(3), reinforced by Article 39 of the Constitution of India."*

10. Hon'ble Apex Court concluded that the Court is not impressed by the submissions of learned counsel for the respondent that he had no source of income as his party business has been closed. The respondent being able bodied, he is obliged towards to earn by legitimate means and maintain his wife and the minor child.

11. Having regard to the evidence of the revisionist-wife before the Family Court and having regard to the other evidence on record, the Court has no hesitation in holding that though the respondent had sufficient source of income

and was able bodied, had failed and neglected to main the applicants.

12. So far as the plea of revisionist with regard to attainment of majority by respondent No.2 Vanshika, the daughter of revisionist and respondent No.1 is concerned, a plea was taken on behalf of the revisionist that having attained majority during pendency of petition under Section 125 Cr.P.C., the respondent No.3 Vanshika is not entitled to maintenance is concerned, the provisions of Section 125 Cr.P.C. are liable to be reproduced as under:-

"125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may

from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.- For the purposes of this Chapter,-

(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such

Magistrate may consider any grounds of refusal stated by her, and may

make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

13. On the basis of provision of Section 125(1)(c) Cr.P.C. and explanation appended thereto, above plea has been raised on behalf of the revisionist.

14. Hon'ble Apex Court considered this matter in **Jagdish Jugtawat vs. Manju Lata And Others** in SLP (Criminal) No.905 of 2001 decided on 23.4.2002. In that case, respondent No.3, who was a minor, unmarried girl of appellant and his wife Manjulata, however, in course of time, she attained majority. Respondent No.1 wife of the appellant and mother of the respondent No.3 filed petition under Section 125 Cr.P.C. before Family Court claiming maintenance for herself and her two children, the family court by order dated 22.7.2000, granted maintenance at

the rate of Rs.500/- per month to each of the applicants. The petitioners herein filed a revision petition before the High Court assailing the order of the family court on the ground, *inter alia*, that the respondent No.3 was entitled to maintenance only till she attains age of majority and not thereafter. Considering the point, learned Single Judge of the High Court accepted, the legal position that under Section 125 Cr.P.C., a minor is entitled to maintenance from her parents only till she attains majority, but decline to interfere with the order passed by the Family Court- taking the cue from Section 20(3) of the Hindu Adoptions and Maintenance Act, under which the right of maintenance is given to minor daughter till her marriage. Learned Single Judge was persuaded to maintain the order of the Family Court with a view to avoid the multiplicity of the proceedings, with observation that the Court is not inclined to interfere in the order of Family Court granting maintenance to respondent No.3 on the ground that she having attained majority would cease to have the benefit of the provisions of Section 125 Cr.P.C., though she would be entitled to claim benefits provided under the statute/personal law, as the order does not result in miscarriage of the justice, rather interfering with the order would create great inconvenience to respondent No.3 as she would be forced to file another petition under Sub-section (3) of Section 20 of the Act for further maintenance, etc. Hon'ble Apex Court affirmed the finding and observation made by the learned Single Judge of the High Court and observed that applying the principle to the facts and circumstances of the case in hand, it is manifest that the right of a minor girl for maintenance from parents after attaining majority till her marriage is recognized in Section 20(3) of the Hindu Adoptions and

Maintenance Act. Therefore, no exception can be taken to the judgment/order passed by the learned Single Judge for maintaining the order passed by the Family Court which is based on a combined reading of Section 125 Cr.P.C. and Section 20(3) of the Hindu Adoptions and Maintenance Act. For the reasons aforesaid we are of the view that on facts and in the circumstances of the case, no interference with the impugned judgement order of the High Court is called for.

15. Thus, in the light of pronouncements of Hon'ble Apex Court in aforesaid cases, this Court is of the opinion that the plea raised on behalf of the revisionist that having lost his job and being devoid of any regular employment, the revisionist may not be saddled with liability to maintain his wife and children, is not tenable. In the same vein, the respondent No.3 Vanshika, the daughter of the revisionist and respondent No.2 will not be deprived of the maintenance awarded by the learned Family Court only on the ground that during pendency of proceeding, she attained majority. However, this court is not oblivious of the fact that when the maintenance was awarded by the learned Principal Judge, Family Court, vide order dated 21.1.2015, the revisionist was residing in Portugal in connection with his livelihood and thus the fact is not denied that now he has lost his job abroad and came back to the place of his parents. This is also admitted position that revisionist and private respondents are residing in the same house, said to be built by parents of revisionist. He has taken a plea that he earns livelihood by some odd jobs like driving tempo and earns in meager amount whereas according to the submissions of learned counsel for the private respondents

and averments in counter affidavit filed on behalf of the private respondents, the fee structure of her dependent children has been enhanced by the course of time and they are also taking tuition by private home tutor; it is also stated therein that it would be incorrect to state that there is no earning of the revisionist and he has become jobless. The revisionist has not disclosed his real income before the court below in proceeding under Section 125 Cr.P.C. He made several defaults in payment of maintenance awarded by court below as modified by interim order passed by this Court.

16. Considering the changed circumstances related to the revisionist, which has affected his earnings as he lost his job in Portugal, this Court is of the view that the amount ordered by learned court below towards maintenance of the respondent No.2 to 4 is liable to be modified in the light of the facts and circumstances of the case. Impugned order passed by court below awarding maintenance to private respondents against present revisionist is modified to the extent mentioned as under:-

(1) The revisionist shall pay monthly maintenance allowance at the rate of Rs.5,000/- to respondent No.1 Vinita Maurya and her daughters Vanshika and Niharika at the rate of Rs.2500/- per month to each of them with effect from 1.1.2015, as and when becomes due in the manner provided by the court below under the impugned award.

(2) The arrears of maintenance will be computed in accordance with the direction No.1 as above, from 1.1.2015 and will be payable to the respondents in 10 equal and monthly installments, which will commence

from the period of one month from the date of production of certified copy of this order before the court concerned.

(3) Any amount deposited by the revisionist towards the maintenance allowance payable to opposite party Nos.2 to 4 either in terms of award of learned Principal Judge, Family Court or in terms of interim order of this Court dated 25.3.2015 will be adjusted into the amount payable by the revisionist. The amount payable by the revisionist will be spread over 10 monthly installments as stated above. However, it is made clear that in the event of failure on the part of the revisionist to oblige any part of the order, coercive measures be revived from that stage and recoveries will be made in accordance with law.

17. Accordingly, the revision petition is disposed of in the manner and the maintenance awarded by the court below will stand modified to the above extent, accordingly.

18. Let a copy of this order be forwarded to court concerned for information and necessary actions.

(2023) 5 ILRA 90
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.04.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.

Criminal Revision No. 1416 of 2023

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

Counsel for the Revisionists:

Sri Ravikant Shukla

Cr.P.C. to establish the complicity of revisionists in crime.(Para - 19)

Counsel for the Opposite Parties:

G.A., Sri Manvendra Singh

Revision allowed. (E-7)**List of Cases cited:**

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 156(3),161,164 & 397/401 - Revision - Section 319 - Power to proceed against other persons appearing to be guilty of offence , Indian Penal Code, 1860 - Sections-506 and 376 D , Protection of Children From Sexual Offences, Act 2012 - Section-7/8 - material must be more than prima facie case as exercised at the time of framing of charges but short of satisfaction to the extent that evidence if goes un rebutted would lead to conviction - minority of a witness itself cannot be a ground to reject his/her testimony if he/she is quite mature to understand his or her testimony. (Para -18)

Application of first informant (father of victim) under Section 319 Cr.P.C. - allowed - revisionists were summoned - to face the trial - hence revision. **(Para - 2)**

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 319 - material available at the time of inquiry is also the evidence for the purpose of Section-319 Cr.P.C - during inquiry only material that could be available is the material collected by the Investigating Officer during investigation - exercising power under Section 319 Cr.P.C. apart from the evidence recorded during trial - any material that has been received by the court after cognizance is taken and before the trial commences - can be utilized for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. . (Para - 11,12)

HELD:-Material collected by the prosecuting agency during investigation available at the time of inquiry as well as the statement of PW-1 recorded during trial is not sufficient for summoning the revisionists as additional accused in exercise of power under Section-319

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

2. Sagar Vs St. of U.P. , (2022) 6 SCC 389

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

1. Heard Sri Ravikant Shukla, learned counsel for the revisionists, Sri Manvendra Singh, learned counsel for the opposite party no.2 and learned AGA for the State.

2. By way of present revision, revisionists, who are two in numbers, have challenged the order dated 04.02.2023 passed by the learned Additional Sessions Judge/Special Judge (Rape and POCSO Act), Court No.1, Fatehpur in Special Sessions Trial No.101 of 2019, by which application of first informant (father of victim) under Section 319 Cr.P.C. was allowed and revisionists were summoned under Sections-506 and 376 D IPC read with Section-7/8 of Protection of Children From Sexual Offences, Act 2012 to face the trial.

3. Contention of learned counsel for the revisionists is that for the incident dated 25.02.2019, FIR was lodged on 06.03.2019 by the father of victim under Sections-363, 366 and 506 IPC in Case Crime No.83 of 2019 at Police Station-Bindki, District-Fatehpur, making allegations that co-accused, Pawan Raidas enticed away his 13 year daughter Renu Devi and present

revisionists also helped him in the aforesaid crime. During investigation, statement of victim under Section-161 Cr.P.C. and thereafter, under Section-164 Cr.P.C. was recorded but victim did not make any allegations against the present revisionists. On the contrary, she admitted that she had run away with Pawan Kumar willingly for marriage because she likes Pawan. During investigation, medical examination of victim was also conducted in which no opinion about sexual assault was given and CMO by certificate dated 04.04.2019 mentioned the age of victim Renu Devi as 19 year on the basis of radiological examination. Thereafter, police submitted charge-sheet dated 01.06.2019 against the co-accused, Pawan Raidas and involvement of revisionists was found to be false. It is also submitted that during investigation co-accused, Pawan as well as the victim Renu Devi and also the present revisionists had also approached this Hon'ble Court by way of Criminal Misc. Writ Petition No.7322 of 2019 challenging the FIR of Case Crime No.83 of 2019 registered at Police Station-Bindki, District-Fatehpur. In that writ petition, the victim Renu Devi had filed an affidavit stating therein that she willingly run away with Pawan and got married with him. On the basis of aforesaid affidavit of victim Renu Devi, writ petition was disposed of by order dated 15.03.2019 granting interim protection to all the petitioners including the present revisionists from arrest till submission of chargesheet.

4. It is further submitted that all these documents were before the court below during inquiry and on the basis of the evidence available on record, charges were framed against co-accused Pawan Raidas. During trial, PW-1 (victim) had taken u-

turn and had stated that the present revisionists along with the co-accused, Pawan forced her to sit in Baleno Car and threatened that she had to get married with Pawan. Thereafter, they kept her at Maharajpur and repeatedly raped her for many days and thereafter co-accused, Pawan forced her to sign on blank paper and then brought her to this Court and thereafter, when the police raided at their house then they left the victim at Bindki, Lalauli Chauraha where the police recovered her. It was further contended that the statement of PW-1 was recorded at the instance of her father who is the first informant because aunty of revisionists, namely, Gudiya Devi had moved an application under Section 156(3) Cr.P.C. on 13.11.2017 which was registered as complaint case no.57 of 2018 in which summoning order was also passed on 19.07.2022 summoning the father of PW-1 (Jai Karan Nishad) and thereafter charges were also framed on 19.07.2022, against the first informant, Jai Karan Nishad for the incident dated 18.09.2017 for outraging her modesty, beating and injuring her as well as her family members.

5. Learned counsel for the revisionists lastly submitted that there is no sufficient material to summon them under Section 319 Cr.P.C. on the basis of statement of PW-1 recorded before the Court on 03.11.2020 as there is not only a u-turn from her earlier statement recorded under Sections-161 and 164 Cr.P.C. but there was serious contradiction in the statement of PW-1, therefore, prayed for quashing of the impugned order.

6. On the other hand, learned counsel for the opposite party no.2 had stated that

the alleged complaint filed by the aunty of revisionists was lodged subsequent to the FIR lodged by the first informant (father of victim) against the revisionists. It was further submitted that as per the school certificate as well as statement of PW-1, her date of birth is 15.01.2006. Therefore, at the time of incident, victim was minor, therefore, her statement recorded under Sections-161 and 164 Cr.P.C. has no evidentiary value.

7. Learned AGA also submitted that on the basis of statement of PW-1, there is sufficient material on record to summon the revisionists under Section-319 Cr.P.C., therefore, present revision deserves to be dismissed.

8. After hearing counsel for the parties and from perusal of record, the first question arises is whether the material available during inquiry which was collected during investigation like statement under Section-161 Cr.P.C. as well as under Section-164 Cr.P.C. and also the medical examination report as well as age determination certificate of CMO can be looked into while summoning the accused under Section 319 Cr.P.C., on the basis of statement recorded at the time of trial.

9. Second question arises is whether there is sufficient material available on the basis of statement of PW-1 during trial to summon the revisionists.

10. Hon'ble Supreme Court in the case of **Hardeep Singh Vs State of Punjab (2014) 3 SCC 92** had observed in

paragraph no.54, which is being quoted as below :

"54. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor could the legislature have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 Cr.P.C."

11. From the observations of the Hon'ble Supreme Court in the above case, it is clear that the material available at the time of inquiry is also the evidence for the purpose of Section-319 Cr.P.C. It is also clear that during inquiry only material that could be available is the material collected by the Investigating Officer during investigation because at that time, no other material could be brought on record but question arises relevancy of this material available during inquiry for the purpose of

exercising power under Section 319 Cr.P.C. on the basis of evidence comes during trial. This question was also answered by Hon'ble Supreme Court in paragraph no.85 of **Hardeep Singh Vs State of Punjab (supra)**, which is quoted hereinunder:

"85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The 'evidence' is thus, limited to the evidence recorded during trial."

12. Therefore, for exercising power under Section 319 Cr.P.C. apart from the evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilized for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C.

13. The evidence is thus limited to evidence recorded during trial but same can be corroborated or supported by the evidence available during inquiry.

14. So far as second question regarding the availability of sufficient material for summoning the revisionists on the basis of statement of PW-1 recorded at the time of trial is concerned, for that purpose, Hon'ble

Supreme Court has already issued detailed guidelines in **Hardeep Singh Vs State of Punjab (supra)** in paragraph nos.105 and 106 which are quoted as below :

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

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

15. Similarly, Hon'ble Supreme Court in **Sagar Vs. State of U.P. (2022) 6 SCC 389** also observed regarding sufficiency of material as well as power under Section-319 Cr.P.C. Relevant paragraph no.9 of the said judgement is quoted as under:

"9. The Constitution Bench has given a caution that power under Section 319 of the Code is a discretionary and extraordinary power which should be exercised sparingly and only in those cases where the circumstances of the case so warrant and the crucial test as noticed above has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. The learned Single Judge of the High Court has even failed to consider the basic principles laid down by this Court while invoking Section 319 of the Code, which has been considered by the learned trial Judge under its order dated 30 th January, 2018."

16. From Section 319 Cr.P.C., it is clear that power of summoning a person as accused can be exercised on the basis of material coming on record during inquiry or trial. For ready reference, Section 319 Cr.P.C. is being quoted as below:

"319. Power to proceed against other persons appearing to be guilty of offence.- (1) *Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be*

tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

17. The purpose of Section 319 Cr.P.C. is to impose a duty to enable the court so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to get escort free by being not arraigned in the trial instead of the possibility of his complicity which can be gathered from the document presented by the prosecution. The court is sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such power with a court in a criminal

justice system where it is not uncommon that real accused, at times, gets away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes effort at times to get himself absolved and even at the stage of investigation or inquiry, even though he may be connected with the commission of offence. Therefore, word evidence used in Section 319 Cr.P.C. has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. The court, therefore, should be understood to have power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such power cautiously on such material after evidence has been led during trial.

18. Now, we come to second question whether there is sufficient material on the basis of statement of PW-1 recorded during trial to summon the revisionists under Section 319 Cr.P.C. In her statement, PW-1 admitted that she was medically examined for the purpose of any assault as well as for the purpose of determination of her age and also her statement was recorded by Magistrate but she had stated that her statement under Section-164 Cr.P.C. was recorded under the threat of co-accused, Pawan and her father, Harilal. At one stage of her statement, PW-1 has stated that, only Pawan had been residing with her in room and no other person was there but subsequently, she stated all persons had been residing with her in room. In examination-in-chief, she stated that all persons committed rape upon her repeatedly but in cross-examination, PW-1 stated that except Pawan, only revisionist no.1 committed rape upon her and no other

person committed rape upon her. During trial there was only statement of PW-1 which was basis of passing the impugned order and there was no other evidence on record showing that any other person has seen the above incident as stated by PW-1. On considering the totality of statement of PW-1 as well as its corroboration with the material available at the time of inquiry i.e. statement under Sections-161 and 164 Cr.P.C., evidence is not sufficient for summoning the revisionists because as per the established law by Hon'ble Supreme Court, the test is that material must be more than prima facie case as exercised at the time of framing of charges but short of satisfaction to the extent that evidence if goes unrebutted would lead to conviction. So far as contention of counsel for opposite party no.2 that as per school leaving certificate of victim, she is minor, therefore, her statement recorded under Sections-161 and 164 Cr.P.C. is not relevant, is concerned, that is also misconceived because if this reasoning is accepted then her statement during trial as PW-1 will also cannot be treated as evidence. Even otherwise, it is established position of law that minority of a witness itself cannot be a ground to reject his/her testimony if he/she is quite mature to understand his or her testimony.

19. Therefore, in totality considering the material collected by the prosecuting agency during investigation available at the time of inquiry as well as the statement of PW-1 recorded during trial is not sufficient for summoning the revisionists as additional accused in exercise of power under Section-319 Cr.P.C. to establish the complicity of revisionists in crime.

20. In view of the facts discussed above as well as the law laid down by the

Apex Court in **Hardeep Singh Vs State of Punjab (supra)** as well as **Sagar Vs. State of U.P. (supra)**, the impugned order dated 04.02.2023 is set aside and the present revision is **allowed**.

(2023) 5 ILRA 97
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 1738 of 2013

Rajkeshwar **...Revisionist**
Versus
State of U.P. & Ors. **...Opposite Parties**

Counsel for the Revisionist:

Sri Ashok Kumar Srivastava, Sri Ganesh

Counsel for the Opposite Parties:

Govt. Advocate, Sri N.D. Upadhyay, Sri
Vinay Bhushan

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Section 145 - Procedure where dispute concerning land or water is likely to cause breach of peace , Section 146 - power to attach subject to dispute and to appoint receiver - when a civil suit is pending and the parties have been directed to maintain status quo, initiation of proceeding under Section 145 Cr.P.C. is improper - For breach of peace Section 107 Cr.P.C. can be invoked but cannot attach the property. (Para - 14)

Property in question pending in Revenue Court - with an interim stay order to maintain status quo - SDM directed SHO - to send a report for action under Sections 145 and 146 CrPC - which is against provisions of law - superior officer directed SHO to send a positive report - concerned report was sent by SHO - Order

passed by Sub-Divisional Magistrate under Section 145 CrPC. - land, totaling 1.0.912 hectares, was attached under section 146 (1) CrPC. - hence criminal revision. **(Para - 2,12)**

HELD:-Impugned order is not liable to be sustained. Impugned order passed by Sub-Divisional Magistrate, under Section 146(1) CrPC quashed. **(Para - 15,16)**

Revision allowed. (E-7)

List of Cases cited:

1. Ashok Kumar Vs St. of Uttarakhand & ors. , 2013 (3) SCC 366
2. Manika Shahu Vs Dandapani Shahu, 1986 CrLJ 287
3. Suresh Kumar Vs Vijay Kumar, 1988 CrLJ 977
4. Delhi Ram Sumer Puri Vs St. of U.P., AIR 1985 SC 472
5. Iqbal Singh Vs St. of Har., 1985 CrLJ 1757 (P& H)
6. Anand Ram Vs St. of Delhi, 1986 CrLJ 2008
7. Mohinder Singh Vs Dilbagh Rai, 1977 CrLJ 1029

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

1. Heard Mr. Ganesh, learned counsel for the revisionist and learned Additional Government Advocate. None appeared from the side of opposite party no.2 to argue the case. Perused the material available on record.

2. This criminal revision has been preferred against the order passed by opposite party no.2/Sub-Divisional Magistrate, Robertsganj, District Sonbhadra dated 02.05.2013 in Case No.39

of 2013 (Smt. Prema Devi Vs. Rajkeshwar Yadav), under Section 145 CrPC, Police Station Kone, District Sonbhadra whereby the land being Arajai nos.4, 5, 11, 15, 313, 721 722, 749, 767/1 and 267/202 total 11 gata area 1.0.912 hectare had been attached under section 146 (1) CrPC.

3. The facts in brief of the case are that on the report of Station House Officer, Police Station Kone that there was breach of peace with regard to the aforesaid plot numbers and there was essentiality of attachment of the aforesaid plots under Section 146(1) CrPC the Sub-divisional Magistrate convinced with the report of the concerned SHO attached the aforesaid plots under Section 146(1) CrPC vide order dated 02.05.2013. Before passing the impugned order, a preliminary order under Section 145(1) CrPC had also been passed by the concerned SDM. Being aggrieved from the order of the SDM, this revision petition has been preferred.

4. Facts of the case are that Prema Devi opposite party no.3 moved an application under Section 145 CrPC before the concerned SDM stating that respondent no.7, Jag Narayan (now deceased) son of Tulsi had 1/5th share in property in question which was also in his use and occupation, was, later on, purchased by Prema Devi and her name had also been mutated in the revenue records. Opposite party nos.2 to 5, 7 & 8 are the real tenure holder and respondent no.1 - Rajkeshwar is also recorded co-tenure holder after execution of sale deed from Satya Narayan and Raj Narayan son of Tulsi. Respondent nos.6 and 9 purchased the shares through sale deed from Shiv Prasad father of respondent no.8 and respondent nos.2 to 5

respectively and have become co-tenure holder. Gata no.773(ka) is a valuable property on the main pitch road of Kone to Telgudwa Road in which all the brothers and the purchasers have the share and title.

5. On the basis of money and muscle power opposite party no.1 tried to occupy the part of land adjoining to the road since month of June, 2011 after purchasing the land from two sons of Tulsi. A case for partition had also been filed by Prema Devi in which an interim stay order has also been passed but opposite party no.1 is adamant to change the nature of property in question in any manner and on the request, not to do so, he is adamant to commit offence and cause injury to her and her family members, hence if the property in question is not attached, an untoward incident might be occurred at any time.

6. The application was considered by the Sub-Divisional Magistrate and SHO, Kone, Sonbhadra was directed to send a report for attachment of the property in question under Sections 145/146 CrPC. The report was submitted by concerned SHO and thereafter, the impugned order had been passed by the SDM, which is under challenge before this Court.

7. In this revision, the Revisionist has taken ground that the police report clearly indicates that the revisionist is in possession of the property in question, hence no order for its attachment could be passed. The order under Section 145(1) CrPC and the order under Section 146(1) CrPC have been passed on the same day i.e. 02.05.2013 thus the order under Section

145(1) is wholly illegal and without jurisdiction. The impugned order is an *ex parte* order without awaiting the written statement. In Suit No.235 of 2011, under Section 176 of the UPZA & LR Act, order to maintain *status quo* has also been passed on 26.04.2011. Actually, there was no circumstance existing in which aforesaid order could be passed concluding any emergency. Both the orders are bad in law as there was also an order to maintain *status quo* passed by the Revenue Court in respect of the same land in between the same parties, hence the impugned order is liable to be quashed and the same be quashed.

8. Learned counsel for the applicant relied upon the judgement ***Ashok Kumar Vs. State of Uttarakhand and others reported in 2013 (3) SCC 366*** in which it has been laid down that the Magistrate can act under Sections 145 and 146 CrPC, only when he is unable to decide as to which of the party was in possession. The property can be attached only in case of emergency as contemplated under Section 146 CrPC and mere apprehension of breach of peace cannot be ground to pass an order under Section 146 CrPC, if a suit is pending. It is for the Civil Court to decide as to who was in possession on the date of filing of the suit.

9. On behalf of the opposite party nos.1 and 2, a counter affidavit has been filed in which it has been stated that before passing of impugned order since Rajkeshwar was already in possession and the property in question had been sold to Prema Devi, therefore, a marpeet took place between the parties and for the same, two criminal cases being Case Crime No.210 of 2012, under Sections 523, 504,

506 & 325 IPC and Case Crime No.210A of 2012, under Sections 323, 504, 506 & 308 IPC were lodged by both the parties against each other in which after investigation, charge-sheet had been submitted, however a Suit No.235 of 2011, under Section 176 of the UPZA & LR Act was also pending in which parties were directed to maintain *status quo* over the land in question but the revisionist tried to obtain forcible possession over the same, due to which, there was apprehension of breach of peace between the parties, therefore, SHO, Kone had submitted a report before opposite party no.2 regarding apprehension of breach of peace between the parties and search proceeding under Section 146(1) CrPC was required to be undertaken.

10. Opposite party no.2 after considering the report, concluded that any untoward incident will take place between the parties, hence by order dated 02.05.2013 attached the property in question and directed the SHO to give the aforesaid property in custody of any supurdgar with condition that till date the property in question will remain under the supervision of Police Station Kone. The order passed by opposite party no.2 is just, appropriate and legal order which does not suffer from any illegality or infirmity. Hence, the application be rejected.

11. A rejoinder affidavit has been filed by the applicant denying the allegations of the counter affidavit that a Suit No.235 of 2011, under Section 176 of UPZA & LR Act about the disputed land is pending in which an order to maintain *status quo* has been passed by SDM, Robertsganj on 24.06.2011 and the same is still effective.

The name of the revisionist has been shown as Bhumidhar, with transferable right in the revenue record of fasli year 1427-1431. On the basis of the contention of the applicant and the rejoinder affidavit, the order dated 02.05.2013 is liable to be vacated.

12. From the above discussion, it is very much clear that about the property in question, a partition suit is pending in Revenue Court in which interim stay order to maintain *status quo* is also passed and is still in operation. From the records, it also transpires that no report had been transmitted by SHO, Police Station Kone to the learned SDM that there was any apprehension of breach of peace but rather the learned SDM himself directed SO, Kone after getting the report from opposite party no.3 for sending the report for taking action under Sections 145 and 146 CrPC, which is against the provisions of law. Thus, it transpires that since the superior officer had directed the SHO to send a positive report, hence the concerned report had been sent by SHO, Kone upon which SDM passed the impugned order.

13. This Court is also unable to understand that when the Revenue Court had taken cognizance of the property in question and had passed stay order, it was not open for the SDM to proceed with the matter under Sections 145 and 146 CrPC. When a Court's interim stay order was already into existence, the same could be complied with in due course of law by the Revenue Court and there was no occasion for the SDM to exercise the duty under the Code of Criminal Procedure. Though it has also come to knowledge that both the parties had lodged FIR against each other and the parties would have been enlarged

on bail on certain conditions, hence it does not look any possibility of breach of peace again in the near future. It is also noteworthy that both the orders under Sections 145 & 146 CrPC have been passed simultaneously and on the same day i.e. 02.05.2013, which is against the provisions of law. It appears that the SDM had already made up the mind to pass the impugned order, hence both the orders were passed together by the learned SDM without affording opportunity to the revisionists.

14. The above findings also find support from the following judicial precedents which are as under:

(a) In ***Manika Shahu Vs. Dandapani Shahu***, 1986 CrLJ 287, it has been held that when between the parties no partition by metes and bounds has taken place, then even when one is in possession over a land for convenience it is a possession of all co-sharers.

(b) In ***Suresh Kumar Vs. Vijay Kumar***, 1988 CrLJ 977 Delhi, it has been held that a property which in joint possession is outside the ambit of Section 145 Cr.P.C. Magistrate can not decide the question of joint possession.

(c) In ***Ram Sumer Puri Vs. State of U.P.***, AIR 1985 SC 472, it has been held that where a civil litigation is pending for the property where the question of possession is involved, parallel proceeding in criminal Court is not justified. In such a situation the Apex Court quashed the proceeding before the Magistrate living it open to the parties to approach the Civil Court for injunction or Receiver or the like.

(d) In *Iqbal Singh Vs. State of Haryana, 1985 CrLJ 1757 (P& H)*, it has been held that when Civil Court directs maintenance of *status quo*, it postulates that the Civil Court is not sure as to which party is in possession. It virtually directs that if the contention of either one of them supposedly was right then that position should be continued. In this backdrop the Magistrate can initiate proceeding to decide which party was in possession. For breach of peace he can invoke Section 107, Cr.P.C. Although he can not attach the property.

(e) In *Anand Ram Vs. State of Delhi, 1986 CrLJ 2008*, it has been held that when a civil suit is pending and the parties have been directed to maintain *status quo*, initiation of proceeding under Section 145 Cr.P.C. is improper.

(f) In *Mohinder Singh Vs. Dilbagh Rai, 1977 CrLJ 1029*, it has been held that in cases of dispute of possession civil court can pass three types of orders- (a) appointment of receiver; (b) granting injunction against a party; and (c) direction to maintain *status quo*. In first type of cases there can not be any dispute giving rise to proceeding under Section 145 Cr.P.C. In second type of cases jurisdiction of criminal court can not be restricted and if so required Magistrate may have to start a parallel proceeding but only to defend the order of civil court by not allowing the aggressor to come in violating the command of civil court. In third type of cases Magistrate may intervene but only to defend the civil court's order by maintaining *status quo*.

15. In view of the above discussion, this Court is of the considered conclusion that the impugned order is not liable to be sustained.

Order

16. This criminal revision is accordingly **allowed** and the impugned order dated 02.05.2013 passed by Sub-Divisional Magistrate, Robertsganj, District Sonbhadra in Case No.39 of 2013 (Smt. Prema Devi Vs. Rajkeshwar Yadav), under Section 146(1) CrPC is hereby quashed.

(2023) 5 ILRA 101

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 02.02.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Revision No. 2581 of 2022

Arpit Saxena

...Revisionist

Versus

Smt. Nancy Saxena

...Opposite Party

Counsel for the Revisionist:

Sri Pramod Kumar Sinha

Counsel for the Opposite Party:

Sri Arvind Srivastava III

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision, Section 125 - Order for maintenance of wives, children and parents - Court must assess the wife's income and determine if she can sustain herself in the husband's house - Sustenance does not mean survival, as per section 125 - Right to claim maintenance must date back to the filing of the application, as the pending maintenance proceedings are not within the applicant's control - claimant wife's employment and husband's economic resources must be considered when awarding interim

maintenance, considering her income, genuine needs, and standard of life. (Para - 11,12)

Opposite party filed application under Section 125 Cr.P.C. - against her husband-revisionist - application moved under Section 18A by applicant (opposite party) - partly allowed - revisionist had been directed to pay Rs. 4,000/- as maintenance - on monthly basis to opposite party - from date of filing of application – durin. **(Para -3)**

HELD:- Court awarded Rs. 4,000/- as interim maintenance to the opposite party in her petition under Section 125 Cr.P.C.against the revisionist /husband. It is not unreasonable, excessive, or unfair to the revisionist. No good ground to interfere with the award, and the revision lacks merit.**(Para -13,)**

Revision dismissed. (E-7)

List of Cases cited:

1. Ankur Gupta Vs St. of U.P., 2021 (5) ADJ 640
2. Kiran Tomar & ors. Vs St. of U.P. & anr. , Criminal Appeal No. 1865 Of 2022

(Delivered by Hon'ble Ram Manohar Naryan Mishra, J.)

1. Heard learned counsel for the revisionist and learned counsel for the respondent and perused the material on record.

2. The present criminal revision is filed against the order dated 24.5.2022 passed by Principal Judge, Family Court, Rampur in Criminal Misc. Case No. 596 of 2019 (Smt. Nancy Saxena vs. Arpit Saxena) under Section 125 Cr.P.C. whereby application moved under Section 18A by the applicant (opposite party) has been partly allowed and the revisionist had been directed to pay Rs. 4,000/- as maintenance

on monthly basis to opposite party Smt. Nancy Saxena from the date of filing of the application and during the pendency of application under Section 125 Cr.P.C.

3. The brief facts of the case are that the opposite party filed an application under Section 125 Cr.P.C. before the Principal Judge, Family Court against her husband- revisionist with averments that marriage of the applicant and opposite party was solemnized on 9.5.2017 as per Hindu rites and rituals at Rampur and no dowry was agreed between the parties in the marriage, however, after solemnizing marriage, opposite party and his family members started demanding dowry on pretext of purchasing a plot in Delhi and when the applicant expressed inability of her father to fulfill the demand of her husband and in-laws, they subjected her to mental and physical agony and opposite party used to make unnatural physical relation with the applicant against her will and she was ultimately turned out from her matrimonial home; she is presently residing at the place of her parents; he is not paying a single penny for her maintenance after keeping her out from his home therefore, it is prayed for providing interim maintenance from the date of filing of application, which was partly allowed on 24.5.2022 directing the revisionist to pay interim maintenance Rs. 4,000/- per month to the applicant.

4. Learned counsel for the revisionist submitted that impugned order passed by the family court is manifestly erroneous and unsustainable in the eyes of law as same was passed without considering the materials placed on record; findings recorded in the impugned order are based

on misreading of facts and illegal presumption; the findings in the impugned order that as per the income tax return 2021-22 submitted by the husband, his annual income is Rs. 2,59,000/-, therefore, prima facie, he has sufficient income; it is apparent from the said income tax return 2021-22 that under Section 44AD of the Income Tax Act the annual income of the husband from his business/medical shop is Rs. 79,000/- only and the arrears of salary Rs. 1,80,000/- received by him for the services rendered earlier in the private concern has been shown under section 44ADA that is not his regular income but while passing the impugned order the family court has illegally added both said income (mentioned under 44AD and under Section 44ADA) in his regular income. In the income tax return total income has been added for the purpose of computation of income tax in that particular assessment year; it is not the regular income of the husband. In the impugned order the family court recorded the findings that the wife has been working as a teacher and receiving Rs. 13,000/- per month as her salary, therefore, it was incumbent upon the court below to assess the income of the husband and compare it to the income of the wife before granting the interim maintenance but it has wholly illegally observed, "his income is sufficient" which is misconceived and against the settled proposition of law. It is apparent from the record that monthly income of the wife is admittedly more than the income of the husband and she is able to maintain herself, therefore, she is not entitled for maintenance. There are three cases including the present one filed by the wife against the husband which are pending before the District Court, Rampur, which is too far from the district Bhopal of Madhya Pradesh and on different dates the husband

comes to Bhopal to Rampur for attending the cases by expending huge amount and on those dates he keeps his medical shop closed, means he does not earn a single penny on those days, which amounts to great harassment to him.

5. He lastly submitted that due to high-handedness and untoward conduct of wife, revisionist became mentally disturbed and unfit for job and ultimately he had to resign from service; he was working as Manager in Strategic Alliance Company and Management Pvt. Ltd. where he was working at the time of marriage and now he is running a small medical shop wherein he earns Rs. 8,500/- per month which is not sufficient for his own survival and bearing cost of a number of litigations filed against him at the instance of opposite party; the amount of interim maintenance awarded by the court below is too much and excessive and is disproportionate and he is not in a position to bear the same; the opposite part is well educated and a skilled lady, who herself is in a position to maintain her and such she is not entitled for interim maintenance, therefore present revision may be allowed and the impugned order passed by the court below may be set aside.

6. Learned counsel for the respondent submitted that the impugned order has been passed on the application for interim maintenance moved by the applicant for maintenance case under Section 125 Cr.P.C.; the order passed by the court below is in the form of an interim measure, which has been passed after considering the pleadings of the parties and documentary evidence on record, finding of fact should not be disturbed or interfered in revision as there is no illegality, irregularity or

perversity in the impugned order passed by the court below; the amount of interim maintenance is at lower side as applicant had sought Rs. 3500/- as interim maintenance in her application, in Misc. maintenance case under Section 125 Cr.P.C. court has awarded only Rs.4000/- as interim maintenance and same is not liable to be interfered in revision filed by the opposite party before the court below; it cannot be comprehend that the revisionist who admittedly runs medical retails shop is earning Rs. 8500/- per month only therefrom whereas this is admitted fact that he has undergone B.Pharm and some diploma also; the respondent is victim of domestic violence meted out to her by the revisionist; she was thrown out from her matrimonial home by her husband and she had to depend on her parents who cater to her needs and shelter whereas her father himself is at present jobless.

7. Learned counsel for the respondent placed reliance on the judgement of this Court in **Ankur Gupta vs. State of U.P., 2021 (5) ADJ 640**, wherein this Court held that monetary relief granted under Section 125 Cr.P.C. shall be adequate, fair and reasonable and consistent with the standard of living to which aggrieved person is accustomed merely because wife is capable of earning, is not sufficient ground to refuse claim of maintenance granted by the court to the minor daughters of opposite party no. 2. In **Kiran Tomar and others vs. State of U.P. and another** in Criminal Appeal No. 1865 of 2022 the Hon'ble Apex court in para-10 has observed as under:-

"On the first aspect, it is well-settled that income tax returns do not necessarily furnish an accurate guide of the

real income. Particularly, when parties are engaged in a matrimonial conflict, there is a tendency to underestimate income. Hence, it is for the Family Court to determine on a holistic assessment of the evidence what would be the real income of the second respondent so as to enable the appellants to live in a condition commensurate with the status to which they were accustomed to during the time when they were staying together. The two children are aged 17 and 15 years, respectively, and their needs have to be duly met."

8. In present case, in income tax return 2021-22 filed by the revisionist, he has shown is annual income as Rs. 2,59,000/-, which has been taken into account by the court below while awarding the interim maintenance to the applicant/opposite party; case of the revisionist is that opposite party in her statement of assets and earnings filed in the form of affidavit in compliance of direction of Hon'ble Apex Court has stated her monthly earning as Rs. 13,000/-; according to the revisionist, the applicant works as a teacher in Whitehall Public School, Rampur.

9. In income tax return and assessment year 2021-22 revisionist has shown his income under Section 44 AD Rs. 79,000/- and income under Section 44ADA as Rs. 1,80,000/-, which is total income in that assessment year is shown as Rs. 2,59,000/-. Under Section 44AD of Income Tax Act presumptive taxation scheme for a businessman is provided whereas under Section 44 ADA the presumptive income for a professional is provided; thus even if it is assumed that income Rs. 1,80,000/- was income earned from arrears of salary

received by the revisionist from her previous employment and income earned from his medical shop is shown as Rs. 79,000/- yearly, same cannot be treated as actual annual income because Section itself covers the presumptive income for a small businessman, whose turnover is less than 20 crore prior to budget of 2020; the revisionist is well qualified pharmacist and it cannot be presumed on that basis that he earns only Rs. 8,500/- per month from the shop and it cannot be treated with finality at the stage of deciding an application for interim maintenance, which is an interim measure during pendency of application under Section 125 Cr.P.C.; learned court below has awarded interim maintenance of Rs. 4,000/- to the opposite party after keeping into account the affidavit 13kha filed by the applicant in the form of assets and liability; she has also stated that her salary as teacher received from school is not her regular income. The revisionist has not filed any bank statement in support of his claim that he is a man of meager economic resources.

10. Claiming maintenance is one of the most formidable tools in the armoury of deserted wife to be able to support herself, and is thus crucial for the accomplishing goal of social justice. Courts have established caveats necessary to prevent its abuse. Certain guidelines have been setup by Hon'ble Supreme Court in its judgement in the case of Rajnesh vs. Neha, (2021) 2 SCC 324. Said criteria include the parties' status, the applicant's (in this case the wife's) needs, and the respondent's income and property, the claimant's liabilities and financial responsibilities, the parties' age and employment status, the parties' residential arrangements, the parties' minor

children's maintenance, and illness or disability etc.

11. In Rajnesh (supra) it is held that if the wife is earning some income, it cannot operate as a bar from being awarded maintenance by the husband". The duty of the court is to look at the income she is earning in and of itself, and from that, determine whether or nor she is capable of sustaining herself in the manner and lifestyle to which she is accustomed to in the husband's house. Sustenance (as per the provisions of section 125) doesn't mean and cannot be allowed to mean survival. The right to claim maintenance must date back to the filing of the application since the period during which the maintenance proceedings remained pending is not within the control of the applicant.

12. Thus, employment does not clarify the claimant wife and while deciding the question of award of interim maintenance the income of claimant wife, nature of her employment, economic resources of husband, genuine needs of wife, standard of life, she was accustomed to live when she had not live company of her husband all these facts are to be kept in account.

13. Therefore, in my considered opinion, reasonable amount Rs. 4,000/- awarded to opposite party as interim maintenance in her petition under Section 125 Cr.P.C. against the revisionist /husband is not unreasonable, excessive or unfair to the revisionist. Keeping in view the amount of maintenance awarded against the revisionist and attending facts and circumstances of the case no good ground

appear to interfere in the impugned order passed by the court below and revision lacks merit and is liable to be dismissed.

14. The revision is accordingly dismissed.

15. However, arrears of interim maintenance prior to passing of impugned order dated 24.5.2022 will be payable to the applicant/opposite party in the form of six equally monthly installments from the date of production of certified copy of this order before the court below provided the revisionist shall pay amount of interim maintenance on monthly basis to the opposite party. However, it is made clear that observations of this Court made therein are only for the purpose of deciding present revision and it will not be binding on court below while deciding the maintenance application on merits.

(2023) 5 ILRA 106

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 25.04.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 4598 of 2009

Om Prakash Jain & Ors. ...Revisionists

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:

Sri Vidya Prakash Singh

Counsel for the Opposite Parties:

Govt. Advocate, Sri Akshat Sinha, Sri Y.K. Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Indian Penal Code, 1860 - Section-498-A ,Dowry prohibition Act,1961- Section 3/4 , cases where the fact of death is disputed, caution must be exercised - If no concrete conclusion is reached, a separate miscellaneous case may be registered and authorities directed to provide evidence - appeal cannot be left pending just because a collateral issue or a question of mere procedural importance has cropped up which may demand calling for further evidence and may require inquiry. (Para - 6)

Case convicting all accused persons for offences - convicts preferred an appeal - one of appellants (husband of victim) died - victim filed an application no. 55-B - stating that her husband is still alive - forged and fake papers given from side of appellants - to close case against him. **(Para -3)**

HELD:- Appellate court should have instituted a separate miscellaneous case to determine the death of one appellant and proceed with the rest's appeal. If forged paper submitted, the court can institute an enquiry under section 340 of Cr.P.C. or file an F.I.R. if fit in the circumstances. Court directed to separate case of appellant and inquire into his death, while the rest of the appellants (revisionists) will proceed as per law.(Para - 7,8)

Revision disposed of. (E-7)

List of Cases cited:

1. Madhu Limaye Vs The St. of Maha. , CrI. Appeal No. 81 of 1977

2. Amar Nath & ors. Vs St. of Harayana & ors. , CrI. Appeal No. 124 of 1977

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

1. Heard Vidya Prakash Singh, learned counsel for the revisionists and Sri O.P.

Mishra, the learned A.G.A. for the State and perused the material on record.

2. By means of this criminal revision, the revisionists no. 1, 2 & 3 have challenged the order dated 06.11.2009 passed in Criminal Appeal No. 01 of 2005, Sanjay Jain & Others Vs. State of U.P., arising out of Case Crime No. 175 of 1999, under section-498-A I.P.C. read with section 3/4 of D.P. Act, Police Station-Kavi Nagar, District Ghaziabad, by which the learned Additional Sessions Judge, Ghaziabad passed an order that it shall be presumed that one of the accused person namely, Sanjay Jain, is absconding and accordingly the appeal shall proceed.

3. Some other relevant facts are below:-

i. Sanjay Jain, Om Prakash Jain, Smt. Nisha and Smt. Shakuntala were tried for the offences under sections 498-A I.P.C. and Section 3/4 of Dowry Prohibition Act, Case Crime No. 175 of 1999. The trial court decided the case convicting all the accused persons for the offences under sections 498-A I.P.C. and section 3/4 of D.P. Act and sentenced them to undergo different span of imprisonment and fine.

ii. The convicts preferred an appeal. During the course of hearing of the appeal, the revisionists-Om Prakash Jain and others informed the appellate court that one of the appellants namely, Sanjay Jain (husband of the victim), has died. On this application, a report was called from the police, who submitted certain papers including death certificate from Nagar Palika Parishad and some medical papers.

The victim (wife of Sanjay Jain) filed an application no. 55-B stating therein that her husband is still alive and that forged and fake papers have been given from the side of the appellants so that the case against him is closed.

iii. The learned appellate court went through the papers filed in this regard and considered the contentions of both the sides and concluded as below:-

"इस प्रकार उपरोक्त परिस्थितियों को देखते हुए मैं इस निष्कर्ष पर पहुंचता हूँ कि पत्रावली पर उपलब्ध दस्तावेजों के आधार पर संजय जैन की मृत्यु निश्चित नहीं है और इस समय अपील की सुनवाई होनी है। ऐसी स्थिति में संजय जैन को फरार मानकर अपील का निस्तारण किया जाना न्यायोचित है।"

4. From the side of respondent no. 2, it is contended that order is purely interlocutory in nature, therefore criminal revision is not maintainable. In addition, this objection has been raised on behalf of State as well as respondent no. 2 that the instant revisionist do not have any locus standi to assail the order. The respondent no. 2 has cited judgments of the Hon'ble Supreme Court given in ***Madhu Limaye Vs. The State of Maharashtra in Crl. Appeal No. 81 of 1977 decided on 30.10.1977 and Amar Nath & Others Vs. State of Harayana & Others in Crl. Appeal No. 124 of 1977 decided on 29.07.1977*** in this regard.

5. In reply to the above contention, it is stated on behalf of revisionists that they being the parents of Sanjay Jain have tried to bring the true facts before the court so that the appeal can proceed. They may not strictly fall in the category of aggrieved

persons, however they can very well point out the mistake if any, has been committed by the trial court or the appellate court and in this view of the matter this revision cannot be thrown out at the very threshold.

6. I went through the impugned order. As far as the fact of death of one of the accused/appellant is concerned, it is a matter of inquiry and in case the court comes to a conclusion that in fact he has died the case against him may abate. There may be cases where the such fact of death is disputed and is contested. In such circumstances, the court has to proceed in a very cautious manner. If the court cannot come to any concrete conclusion, it may register a separate miscellaneous case and proceed to inquire into the facts and direct the authorities concerned to furnish evidence. The appeal cannot be left pending just because a collateral issue or a question of mere procedural importance has cropped up which may demand calling for further evidence and may require inquiry.

7. In such peculiar circumstances it was just not right for the appellate court to presume that the appellant is absconding. It would have been much better if a separate miscellaneous case is instituted to decide upon the fact of death of one of the appellant and to proceed with the appeal of the rests of the appellants. It may be made clear that if at any stage of the proceeding the court concerned finds that forged paper has been submitted before it, then it will be within its power to institute an enquiry under section 340 of Cr.P.C. or file an F.I.R. if found fit in the circumstance of matter.

8. The impugned order is set aside and the learned court below is directed to

separate the case of appellant Sanjay Jain and to proceed to inquire into the fact of his death. The appeal of the rest of the appellants (the revisionists in this case) shall proceed as per law.

9. Accordingly, this revision is disposed of.

(2023) 5 ILRA 108
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 17 of 2019

Smt. Pooja & Ors. ...Appellants
Versus
Vijay Kumar Tiwari & Ors. ...Respondents

Counsel for the Appellants:
 Sri Prakhar Tandon

Counsel for the Respondents:
 Sri Anubhav Sinha

A. Civil Law - Motor Vehicle Act, 1988 - Section 176-challenge to-enhancement of claim- deceased died leaving behind his wife and three children-the tribunal considered the deceased income Rs. 3000/- per month in place of 16,321/- per month and has not granted future loss of income-The claimants are entitled to 50% enhancement in wages towards future prospects, consistent with the UP Rules, 1998-Total compensation would be Rs. 38,15,678/- and rate of interest would be 7% -the insurance company shall deposit the amount within 3 months. (Para 1 to 13)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. NICL Vs Pranay Sethi & ors. (2017) 16 SCC 680
2. New India Assur. Co. Ltd. Vs Urmila Shukla & ors.(2021) SCC Online SC 822
3. Sarla Verma (Smt.) & ors. Vs DTC & anr. (2009) 6 SCC 121

(Delivered by Hon'ble Ajay Bhanot, J.)

I. INTRODUCTION

1. The instant appeal arises out of an award made by the learned Motor Accident Claims Tribunal/Additional District Judge, Kanpur¹ dated 13.09.2018 in Motor Accident Claim Petition No. 994 of 2013 (Smt. Pooja Shukla and others Vs. Vinay Kumar Tiwari and others) by partly allowing the claim of the claimants.

II. Case of the claimants and respondents before the learned tribunal:

2. Briefly the case of the claimants before the learned tribunal was that the deceased died of injuries sustained in an accident which occurred on 14.08.2013, and was caused by the rash and negligent driving of the driver of JSA Loader bearing Registration No. UP 78 CN 7323. The offending vehicle was insured by the respondent no. 2-United India Insurance Company Ltd. The claimants are the dependants on the deceased Amit Shukla. The deceased was running a unit which manufactures snacks. The deceased was 30 years of age at the time of his death.

III. Compensation awarded by the learned tribunal:

3. The learned tribunal in the impugned judgement dated 13.09.2018

awarded compensation which is depicted in the tabulated form hereunder:

Sr.No.	Heads	Amount Awarded by the tribunal
1.	Monthly Income	3000
2.	Annual Income	36,000/-
3.	Future prospects	25% of 36000= 9,000/-
4.	Annual Income + Future Prospects	36000+9000=45000/-
5.	Deduction towards personal expenses	1/3 of 45000 =15000/-
6.	Annual loss of dependancy	45000-15000=30000/-
7.	Multiplier	17
8.	Total loss of dependancy	30,000x17= 5,10,000/-
9.	Conventional Heads (a) Loss of consortium (b) loss of Estate (c) Funeral Expenses	55,000
10.	Total compensation	5,10,000+55000 = 5,65,000/-
11.	Interest	7%

4. The claimants seek enhancement of compensation by means of the instant appeal.

IV. Arguments of learned counsels:

5. Shri Prakhar Tandon, learned counsel for the appellants assails the order by contending that the learned tribunal led into error by neglecting to consider the income tax returns which reflects the true income of the deceased. Secondly, the personal expenses were incorrectly deducted. The learned trial court also erred in law in awarding future prospects and conventional heads which is in teeth of the

law laid by Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others**² and **National Insurance Company Ltd. vs. Pranay Sethi and others**³.

6. The deceased had four dependants. The deduction of 1/3rd made towards personal expenses made by the learned tribunal was excessive. The amount which is liable to be deduction towards personal expenses of the deceased is 1/4th. The claimants were entitled to a higher amount.

7. Shri Anubhav Sinha, learned counsel for the Insurance Company contends that the award was just and lawful. However, he fairly contends that the award of future prospects was at variance in judgment laid by the Supreme Court in **Pranay Sethi (surpa)**. Similarly, the personal expenses could not be disputed.

V. Issues for Consideration:

8. After advancing their arguments, learned counsels for the respective parties agree that only the following question falls for consideration in the appeal:

Whether the learned tribunal while determining the compensation lawfully computed the amounts under these heads: income, future prospects, deduction, application of multiplier, conventional heads and interest?

VI. Number of dependants and deduction towards expenses:

9. The claimants-respondents claim the following persons as dependants on the deceased:

Sr . No.	Name	Age	Relation
1.	Smt. Pooja Shukla	33	Wife
2.	Smt. Madhuri Shukl	63	Mother
3.	Sri Om Prakash Shukl	68	Father
4.	Km. Shreya Shukla	13	Daughter

10. The deceased had four dependants (father, mother, wife and one minor children). The deduction of 1/3rd made towards personal expenses by the learned tribunal was excessive. The amount which is liable to be deduction towards personal expenses of the deceased is 1/4th.

11. The determination is fortified by authorities in point. While deciding the issue of deduction of personal expenses, the Supreme Court in **Sarla Verma (Smt) and others Vs Delhi Transport Company and another**⁴ held:

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in *Trilok Chandra* [(1996) 4 SCC 362], the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six."

12. **Sarla Verma (supra)** was later followed with approval in **National**

Insurance Company Limited Vs. *Pranay Sethi and others*⁵ (See Pr. 37).

VII. Issue of computation of the compensation under various heads:

a. Salary of the deceased:

13. The learned tribunal was led into error by failing to consider the income tax returns filed by the claimants to support their claim. It is established that the deceased was a small skilled entrepreneur. He filed his income tax returns regularly. Income tax returns filed after his death was fully credible and the same was filed by the legal representatives/claimants in discharge of their obligation under Section 159 of the Income Tax Act. The relevant provision is extracted hereunder:

"Legal representatives

159. (1) Where a person dies, his legal representative shall be liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased."

14. Perusal of the income tax returns shows that such income tax returns was of credible nature and reflected true income of the deceased. The income of the deceased is quantified at Rs. 1, 95, 855/- per annum as reflected in the income tax returns.

15. Learned tribunal was erred in law by discarding the income tax returns for no good cause.

b. Future Prospects:

16. The future prospects are liable to be calculated in accordance with the Uttar

Pradesh Motor Vehicles Rules, 19986. Rule 220A-3(iii) of the Rules is relevant and is reproduced hereunder:

"(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under:

" (i) Below 40 years of age : 50% of the salary."

17. The UP Rules, 1998 came up for consideration before the Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others**⁷. In **Urmila Shukla (supra)** upon consideration of various judgements including **National Insurance Company Ltd. Vs. *Pranay Sethi and others***⁸ held:

"10. The discussion on the point in *Pranay Sethi* was from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in *Pranay Sethi* cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in *Pranay Sethi* cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. **If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.**"

(emphasis supplied)

18. The Rules of the Uttar Pradesh Motor Vehicles Rules, 1998 were not under consideration before the Supreme Court in ***Pranay Sethi (supra)*** or ***Sarla Verma (Smt) and others Vs. Delhi Transport Company and another***⁹. Future prospects in ***Pranay Sethi (supra)*** were determined without noticing the U.P. Rules, 1998. This fact was adverted to in ***Urmila Shukla (supra)***:

"8. It is submitted by Mr. Rao that the judgment in ***Pranay Sethi*** does not show that the attention of the Court was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in ***Pranay Sethi***. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in ***Pranay Sethi*** ought not to be considered to limit the application of such statutory Rule."

19. The U.P. Rules, 1998 are statutory in nature and their operation is not stymied by ***Pranay Sethi (supra)***. The U. P. Rules, 1998 have the force of law and shall apply with full force in appropriate cases. The U.P. Rules, 1998 are more beneficial for the claimants than the provisions made in ***Pranay Sethi (supra)*** for them. The holdings in ***Pranay Sethi (supra)*** can not dilute the advantages conferred by U.P. Rules, 1998 upon the eligible beneficiaries.

20. In this wake, this Court finds that the claimants/respondents are entitled to 50% enhancement in wages under the head of future prospects as contemplated in the U.P. Rules, 1998. The necessary changes in the award shall be accordingly made.

c. Multiplier:

21. The age of the deceased was 30 years at the time of the accident. The applicable multiplier as per ***Sarla Verma (Smt) and others Vs. Delhi Transport Company and another***¹⁰ read with ***Pranay Sethi (supra)*** is 17.

d. Calculation of Conventional Heads:

22. The amount determined under conventional heads in the impugned award is at variance with ***Pranay Sethi (supra)***. The conventional heads were fixed in ***Pranay Sethi (supra)*** by holding as under:

"54. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- funeral expenses should be Rs. 15,000/-, Rs. 40,000/- And Rs. 15,000/- respectively."

23. The figure under conventional heads determined in ***Pranay Sethi (supra)*** shall be applicable to the facts of this case. The award is modified accordingly.

e. Interest:

24. Interest of 7% and the manner of payment decided by the learned tribunal is just and lawful and does not call for interference.

VIII. Determination of Compensation to which claimants-respondents are entitled:

25. In wake of the preceding discussion, the amount of compensation to which the claimants are entitled and are hereby awarded, is tabulated hereunder:

- i. Date of Accident -14.08.2013
- ii. Name of Deceased - Amit Shukla
- iii. Age of the deceased - 30 years
- iv. Occupation of the Deceased - Small entrepreneur
- v. Income of the deceased - 1,95,855 per annum
- vi. Name, Age and Relationship of Claimants with the deceased:

Sr. No.	Name	Age	Relation
1.	Smt. Pooja Shukla	33	Wife
2.	Smt. Madhuri Shukl	63	Mother
3.	Sri Om Prakash Shukl	68	Father
4.	Km. Shreya Shukla	13	Daughter

vii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1.	Monthly Income (A)	Rs. 16,321/-
2.	Annual Income (B) (A x 12 = B)	Rs. 1,95,852/-
3.	Future Prospects (C)	50% of 1,95,852/- = 97,926/-
4.	Annual Income + Future Prospects (B+C=D)	1,95,852+ 97,926/- = 2,93,778/-
5.	Deduction towards personal expenses (E) (1/4 of D)	¼ of 2,93,778/- = 73,444/-
6.	Annual Loss of dependancy (F) (D-E = F)	2,93,778-73,444/- = 2,20,334/-
7.	Multiplier (G)	17
8.	Total loss of dependancy (F x G)	2,20,334 x 17 = 37,45,678/-
9.	Conventional Heads: (a) Loss of consortium (b) Loss of Estate (c) Funeral Expenses	70,000/-
10.	Total compensation	38,15,678/-
11.	Interest	7%

IX. Conclusions & Directions:

26. In view of the above, the appeal is partly allowed.

27. The amount of compensation to which the claimants have been awarded

shall be deposited by the Insurance Company within a period of three months before the learned tribunal. Thereafter the learned tribunal shall release the amount to the claimants without delay. The amount already disbursed to the claimants (if any) shall be adjusted.

(2023) 5 ILRA 114
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2023

BEFORE

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

First Appeal From Order No. 70 of 2019

Ajeet Rajbhar ...Appellant
Versus
Smt. Badami Devi & Anr. ...Respondents

Counsel for the Appellant:

Sri Akhilesh Chandra Srivastava, Sri Ramesh Chandra Pathak, Sri Aditya Singh Parihar

Counsel for the Respondents:

Sri Vijay Kumar Dubey, Sri Manish Kumar Pandey

A. Civil Law - Motor Vehicle Act, 1988 - Section 176-challenge to-Whether the owner of a motor vehicle, who hands it over for repairs to a mechanic, would be liable in damages to third party sustaining injury on account of use of the motor vehicle by the mechanic in a public place, for the purpose of carrying out repairs-if the owner in fact drives an uninsured vehicle in a public place or causes it to be driven through his servant or agent, injuring a third party, the owner would be liable to compensate the third party for the injury or loss sustained-when the vehicle is entrusted to an independent contractor, like a mechanic, for the purpose of service or repairs, it is held by

the mechanic or the repairer under a contact of bailment, it is not held as a servant or an agent of the owner-Therefore, for any injury or loss to a third party, arising out of the use of a motor vehicle in a public place by the mechanic or the repairer, while he holds a motor vehicle under a contract of bailment, the bailee would be liable in damages or compensation to the third party, it would not be the owner.(Para 1 to 53)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Naveen Kumar Vs Vijay Kumar & ors. (2018) 3 SCC 1
2. Sitaram Motilal Kalal Vs Santanuprasad Jaishankar Bhatt (1966) AIR SC 1697
3. Minu B. Mehta & anr. Vs Balkrishna Ramchandra Nayan & anr. (1977) 2 SCC 441
4. Pushpabai Purshottam Udeshi & ors. Vs Ranjit Ginning & Pressing Co. (P) Ltd. & anr. (1977) 2 SCC 745
5. K. Anandan Vs Ammalu Gomathi & anr. (1988) AIR Ker 117
6. Ramu Tolaram Vs Amichand Hansraj Gupta & ors. (1988) AIR Bom 304
7. The Motor & Gen. Finance (India) Ltd. Vs Mary Mony & Or (1990) SCC OnLine Ker 229
8. Devinder Singh Brar Vs Mangal Singh & ors. (1981) AIR P&H 53
9. Guru Govekar Vs Filomena F. Lobo Miss (1988) 3 SCC 1
10. Alias Vs E.M. Paul & ors. (2004) AIR Ker 214
11. Eagle Brand Soapnut Co. repled. by its Partner No. 15, Peria Kammala Street, Tiruchirapalli-8 Vs Rangasamy & anr. (1997) SCC OnLine Mad 67

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

1. This appeal under Section 173 of the Motor Vehicles Act, 1988 (for short, 'the Act') is directed against a judgment and award of Mr. Rakesh Kumar, Motor Accident Claims Tribunal/ the Additional District Judge, Court No.7, Gorakhpur dated May the 31st, 2017 in Motor Accident Claim Petition No.145 of 2012, ordering the appellant to pay compensation to the claimant-respondent No.1 for a fatal motor accident.

2. The moot question involved in this appeal is: Whether the owner of a motor vehicle, who hands it over for repairs to a mechanic, would be liable in damages to a third party sustaining injury on account of use of the motor vehicle by the mechanic in a public place, for the purpose of carrying out repairs?

3. The facts giving rise to this appeal are these:

Indra Kumar Gupta @ Kumbhe was proceeding on his bicycle on 13.02.2012 to Khalilabad. As he reached near a pond, located ahead of the Beni Madhav Inter College, within the local limits of P.S. Bakhira, District Sant Kabir Nagar at about 1:00 o'clock in the afternoon hours, the rider of motorcycle, bearing registration No. UP-58D-4362, riding his motorcycle, at a high speed and negligently, appeared and without sounding a horn, hit the bicycle that Gupta was riding. In consequence of the impact, Gupta sustained grievous injuries. He was being conveyed for the purpose of medical aid to a hospital in Khalilabad, but died on way. These are the assertions in the claim petition instituted by Gupta's wife, Smt. Badami Devi. Badami Devi is the sole claimant arrayed in the claim petition and the

respondent to this appeal. She will hereinafter be referred to as 'the claimant'.

4. It is the claimant's case that though the loss caused by the untimely demise of her husband cannot be compensated in money, but still she is entitled to compensation. The deceased is said to have been earning a sum of Rs.8000/- a month, which he expended on his family. The claimant also asserts that his untimely demise has deprived her of his company. Accordingly, the claimant has demanded in compensation a sum of Rs.18,21,000/-, as per details set forth in Column No.22 of the claim petition.

5. The owner of the offending motorcycle is one Ram Chandra Sahani, arrayed as opposite party No.1 to the claim petition. He is the second respondent to this appeal. He will hereinafter be called 'the owner'. The owner put in a written statement denying the averments in the claim petition generally. In the additional pleas, he has denied the accident involving his motorcycle on the date, time and place alleged. According to the owner, he had entrusted the offending motorcycle prior to the accident to one Ajeet Rajbhar for the purpose of service. Ajeet Rajbhar, without the permission of the owner, was operating the motorcycle, when he caused the accident. The owner had no knowledge of the accident until after the lapse of a week. It is the owner's case that since Ajeet Rajbhar (for short, 'the mechanic') was operating the motorcycle without the owner's consent, it is he, who has to bear the burden of satisfying the compensation awarded, in case the Tribunal is of opinion that it is the offending motorcycle that was involved in the accident.

6. The mechanic, who was arrayed as opposite party No.2 to the claim petition and is the appellant here, put in his separate written statement dated 13.04.2016. He generally denied the allegations in the claim petition. In the additional pleas, it is his case that on 03.02.2012 or at any other date, he was not riding the offending vehicle, but at the time when the accident is said to have happened, he held a valid and effective driving licence, bearing No. A294715KN/05. The said driving licence was issued to him on 07.07.2005 by the Transport Officer, Sant Kabir Nagar. No accident happened on 13.02.2012, because of the mechanic, rashly and negligently riding the offending motorcycle. The claimant merely for the purpose of seeking compensation has come up with this claim. The mechanic has denied his involvement in the accident.

7. On the pleadings of parties, the Tribunal framed the following issues (translated into English from Hindi):

"1. Whether on 13.02.2012 when the deceased Indra Kumar Gupta @ Kumbhe was cycling his way to Khalilabad and had reached the pond, a little ahead of Beni Madhav Inter College within the local limits of P.S. Bakhira, District Sant Kabir Nagar, at about 1:00 o'clock in the afternoon, motorcycle bearing registration No. UP-58D-4362, operated by its rider rashly and negligently and without sounding a horn, bumped into the deceased's motorcycle, which led him to sustain grievous injuries, of which he died while being conveyed to the hospital?

2. Whether on the date and time of the said accident, the rider of the said motorcycle, bearing registration No. UP-58D-4362, held a valid and effective driving licence?

3. Whether on the date and time of the accident, the said motorcycle No. UP-58D-4362 was insured with an Insurance Company?

4. Whether the claimant is entitled to any compensation, if yes, how much and from whom?"

8. On behalf of the claimant, the claimant herself entered the witness box as PW-1, besides examining another Krishna Kumar as PW-2. The owner too entered the witness box and testified as DW-1. Documentary evidence was filed on behalf of the claimant through three lists. The relevant of the evidence for the purpose of this appeal shall be referred to during the course of this judgment.

9. On Issue No.1, after considering the entire evidence on record, the Tribunal held that the offending motorcycle was being ridden by the mechanic at the time when the accident happened. The finding has been recorded after considering the testimony of PW-2, an eye-witness, besides that of the owner. It has also been taken note of that the mechanic was apprehended on the spot along with the motorcycle and taken to the police station. The mechanic's shop is located at a distance of 200 meters from the site of the accident. The owner has said in his examination-in-chief that he had forbidden the mechanic from riding his motorcycle in his absence or doing a trial run, but in his cross-examination the owner has said that he had not given any written instructions to the mechanic not to operate the motorcycle in his absence or to do a trial. The Tribunal has taken note of the fact that the owner had informed the Police about the mechanic causing the accident, while operating the offending motorcycle, and further that the Police in the relative criminal case have charge-sheeted the

mechanic. It was, thus, held by the Tribunal that the offending motorcycle, on the date of the accident, caused it while being operated by the mechanic, and in the said accident, Gupta sustained injuries leading to his death.

10. On Issue No.2, the Tribunal has returned a finding that on the date of the accident, the mechanic held a valid and effective driving licence. So far as Issue No.3 is concerned, the finding returned is that on the date and time of the accident, the offending motorcycle was not insured.

11. The most crucial findings are those on Issue No.4. Here, apart from liquidating the quantum of compensation to which the claimant has been found entitled, the Tribunal has also decided the question as to who, amongst the owner and the mechanic, would be liable to make it good. The Tribunal has opined that since the mechanic had been forbidden from operating the vehicle by the owner in his absence, it is evident that the accident happened when the mechanic was using it for some work of his own. Therefore, the liability to make good the compensation awarded would fall on the mechanic's shoulder; not the owner's.

12. With these remarks, the Tribunal decreed the claim petition, awarding compensation in the sum of Rs.1,88,000/- with 6% interest from the date of institution of the claim petition. The liability to pay compensation was placed exclusively on the mechanic's shoulders. The owner was relieved of the liability.

13. Aggrieved, the mechanic has preferred the instant appeal, asking the liability to be shifted to the owner. It is in

this context that the question set forth in the opening part of this judgment has arisen.

14. Heard Mr. Aditya Singh Parihar, Advocate holding brief of Mr. Ramesh Chandra Pathak, learned Counsel for the mechanic and Mr. Manish Kumar Pandey, Advocate holding brief of Mr. Vijay Kumar Dubey, learned Counsel for the owner. No one appears on behalf of the claimant.

15. It is argued by Mr. Aditya Singh Parihar, learned Counsel for the mechanic, limiting his submissions to a criticism of that part of the Tribunal's findings on Issue No.4, where it has been held as to who would be liable to pay the compensation awarded, that the Tribunal has gone utterly wrong in holding that the mechanic is liable. It is argued with much emphasis that the Tribunal has failed to consider that at the time when the accident happened, the mechanic was test-driving the offending motorcycle, which was part of the contract of bailment, that is to say, service of the offending motorcycle, under which he had custody of it given by the owner. It is also argued that the remark of the Tribunal that the mechanic was operating the offending motorcycle for his own use is bereft of any evidence. It is argued that the fact that the accident took place at a site, located around 200 meters from the mechanic's shop, fortifies circumstantially, the mechanic's stand that he was test-driving the offending motorcycle. Mr. Aditya Singh Parihar has then submitted that the liability to make good the compensation under the Act would be that of the registered owner of the offending motorcycle. In support of his contentions, he has placed reliance upon the decision of the Supreme Court in **Naveen Kumar v. Vijay Kumar and others**, (2018) 3 SCC 1, where it has been held:

"13. The consistent thread of reasoning which emerges from the above decisions is that in view of the definition of the expression "owner" in Section 2(30), it is the person in whose name the motor vehicle stands registered who, for the purposes of the Act, would be treated as the "owner". However, where a person is a minor, the guardian of the minor would be treated as the owner. Where a motor vehicle is subject to an agreement of hire purchase, lease or hypothecation, the person in possession of the vehicle under that agreement is treated as the owner. In a situation such as the present where the registered owner has purported to transfer the vehicle but continues to be reflected in the records of the Registering Authority as the owner of the vehicle, he would not stand absolved of liability. Parliament has consciously introduced the definition of the expression "owner" in Section 2(30), making a departure from the provisions of Section 2(19) in the earlier 1939 Act. The principle underlying the provisions of Section 2(30) is that the victim of a motor accident or, in the case of a death, the legal heirs of the deceased victim should not be left in a state of uncertainty. A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the Registering Authority. To hold otherwise would be to defeat the salutary object and purpose of the Act. Hence, the interpretation to be placed must facilitate the fulfilment of the object of the law. In the present case, the first respondent was the "owner" of the vehicle involved in the accident within the meaning of Section 2(30). The liability to pay compensation stands fastened upon him. Admittedly, the vehicle was uninsured. The High Court has proceeded upon a misconstruction of the judgments of this Court in *Reshma* [*HDFC*

Bank Ltd. v. Reshma, (2015) 3 SCC 679 : (2015) 2 SCC (Civ) 379 : (2015) 2 SCC (Cri) 408] and *Purnya Kala Devi* [*Purnya Kala Devi v. State of Assam*, (2014) 14 SCC 142 : (2015) 1 SCC (Civ) 251 : (2015) 1 SCC (Cri) 304].

14. The submission of the petitioner is that a failure to intimate the transfer will only result in a fine under Section 50(3) but will not invalidate the transfer of the vehicle. In *T.V. Jose* [*T.V. Jose v. Chacko P.M.*, (2001) 8 SCC 748 : 2002 SCC (Cri) 94], this Court observed that there can be transfer of title by payment of consideration and delivery of the car. But for the purposes of the Act, the person whose name is reflected in the records of the Registering Authority is the owner. The owner within the meaning of Section 2(30) is liable to compensate. The mandate of the law must be fulfilled."

16. Mr. Manish Kumar Pandey, learned Counsel appearing for the owner, on the other hand, submits that the owner entered the witness box as DW-1 and has specifically said in his testimony that he had not prohibited the mechanic to drive the offending motorcycle after repairs in writing, but had verbally instructed him not to use the motorcycle in his absence. It is argued that the mechanic has not taken a plea in the written statement that he was test-driving the offending motorcycle after repairs. Rather, he has said that he never caused the accident, a fact which has been established to be incorrect. It is not clear, according to Mr. Pandey, that the mechanic was driving the offending motorcycle after repairing it or before he had carried out the repairs. It is also not clear if indeed he was using it for his own purpose. It is emphatically submitted that the plea that the mechanic was test-driving the motorcycle has not been raised before the

Tribunal specifically and, therefore, cannot be canvassed before this Court for the first time. If the said plea were to be accepted, it would be based on mere conjecture, without any pleading or material.

17. It is submitted by the learned Counsel for the owner that the mechanic has not entered the witness box and testified before the Tribunal. He has not produced any witnesses either to contradict the owner's stand. It is urged that the since the mechanic has not rebutted the owner's case in his pleading or in the witness-box in any manner, the owner's testimony remains unrebutted. It is on the aforesaid premise of pleadings and evidence that the Tribunal has rightfully held that the mechanic was riding the offending motorcycle on the date and time of the accident without the owner's permission. He submits that the owner under the circumstances cannot be held vicariously liable for the mechanic's tort in causing death of the claimant's husband.

18. The learned Counsel for the owner has placed reliance upon the decision of the Supreme Court in **Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt**, AIR 1966 SC 1697; **Minu B. Mehta and another v. Balkrishna Ramchandra Nayan and another**, (1977) 2 SCC 441; and, **Pushpabai Purshottam Udeshi and others v. Ranjit Ginning & Pressing Co. (P) Ltd. and another**, (1977) 2 SCC 745. It is urged on the foot of these authorities by Mr. Manish Kumar Pandey that the master would be vicariously liable for the accident or negligence of his servant or driver, if the driver is acting or driving the vehicle in the course of employment of his master, and for the purpose of some work of his master's. But, the master would not be liable if the servant or driver at the time

of the accident, is not acting or driving during course of employment, but doing something for himself. Here, it is submitted that on the evidence, there is nothing to show that the mechanic was riding the motorcycle for a purpose of the owner's. It was, thus, in operation of the vehicle beyond the limited scope of his authority, and, in fact contrary to the instructions of the owners that the accident occurred.

19. It is next submitted that the ratio of the decision in **Naveen Kumar** (*supra*), that has been relied upon by Mr. Aditya Singh Parihar to say that it is always the registered owner of the offending motorcycle, who would be liable, is a principle laid down in a completely different context. He submits that the principle has been laid down in the context of transfer of a vehicle with delivery of possession to the transferee, where the transfer is not recorded under the Act. It is in those cases that it has been laid down that notwithstanding the purchaser of the vehicle, who has not yet become its registered owner causing an accident, the liability to make good the compensation awarded would still be of the registered owner; not the unregistered transferee.

20. This Court has keenly considered the submissions advanced on both sides and perused the record.

21. The evidence in this case shows that there is no cavil between parties that the offending motorcycle was entrusted by the owner to the mechanic for the purpose of carrying out routine maintenance service. Somewhere, it has been suggested as repairs too. That is not very clear, but would not make much difference because routine maintenance service of every motor vehicle may always involve some repair

job. The parties are sharply at issue on the evidence adduced about the fact, if the owner had forbidden the mechanic from operating or riding the offending motorcycle in his absence. In his examination-in-chief, the owner has taken a stand that he forbade the mechanic from operating it in his absence. But, in his cross-examination, the owner has conceded that he did not forbid the mechanic from doing so in writing.

22. It must be said that it is necessary to answer the question involved in this case as to what is the nature of relationship under the law between the owner of a motor vehicle, who entrusts it to a mechanic for service or repair. *Is it that of a master and servant, a principal and agent or a bailor and bailee?*

23. There are decisions, which have regarded the relationship between the owner of a motor vehicle and a mechanic entrusted for repairs etc. as that of a master and servant or principal and agent, and some that have considered it to be of a bailor and bailee.

24. In our opinion, these decisions must be referred to in order to find out, if at all a mechanic entrusted with the repairs of a motor vehicle, can be regarded as standing in the relationship of a servant to the master, who is the owner. If by any means that were the correct position of the law, the entire body of the law regarding the vicarious liability of master for the act of his servant, *vis-a-vis* third parties might apply to the owner, provided the servant was acting in the course of his employment and in accordance with the directions of the master. In that event, in the present case, the instructions issued by the owner to the mechanic that he has shown in his evidence

to be one forbidding the mechanic from riding his motorcycle in his absence, would be very relevant. By contrast, if the mechanic is indeed a bailee, he would be an independent contractor, not holding the vehicle subject to directions of the owner. He would, of course, have his duties as a bailee to safeguard the interest of the bailor *ex contractu*.

25. Under the law of torts a bailee, as would be presently shown, is answerable to third parties for his tortious act while holding the goods or a chattel under bailment, which here is the motor vehicle. The position under the principles governing torts might, however, be slightly different even in the context of a bailee, holding a motor vehicle under bailment because of the provisions of the Act. Nevertheless, it has to be determined whether a mechanic holds the vehicle on behalf of the owner for repairs as his servant or agent or as a bailee; and if he does in fact hold it as a bailee, would the owner be answerable for his tortious acts *vis-a-vis* third parties under the tort principles, or the statute, that is to say, the Act make the owner liable for the bailee's acts *vis-a-vis* third parties.

26. **K. Anandan v. Ammalu Gomathi and another, AIR 1988 Ker 117** was a case where the owner, who had entrusted his scooter for repairs to a mechanic and who injured a third party by his negligence, was held liable for the mechanic's tort on the principle of master and servant. In **K. Anandan** (*supra*), it was held:

"4. It is the case of the first respondent that he entrusted the scooter to the workshop for repairs and never authorised the second respondent to use it on the road and hence he cannot be made

liable for the compensation claimed by the applicant. The question that has to be considered is as to whether the first respondent can be absolved of his liability on the score that the second respondent was not an employee under him. Even according to the first respondent, the vehicle was entrusted to the workshop and the accident occurred while the second respondent took the vehicle on the road for test after repairs.

Thus it can be seen that the owner of the Vehicle (first respondent) had entrusted the vehicle to the workshop and the second respondent, a mechanic of the workshop used the vehicle on the road and it was then that the accident occurred. Counsel for the applicant submitted that as the accident occurred when the second respondent used the vehicle on the road for test after repairs the first respondent cannot disclaim his tortious liability. There is no evidence that the first respondent instructed the workshop owner not to allow the driving of the vehicle for test after the repairs.

5. When a vehicle is entrusted to a workshop for repairs it is only reasonable to infer permission to take it for test driving as part of the work. It is for the first respondent to prove that the act of driving of the vehicle by the employee of the workshop owner was in excess of his authority. It is settled law that the burden is on the owner of the vehicle to prove that he did not authorise the person concerned to drive the vehicle. It is useful to refer to the decision reported in *Sitaram v. Santanuprasad*, AIR 1966 SC 1697 where it is held as follows:

"A master is vicariously liable for the acts of his servant acting in the course of his employment. Unless the act is done in the course of employment, the servant's act does not make the employer liable. In

other words, for the master's liability to arise, the act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master. The driver of a car taking the car on the master's business makes him vicariously liable if he commits an accident. But it is equally well settled that if the servant, at the time of the accident, is not acting within the course of his employment but is doing something for himself the master is not liable. There is a presumption that a vehicle is driven on the master's business and by his authorised agent or servant but the presumption can be met."

As the second respondent used the scooter on the road the presumption unless rebutted is to the effect that he used it with the authority of the first respondent. As the vehicle was entrusted for repairs to the workshop there was every likelihood of it to have been tested after repairs. Such a possibility cannot be ruled out. It is not possible to hold that the second respondent used the vehicle on the road for a purpose other than testing after repairs. If there is evidence to the contrary first respondent cannot at all be held liable. As there is always a presumption that the machanic drove the vehicle on master's business with due authorization it is futile to contend that the first respondent cannot be saddled with vicarious liability.

6. 1978 Acc CJ 53 (Punj and Har), (*Tara Singh v. Mangala Singh*) is a case where the vehicle was given for repairs by the owner. An unlicenced worker drove the truck and caused accident. It was held in that decision that as the vehicle was driven by the worker of the workshop it should be deemed to have been driven in the course of employment. In *Gopalakrishnan Embrantdiri v. Krishnankutty*, 1966 Acc CJ 262 this Court

had occasion to consider a case where a vehicle given for repairs was driven by the mechanic and caused accident. In that decision it was held that the act of driving the vehicle was incidental to his job and as it was within the scope of his employment the employer had to answer for its consequences. *Savitri Kumari Das v. State of Orissa*, 1976 Acc CJ 341 is also a similar case, where the vehicle was given for repairs and the accident occurred when the mechanic took the vehicle for a test drive. As he drove the vehicle in a rash and negligent manner and knocked down a person, the owner was held vicariously liable. As it was necessary to have a test drive after the repair of the vehicle and as this was done for the owner's benefit the liability of the owner can never be a matter in dispute. In *Pritam Kaur v. Dal Singh*, 1977 Acc CJ 326 (Punj and Har) it has been held as follows:

"It is settled law that if a person is found to be driving the vehicle he shall be presumed to be so doing with the lawful authority of its owner and if the owner alleges that he had not authorised that person for driving of his vehicle then the onus is on him."

As the first respondent does not have a specific case that the vehicle was unauthorisedly used by the second respondent he cannot be heard to say that he is not in any way liable for the claim. As the onus is upon the first respondent to establish that he did not authorise the second respondent to drive the vehicle and as that onus has not been discharged it is futile to contend that liability has been wrongly fastened upon him by the Tribunal.

7. Thus the settled legal position is that there is a presumption that the vehicle is driven on the master's business. Of course it could be repelled by adducing

evidence. So long as that has not been done the presumption cannot be brushed aside. In (1977) 3 SCR 372 : (AIR 1977 SC 1735), (*Pushpabai v. Ranjit Ginning Co.*) it is stated as follows (at p. 1744 of AIR):

"Before we conclude, we would like to point out that the recent trend in law is to make the master liable for acts which do not strictly fall within the term "in the course of the employment" as ordinarily understood. We have referred to **Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhat**, (AIR 1966 SC 1697) where this Court accepted the law laid down by Lord Denning in *Ormrod v. Crosville Motor Services Ltd.*, (1953 (2) All ER 753) that the owner is not only liable for the negligence of the driver if that driver is his servant acting in the course of his employment but also when the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes. This extension has been accepted by this Court".

The indubitable position is that the owner is liable for the negligence of his driver not only if he acted in the course of his employment but also if he drove the vehicle with his tacit or implied consent for his business or other purposes."

(emphasis by Court)

27. In **Ramu Tolaram v. Amichand Hansraj Gupta and others**, AIR 1988 Bom 304, the issue arose in the context of a motor vehicle handed over to a garage for repairs. After the repairs were over and the car was parked in the garage with the keys being handed over to an independent auto electrician, who worked for the garage and resided there. Some unknown person drove the car out and hit four persons, one of whom died. The question was whether the owners of the garage, who were three partners, or the owner of the motor vehicle

could be held vicariously liable for the injuries caused to third parties. In the context of the aforesaid facts, it was held in **Ramu Tolaram** (*supra*):

"Mr. Mhamane may be right on this point. But what the learned Advocate has lost sight of is that even assuming that the Company was not liable for the negligence of respondents Nos. 2 to 4, actual or vicarious, it would be answerable for the liability of respondent No. 1, the owner of the car, and it is here that the Court must pause to consider as to whether respondent No. 1 was not liable vicariously for the acts of omission of respondents Nos. 2 to 4. It may be that respondent No. 1 will not be liable vicariously for the loss caused by the un-identified driver, because respondent No. 1 was not having the control of the car at that time, the control having been transferred by respondent No. 1 lawfully to respondents Nos. 2 to 4. When the car is given by the owner of the vehicle to the garage for repairs, the control of the car certainly stands transferred to the owner of the garage. But the point is that in such a case the owner of the garage is constituted by the owner of the car as his agent. Everything done or omitted to be done by the agent will be something for which the principal will be vicariously liable. It is the principal's liability' for the acts done or omitted to be done by the agent. I gave an illustration to Mr. Mhamane. The owner of the garage makes various purchases for the purpose of the repairs of the car. The owner of the car has to pay for those purchases. This could be so only because the owner of the garage is the agent of the owner of the car and the purchases made by the former are as the agent of the latter. If the doctrine of agency extends to this situation, there is no reason why it should not extend to other situation

where the car is allowed by the agent to go out of the garage berserk. The liability of the agent will have to be vicariously fastened even upon the principal in such a case.

(iv) Mr. Mhamane relied upon the judgment of a learned Single Judge of this Court reported in 1984, Maharashtra LJ, page 456 (*V.J. Acharya v. Ratilal Fulchand Shah*) firstly in support of the proposition that the owner of the garage is certainly liable for the damage caused to any person by the car while the same is in the custody of the owner of the garage and secondly in support of his contention that the owner of the vehicle can in no case, be liable for the acts or omissions of the owner of the garage once the control of the car is transferred by the owner of the car to the owner of the garage.

The facts of the case were as follows:--

A Car got stalled up on the road and hence the car owner went to the garage and told the owner about the complaint. Hearing the nature of the complaint the garage owner asked his mechanic to accompany the car owner to the place where the car was parked. The mechanic had no driving license. But all the same, he drove the car to the garage and that too negligently, thus knocking down the claimant. The Tribunal awarded damages both against the owner of the garage as also the owner of the vehicle. A learned Single Judge of this Court held that whether the mechanic was authorised by the owner to drive the car or not, the vicarious liability for the negligence on the part of his employees was complete. However, the Court further held that the mechanic was not the agent of the owner of the Car. It was, therefore, held that the penalty for the negligence on the part of the mechanic could not be visited upon the car owner.

(v) So far as the 1st proposition is concerned, I am in full agreement with the same. But so far as the present case is concerned, the state of record is even more seakes out the car for the owner. Quite often he also drives the car out for the sake of the owner. Kisanlal was not an ordinary aing license. In the instant case, the evidence of the 2nd respondent that Kisanlal had no authority to drive the car is just incredible and, further, in view of the fact that the 2nd respondent has kept a very eloquent mum about the identity of the person driving the car at the particular time reflects upon his evidence in this behalf.

But the above judgment is no authority for the question as to whether the owner of the garage was the agent of the owner of the car or not. The perusal of the judgment shows that what was argued before the Court was as to whether the mechanic having no license to drive the car and who all the same drove the car negligently was the agent of the owner of the car or not. With respect, I am in full agreement with the view taken by the learned Single Judge that the mechanic driver could not be considered to be the agent of the owner as such directly. But the point is that when the car is given by the car owner to the owner of the garage for repairs, the owner of the garage is constituted an agent of the owner of the car for various purposes and while doing that work the owner of the garage is required to drive the car in and out of the garage, either himself or through his own agent. No doubt such owner of the garage is an independent contractor. But even an independent contractor is an agent of the principal by whom the contract is entrusted. I may mention here that this aspect of the vicarious liability of the owner of the car was not urged before this Court when the appeal was decided by this Court. What

was urged was that the mechanic was directly the agent of the car owner, not that the owner of the garage was the agent of the car owner. In the present case, I have held that the owner of the garage is liable for the negligence of the driver in question. Once we go a step further and hold that the owner of the garage was the agent of the owner of the car, the principal viz. the owner of the car, must be held exposed to the vicarious liability. Since this point was not even urged before this Court and since this Court had no occasion to consider this aspect of the question in the judgment reported in 1984 MLJ page 456, that judgment cannot be relied upon by Mr. Mhamane as an authority on the question as to whether the garage owner was the agent of the car owner or not....."

28. In **Ramu Tolaram**, the Court held the owner liable by constituting the garage owners his agents. The doctrine of agency was invoked, making the principal liable for the act of the agent in discharge of the principal's assignment.

29. Thus, whereas in **K. Anandan**, it has been held that a mechanic entrusted with a car by the owner for its repair, stands in the relationship of the owner's servant, in **Ramu Tolaram** the owner of a garage entrusted by the owner of a car for its repair has been held to be his agent.

30. This Court must notice the three decisions, relied upon by the learned Counsel for the mechanic to assert that the owner and the mechanic stand in the relationship of the master and servant, so as to render the master liable to third parties in compensation for injuries sustained on account of acts done by the mechanic, during the course of employment. The decision of the Supreme Court in **Sitaram**

Motilal Kalal (*supra*), relied on behalf of the owner, is an exposition of the law in the context of the vicarious liability of the owner for acts done by a servant, during the course of employment and about the effect on that liability, if the servant were to act without the course of employment, where he causes injury to third parties. There are also remarks in the said decision about liability of the principal, if the agent injures a third party while acting for the principal, but beyond the scope of his agency. The question in that case also had arisen in the context of use of a motor vehicle. The two other decisions are likewise, ones rendered in the context of the vicarious liability of the master for the tortious acts of his servant, *vis-a-vis* third parties.

31. None of these decisions were rendered in the context of the tortious acts of a mechanic or a garage owner, who held the motor vehicle for repairs on the owner's behalf and caused an accident during that period. It is for this reason that the said decisions, though laying down principles of profound guidance *vis-a-vis* the liability of the master for the acts of his servant, may not be of much relevance on the point whether a mechanic stands in the position of a servant or agent of the vehicle owner, when entrusted with custody of the vehicle for repairs.

32. Here, the point that arises may be similar or draw some analogy from the law that applies to masters and servants, principals and agents, but the relationship between the owner and a mechanic is different. The entrustment by the owner of his vehicle to the mechanic is what is known to the law of contract as bailment. The owner is the bailor and the mechanic, the bailee. What is the scope of the authority of the bailee while handling

bailed goods or movables entrusted to him, has been the subject matter of judicial exposition. Bailment is defined under Section 148 of the Indian Contract Act. Section 148 reads:

"148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called, the "bailee".

Explanation.--If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment."

33. A mechanic, to whom a motor vehicle of any kind is delivered for service or repairs, certainly holds it as bailee, because the essentials of bailment are all present. The mechanic is entrusted the custody of the motor vehicle for the purpose of carrying out repairs etc. When the said purpose is accomplished, the mechanic is under an obligation to return the motor vehicle to the owner, the purpose of delivery thereof to the mechanic being accomplished.

34. In the context of a motor vehicle, the rights of a mechanic as a bailee thereof and how a tort committed by him, if he uses the motor vehicle held on bailment, *vis-a-vis* a third party would make the owner liable to the wronged third party, was the subject matter of consideration before a Division Bench of Kerala High Court in **The Motor and General Finance**

(India) Ltd. v. Mary Mony and Other, 1990 SCC OnLine Ker 229. In **Mary Mony** (*supra*), what had happened was that, a bus used as a stage carriage was handed over for repairs by its owner to the Motor and General Finance (India) Ltd., who were engaged in the business of repair and service of motor vehicles. The vehicle was in the appellant's garage for servicing, that was still being carried out by workers engaged by the appellant. The claimant's husband, who was the owner of the bus, was also in the garage. One of the workers, who took the driver's seat, started the engine, leading the bus to reverse and hit a compound wall of the garage. This led the claimant's husband to be crushed between the bus and the garage wall. He was seriously injured and rushed to medical aid. A surgery was performed, but the operation was unsuccessful. The claimant's husband succumbed to his injuries. In this case, the bailee was the Motor and General Finance (India) Ltd., the appellant before the Kerala High Court and the tort was committed by one of their servants, *vis-a-vis* the bailor himself, while the motor vehicle was held by them for service and repairs under a contract of bailment. The principles that have been laid down in the decision is with regard to the bailee's liability to third parties arising out of the use of the bailed goods by the bailee himself, or one of his servants while executing the bailment, notwithstanding the fact that the third party was in fact the owner. It seems from a reading of the decision that the motor vehicle being in the possession of the bailee under the contract of bailment, the injury sustained by the owner was dealt with as an injury to a third party regarding the bailee as the owner for that limited period of time.

35. Expositing the law regarding the liability of the bailee of the bailed goods,

that it to say, the vehicle there to a injured third party or his heirs, Varghese Kalliath, J. speaking for the Bench, extensively reviewed the law on the subject, observing:

"9. Admittedly, the vehicle was in the custody of the appellant and that custody was that of a bailee. Section 148 of the Indian Contract Act defines bailment. Bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor. The person to whom they are delivered called the bailee. The obligation and responsibility of a bailee are delineated in section 151 of the Indian Contract Act and it postulates that in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take, of his-own goods of the same bulk, quality and value as the goods bailed. All the intents and purposes as long as the contract of bailment continues, there is nothing wrong in deeming the bailee as the owner of the goods bailed. We will consider the effect of a motor accident casted by the employee of the bailee in greater detail later, after considering the question whether the legal representatives of the deceased are entitled to maintain an action against the appellant herein for compensation under the Act.

26. We have said that the liability to pay compensation is a liability under the general law of torts. We have already determined in paragraph 10 the status of the appellant in this case as that of a bailee; What happened is clear. An employee of the bailee caused the accident by his negligence. Allowing the employee to sit in

the driver's seat also is an act of imprudence and negligence on the part of the appellant. If the accident has occurred in the same way as it has occurred in this case, and if the victim is not the owner of the vehicle, but a stander, it will be difficult for the bailee to say that he is not liable for compensation. Perhaps, that stranger victim may have a cause of action against the owner of the vehicle also. If circumstances are brought out to fasten liability on the owner of the vehicle or in case the owner fails to get himself extricated from the liability on the basis of exceptions that can be claimed when the accident has occurred on account of the negligence of the bailee both the owner and bailee may be liable to pay compensation to the injured or the legal representatives of the deceased. Anyhow, in general law it is not difficult to find liability for the negligence of the person who was on the driver's seat. There is no dispute that the person, who was on the driver's seat, was solely responsible for the accident and that he was the employee of the appellant. We have no hesitation to hold that the person who actually caused the accident by his negligence has no-defence to escape liability to pay compensation. He is bound to account for his negligence. If the person who is primarily bound to account for the negligence is the employee of the appellant, the appellant is also vicariously liable to account for the negligence of his employee.

27. There are decisions to the effect which would show that the bailee's sole interest is essentially possessory and it is demonstrated by his ability to recover for injury to the goods without proof of--personal loss against a stranger and is consistent with the principles of bailment generally. A right to immediate possession is better characterised as generating a

constructive rather than an actual possession.

28. In *Mangan v. Leary* (1877) 3 N.Z. Jur. (N.S.) C.A. 10 at 16 per Gillies, J. said:

"Until I heard Mr. Macassey's able and ingenious argument, it never 4 Occurred to me to doubt that the law is that either bailee or bailor may sue a wrongdoer for the entire damage done to the chattel bailed. And after careful consideration of the argument and examination of the authorities, I adhere to my previous opinion".

29. There is no dispute that a bailee's possession is a prerequisite or to which it is one of several grounds of potential qualification. His lack of full ownership does not preclude him, from recovering, the full value of the chattel or the full cost of its impairment; the rule in such circumstances is that "as against a wrongdoer, possession is title". (Vide *The Winkfield*, (1902) P. 42 at 60 and *Bailment* by Palmer (1979) Edn. Page 177.

30. Palmer in his Book '*Bailment*' says that "it was only in the present century that the bailee's rights of action against a wrongdoer were finally established. Although decisions granting him an action in trover for the full value of the goods can be traced from the beginning of the 19th century, it was at first unclear whether his use of this or any remedy was conditional upon his liability to the bailor; if it were not, he would stand to recover more than he had lost, while the wrongdoer would be forfeiting more than the extent of his immediate damage".

31. We have considered now only the bailee's right to recover damages from a wrongdoer in regard to the goods bailed. But, the question that has to be focused is the liability of bailee to third parties. Again we rely in *Bailment* by Palmer at page 966.

Referring to decided cases, the learned author has epitomised the rule thus:--

"The bailee's responsibility for injury or loss inflicted upon a stranger to the bailment by the chattel is a simple facet of the ordinary law of negligence or trespass and does not necessitate exhaustive discussion. He will be liable if, through the negligent misuse of the chattel by himself or his servants acting in the course of their employment, a third party is forceably injured or property is forceably damaged".

32. We feel that the appellant whose status is that of a bailee, in the circumstances, is accountable for the negligence of his employee. So, necessarily, we have to hold that the appellant is liable to pay compensation to the claimants."

36. This decision does not go beyond determining the liability of the bailee for the injuries caused to third parties while a chattel, like a motor vehicle, is in his possession for doing some work in relation to it. It holds the bailee liable to third parties for any injury arising out of the use of a motor vehicle given in possession of the bailee for doing of some job on it. The decision, however, does not logically deal with the liability of the owner of the bailed goods or chattel, that is to say, the motor vehicle, because of the very peculiar facts of the case there, where the owner of the motor vehicle, while it was under the control and possession of the bailee himself, became the victim of negligence by the bailee's servant. The question of the owner's liability, therefore, would not have arisen. The owner after all was the injured third party.

37. The issue about the liability of the owner of a motor vehicle to third parties for injuries sustained when the motor vehicle

was entrusted for repairs to a mechanic or a garage, was considered by a Division Bench of the Punjab and Haryana High Court in **Devinder Singh Brar v. Mangal Singh and others**, AIR 1981 P&H 53. The facts in **Devinder Singh** (*supra*) can best be recapitulated in the words of their Lordships:

"2. On February 23, 1968, at about mid-day Mangal Singh, injured respondent, whilst going on his bicycle, within the town of Moga collided with truck No. PNF-8078 and suffered serious injuries on his person. He was immediately removed to the Civil Hospital, Moga, where the medical witness found that apart from other injuries, the whole of the outer side of the right leg and the right thigh were abraded and contused and bones of the right thigh and right ankle were fractured. A case was also registered against the driver of the vehicle at Police Station, Moga. Mangal Singh was later removed to the Post Graduate Institute at Chandigarh for better treatment for the compound fracture of the lower and right femur and compound fracture of right medial malleolus. He was discharged from the hospital partially cured.

3. Mangal Singh, respondent, preferred an application for compensation for a sum of Rs. 60,000 for injuries and loss of his earnings due to the disability caused thereby.

4. In contesting the claim application, the appellant, **Devinder Singh** Brar, pleaded that he had completely entrusted his truck for repairs to the Behon Workshop at Moga, which apparently was the proprietary concern of Jarnail Singh, respondent. It was his express stand that he had never authorised its driving on the road either by the said Jarnail Singh or anyone of his employees. He further took up the

plea that the truck at the time of the accident was being driven at a low speed and in any case the accident was caused by the contributory negligence of Mangal Singh, respondent, who suddenly swerved his bicycle towards one side."

38. In answering the point that arose for consideration, it was held by their Lordships of the Division Bench:

"14. Mr. G.R. Majithia, learned counsel for the appellant-owner, has respectfully assailed the aforesaid view on the ground that herein no question of any relationship of master and servant betwixt the appellant and Tara Singh arises. As a natural corollary, therefore, it was argued that no issue of any actual or deemed driving of the vehicle in the course of employment of the appellant would be attracted. The core of the submission on behalf of the appellant is that the appellant-owner had entrusted his vehicle for repairs to an independent contractor and was, therefore, in no way responsible for the fault, if any, of the later.

15. On the aforesaid contention, the issue that arises at the very threshold is whether Jarnail Singh, respondent, who is the proprietor of Behon workshop at Moga and to whom admittedly the vehicle was entrusted for repairs, was an agent or employee of the owner or merely an independent contractor, unfettered by any control or direction of the appellant. It appears to me that the answer is plain. Judged by any test, the relationship betwixt the owner of the truck and the proprietor of the workshop, to whom it is entrusted for repairs, cannot be that of a master and servant. It is wellsettled that an independent contractor is one who undertakes to produce a given result or performs a particular work, but in the actual execution

of that work he is not under the order or control of the person for whom the work is done and he is at liberty to use his own discretion and judgment. Applying this test, it would appear that the appellant could not possibly direct and control the manner in which the repair was to be done of his vehicle. Speaking generally also, it does not appear to be possible to hold that proprietors of automobile workshops stand in the relationship of master and servant in regard to the owners of cars or lorries entrusted to them for repairs.

16. Once it is held that Jarnail Singh, respondent, was an independent contractor, then it would inevitably follow that the appellant cannot be vicariously saddled with the responsibility for his acts or for the unauthorised use of the vehicle while in his custody by a stranger or an employee of the independent contractor. It is significant that the factual finding herein is that it was not the independent contractor who at the material time was driving the truck but a different person, namely, Tara Singh, respondent, who cannot even remotely be deemed to have been authorised by the owner of the vehicle to drive the same.

17. I am not oblivious of the fact that the settled rule that an employer is not liable for the negligence of an independent contractor has some well recognised exception. However, the present case of the entrustment of a motor vehicle to a workshop owner cannot possibly be brought within the ambit of any such exceptions. The absolute rule of *Ryland v. Fletcher* cannot possibly be attracted to the case of an ordinary work-a-day chattel like a motor vehicle. Whenever may have been the position of the law a century earlier, it cannot today be held that a motor vehicle is so inherently dangerous and hazardous that even its entrustment to another for repairs

would attract the absolute rule of liability at the owner's own peril. On the other hand, there appears to be ample authority for the view that a motor vehicle in itself 1st not a nuisance or a hazardous chattel so as to attract the doctrine of *Ryland v. Fletcher*.

18. The view I am inclined to take seems to have the substantial, if not conclusive, support of the Division Bench Judgment of the Madras High Court in *B. Govindarajulu Cheety v. M.L.A. Govindaraja Mudaliar* [1966 A.C.J. 153.] . Therein, an exhaustive examination of case law on the point has been made and it would be evidently wasteful to traverse the same ground over again. It suffices to notice that the learned Judges in *B. Govindarajulu Chetty's case (supra)* had concluded as follows:

"From this decision it is solutely clear that in the case of a motor vehicle liability can be fastened as against a person only on proof that he was negligent and that that negligence was responsible for the accident in question. It is impossible to hold that the first respondent owed any duty or could have exercised any control or taken any precaution about the lorry once it had been entrusted to the workshop for the repairs. We have no doubt there is no law which throws a duty upon the owner to speculate and anticipate that some, unauthorised person would take the lorry out from the garage of the repairer. It is not one of the necessary natural consequences that would be expected to arise in the matter of entrustment of a lorry for repair."

39. The question again arose in a slightly different context, but certainly in the context of the use of a motor vehicle by a bailee holding it for repairs before the Supreme Court in **Guru Govekar v. Filomena F. Lobo Miss, (1988) 3 SCC 1**. The question that arose in that case may

best be left to the words of their Lordships in the opening part of the report. It reads:

"whether an insurer who has issued a policy insuring any person specified in the policy against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of a motor vehicle in a public place, is liable to pay compensation to such third party or to his or her legal representatives as the case may be *when the liability arises when the motor vehicle is in the custody of a repairer.*"

40. In **Guru Govekar (supra)**, the question was answered by their Lordships thus:

"12. We agree with the view expressed in *Monk v. Warbey* [(1935) 1 KB 75] . In India the opinion appears to be divided on the liability of the insurer of a motor vehicle when the accident giving rise to the claim takes place when the motor vehicle is in the custody of a repairer. In *Vijayanagaram Narasimha Rao v. Ghanashyam Das Tapadia* [(1986) 2 ACJ 850] Ramaswamy, J. of the High Court of Andhra Pradesh held that once the owner had entrusted the motor vehicle to the licensed mechanic to effect repairs, testing being integral part of effecting repairs and the accident had taken place during the course of testing the vehicle, the necessary conclusion was that the mechanic acted within his limits of authority and in the course of the employment for and on behalf of the owner. Therefore, the owner should be vicariously liable for the acts of the mechanic. Accordingly, he held that both the owner and the insurance company were also jointly and severally liable for the

payment of the compensation to the third party, who had suffered the injury by virtue of the provisions of the Act. The decision of the High Court of Madhya Pradesh in *Shantibai v. Principal, Govindram Sakseria Technological Institute, Indore* [1972 ACJ 354] is also to the same effect. G.L. Oza, J., as he then was, in the course of the said decision rejected the contention of the insurance company based on the exemption clause which exempted the insurance company from liability arising out of an accident during the period when the motor vehicle was used "for hire or used for organised racing, pace-making, reliability speed testing", which was also one of the contentions urged before us in the present case although the said contention could not be urged in the circumstances of this case. We do not agree with the decision in *D. Rajapathi v. University of Madurai* [1980 ACJ 113] in which it has been held that the doctrine of vicarious liability could not be extended to a case where the accident had taken place on account of the negligence of the driver employed by an independent contractor even when the claim is made not under the Law of Torts but under the provisions of the Act. While it may be true, as we have observed earlier, that under the Law of Torts, the owner may not be liable on the principle of vicarious liability, the insurer would be liable to pay the compensation by virtue of provisions of Section 94 and Section 95 of the Act, referred to above."

41. It has to be borne in mind that the Act has amongst many of its objects relating to the overall regulation of motor vehicles, the social welfare object, that is about the provision of compensation to the victim of a motor accident, effectively through a summary remedy provided before a special forum, that is the Tribunal.

The persons, against whom an award may be passed by the Tribunal, are specified in Section 168 of the Act, that speaks about the award of the claims Tribunal. It reads:

"168. Award of the Claims Tribunal.--(1) On receipt of an application for compensation made under Section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of Section 163 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."

(emphasis by Court)

42. A perusal of the aforesaid provision shows that the Tribunal may pass an award directing compensation, which appears to be just and mandates that the Tribunal shall specify the amount of compensation payable by the Insurer, the

owner or the driver. It is, thus, clear that the exclusive remedy, which is summary in nature, is provided to the victim of a Motor Accident before the Tribunal investing the Tribunal to pass an award holding the Insurer, the owner or the driver liable. The Tribunal has been empowered to direct, which of them and in what proportion shall be liable under the award and the award may be passed against any or all of them.

43. It would be necessary to notice one submission advanced by the learned Counsel for the mechanic that most of the decisions relied upon on behalf of the owner are those rendered in the context of the Act of 1939, whereas the present issue has arisen in the context of the Act, which is a successor statute and very different from its predecessor, including the provisions relating to rights and liabilities of the Insurance Company. Suffice it to say that the provisions of Sections 94 and 95 of the Act of 1939 are broadly *pari materia* to the provisions of Sections 146 and 147 of the Act though there are important distinctions of detail on certain issues. But, those distinctions in the provisions of Sections 94 and 95 of the Act of 1939 and the corresponding provisions in the present statute have little bearing on the issue involved here.

44. The decisions rendered under the Act of 1939 on the question involved in the present appeal cannot be said to be irrelevant and away from the contemporary statutory context. Broadly, the provisions of Sections 94 and 95 of the Act of 1939 and those of Sections 146 and 147 of the Act make it imperative that any person, who uses or causes to be used a motor vehicle in a public place, shall not do so unless there is in force an insurance policy in relation to that vehicle complying with

the requirements of the relative statute. What the policy must ensure, is also spelt out by corresponding provisions under both the statutes and make it imperative for the policy to cover third party risk, involving either death of a person or grievous hurt.

45. The decision in **Guru Govekar** for the last part of the principle holding the Insurer liable by virtue of Section 95 of the Act of 1939 was followed by a Division Bench of the Kerala High Court in **Alias v. E. M. Paul and others**, AIR 2004 Ker 214, and still earlier, by a Single Judge of the Madras High Court in **Eagle Brand Soapnut Co. represented by its Partner No. 15, Peria Kammala Street, Tiruchirapalli-8 v. Rangasamy and another**, 1997 SCC OnLine Mad 67. These decisions, in fact, were about the liability of the Insurance Company to indemnify when the motor vehicle was in the custody of a mechanic or a repairer. These decisions are not about the issue whether for the act of a bailee in injuring a third party while holding custody of a chattel under a contract of bailment would render the bailor/ owner liable in damages to the third party. These authorities are not about the liability that arises under the torts, but one that arises under the Act for the Insurer when a motor vehicle in the custody of a bailee causes injury to a third party.

46. The decision in **Guru Govekar** makes it clear that under the general principles governing torts, the owner is not liable for the act of an independent contractor, like a bailee, *vis-a-vis* third parties while holding his chattel under a contract of bailment. In that situation, it is the bailee alone who is answerable to the injured third party, again so far as principles governing torts are concerned.

But, the decision in **Guru Govekar**, which has thereafter been followed by the Kerala High Court and the Madras High Court, has drawn upon the provisions of Sections 94 and 95 of the Act of 1939 to hold the Insurance Company liable under a statutory liability, where a duly insured motor vehicle entrusted for repairs to an independent contractor, a bailee, like a mechanic, causes injuries to a third parties while operating it.

47. It is true that the Act of 1939 has since been replaced by the present statute, that is to say, the Act, but as said earlier, the salient features of the rights and liabilities between the owner, the insurer and third parties, remain unchanged under the Act, which has corresponding provisions in Sections 146 and 147.

48. The liability of the Insurance Company arises, therefore, under Sections 146 and 147 of the Act *vis-a-vis* third parties from the use of the vehicle in a public place. What would happen if a motor vehicle is used in a public place, which is not covered by the mandatory insurance postulated under Section 146 of the Act. In fact, under Section 196, it is an offence punishable both with fine and imprisonment to drive a motor vehicle or cause or permit it to be driven in contravention of the provisions of Section 146 of the Act, that is to say, without an insurance policy. Here, it is the owner, who caused the vehicle to be placed in the hands of the independent contractor, the bailee, who is the mechanic, for repairs while it was not covered by an insurance policy. The mechanic would be presumed not to know of the fact. There is no evidence by the owner led to show that he had informed the mechanic that the vehicle was without a valid insurance cover as required under the

Act. It is perhaps for this reason that the owner had asked the mechanic not to use the motor vehicle in his absence. That, however, cannot be a fact imputing knowledge to the mechanic about the vehicle being uninsured or altering his status as an independent contractor holding it under a contract of bailment.

49. It brooks no doubt that though the driving of an uninsured vehicle in a public place is absolutely prohibited by the Act and also constituted an offence punishable by law, if the owner in fact drives an uninsured vehicle in a public place or causes it to be driven through his servant or agent, injuring a third party, the owner would be liable to compensate the third party for the injury or loss sustained. However, when the vehicle is entrusted to an independent contractor, like a mechanic, for the purpose of service or repairs, it is held by the mechanic or the repairer under a contract of bailment. It is not held as a servant or an agent of the owner. It is well settled by consistent authorities that so long as the bailee, a mechanic or a repairer is holding a motor vehicle, the owner has no control over it.

50. In the considered opinion of this Court, therefore, even if the owner while entrusting a vehicle to an independent contractor, a bailee, like a garage owner or an independent mechanic or repairer, gives him certain instructions not to use the vehicle in a public place, those will not alter the status of the bailee into an agent or servant of the owner. And, therefore, for any injury or loss to a third party, arising out of the use of a motor vehicle in a public place by the mechanic or the repairer, while he holds a motor vehicle under a contract of bailment, the bailee would be liable in

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

U.P.S.R.T.C., Lucknow ...Appellant
Versus
Ashok Kumar Sharma ...Respondent

Sri C.P. Srivastava, Sri Amit Manohar, Sri Anubhav Chandra, Sri Anuj Srivastava, Sri A.K. Saxena

Sri G.L., Tripathi, Sri B.D. Shukla, Sri
Saurabh Roy

B. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act or joint tortfeasors. In a case of accident caused by negligence of joint tortfeasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such a case, the liability is always joint and several. The extent of negligence of joint tortfeasors in such a case is immaterial for satisfaction of the claim of the claimant and need not be determined by the court.(Para 10)

List of Cases cited:

1. Bajaj Allianz Gen. Ins. Co. Ltd. Vs Smt. Renu Singh & ors. FAO No. 1818 of 2012

52. In the opinion of this Court, therefore, no case for interference with the impugned judgment and award is made out.

53. In the result, this appeal **fails** and is **dismissed**.

54. Costs easy.

(2023) 5 ILRA 134
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2023

BEFORE

2. Rylands Vs Fletcher (1868) 3 HL (LR) 330

3. Jacob Mathew Vs St. of Punj. (2005) 0 ACJ SC 1840

4. Khenyei Vs New India Assur. Co. Ltd. & ors. (2015) LawSuit SC 469

5. T.O. Anthony Vs Karvarnan & ors. (2008) (3) SCC 748

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

1. Heard Sri A.K.Saxena, learned counsel for the appellant and learned counsel for respondent.

2. This appeal, at the behest of the U.P.S.R.T.C, challenges the judgement and award dated 18.09.2002 passed by M.A.C.T/11-Additional District Judge, Kanpur Nagar (hereinafter referred to as "Tribunal") in M.A.C.P. No. 568 of 1999. The fact that the vehicle is involved in the accident which takes place on 25.11.1998 is not in dispute, therefore, involvement of the vehicle is not in dispute. Only dispute now is regarding contributory negligence of injured and the quantum and misjoinder of parties.

3. Brief facts as culled out from the record are that on 25.11.1998 at about 12:15 p.m, Ashok Kumar Sharma was going to Hathras for his business on his Vespa Scooter no. U.P. 81F-4862. U.P.S.R.T.C driven by its driver rashly and negligently hit the scooter as a result of which Ashok Kumar Sharma sustained grievous injuries got his leg fractured from various places. Injured was given treatment in Hathras but to grievous injuries he was referred to Indraprastha Sarita Vihar, Delhi.

4. The deceased was 35 years of age at the time of accident and he was working in

M/s Janardan Sharma & company and was earning Rs. 5000/-p.m. He was a married person having two minor children and a wife. The tribunal has granted a lumpsum amount of Rs. 6,56, 331/-.

5. Grounds of challenge are that the quantum of compensation awarded is illegal, arbitrary and highly excessive. It is submitted that the tribunal ought to have considered the question of contributory negligence of the claimant as the accident was caused on the rear portion of the bus. It is submitted that the driver of the bus was not negligent and the driving licence and insurance policy was not produced by the respondent and therefore the claim petition was liable to be dismissed on the ground of non-joinder of the parties.

6. It is further submitted that the claimant who is the injured has not produced any documentary evidence for contending what was his income, the medical vouchers have not been attested by any doctor.

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

8. The principle of contributory negligence has been discussed time and

again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

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

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the

duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

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

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

may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

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

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (**per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840**).

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

emphasis added

10. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasons. In a case of accident caused by negligence of joint tort feasons, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasons in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasons are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feason vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasons for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in **T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]** has held that in

case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the

drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in **Challa Bharathamma & Nanjappan (supra)** has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tortfeasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the

amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the

drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

emphasis added

11. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care.

12. The tribunal has very categorically come to the conclusion that the driver of bus of the roadways was driving the bus rashly and negligently. The U.P.S.R.T.C in its reply before the tribunal contended that no such accident had taken place and in the alternative that the scooter dashed the bus from behind. The evidence of D.W.-2 and the scootrist namely the claimant have been elaborately discussed by tribunal. The finding of facts as far as negligence are concerned cannot be interfered with.

13. The impact was such that the claimant sustained 75% of disability. This takes this Court to the compensation. The compensation awarded cannot be said to be on the higher side. The tribunal has not granted any amount under the head of future loss of income. The quantum rather is on the lower side. As Sri Vidya Kant Shukla, learned counsel appeared for the respondent but there is no cross objection raised, hence, there is no question of

4. Pappu & ors. Vs Vinod Kumar Lamba & anr. (2018) 3 SCC 208

5. Prem Kumari Vs Prahlad Dev. (2008) 3 SCC 193

6. Nirmala Kothari Vs United India Ins. Ltd. (2020) 4 SCC 49

7. Rishi Pal Singh Vs New India Assur. Co. Ltd & ors. MANU/SC/1303/2022

8. Kedar Singh Vs Sarla Devi & ors. MANU/UP/1726/2021

9. Oriental Ins. Co. Ltd. Vs Smt. Poonam Kesarwani & ors. (2009) 0 ADJ 1

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This first appeal from order arises out of the judgment and award dated 13.10.2017 passed by the learned Motor Accident Claims Tribunal/learned Additional District Judge, Maharajganj in Motor Accident Claim Petition No.114 of 2014 (Harilal and others Vs. Ram Shabad Yadav and others).

2. The owner-appellant contesting the liability to pay the compensation.

3. Briefly the case of the claimants before the learned tribunal was that the deceased-Bhanmati died of injuries sustained in an accident which occurred on 02.05.2014 and was caused by the rash and negligent driving of the driver of truck bearing Registration No. UP-52F-0405. The offending vehicle was insured by the respondent Insurance Company. The claimants were dependant on the deceased. The deceased was 44 years of age at the time of the accident.

4. The learned tribunal in the impugned award found for the claimants by

holding that the driver of the offending truck drove negligently and was solely responsible for the accident which resulted in the death of the deceased. Learned tribunal found that the insurance policy terms were breached. The insurance company was absolved of its liability on this footing, and the owner was made liable to pay the awarded compensation.

5. Shri Satendra Pandey, learned counsel for the appellant-owner contends that the learned tribunal erred in law by absolving the Insurance Company of the liability to pay the compensation. The finding that the appellant-owner had breached the terms of the insurance policy since the insured vehicle was being driven by a person who was not in possession of valid driving licence is perverse. The award was illegal and is liable to be set aside.

6. Shri Aditya Singh Parihar, learned counsel holding brief of Shri Rahul Sahai, learned counsel for the respondent-Insurance Company contends that the award passed by the learned tribunal is lawful and brooks no interference. The liability to pay the compensation is on the owner since there was a breach of the insurance policy.

7. After advancing their arguments, learned counsel for both the parties agree that though many grounds have been pleaded, only the following question fall for consideration in this appeal:-

Whether, in the facts of this case, the learned tribunal erred in law by fixing the liability to pay the compensation on the owner of the offending vehicle?

8. These facts found by the learned tribunal are undisputed. The accident

occurred on account of the rash and negligent driving of the offending truck. The offending truck was insured by the respondent-Insurance company.

9. The Insurance company contested the validity of the licence of the driver of the offending vehicle since inception of the claim petition by filing a written statement. The written statement asserts that not only the licence was fake but the owner was fully aware of these facts.

10. The owner as well as the driver in the written statement asserted that the latter was skilled at driving and was in possession of a valid driving licence.

11. It is evident from the facts that the insurance company categorically denied the validity of the licence and pleaded wilful knowledge and liability of the owner in permitting the driver to drive without a valid driving licence. Neither the owner nor the driver appeared in the witness box to establish that the owner had exercised due diligence to ensure that the driver had the requisite driving skill and was in possession of a valid driving licence. Requisite pleadings by the owner/appellant in this regard too are absent.

12. On its part the insurance company introduced form 54 issued by the concerned RTO Office to establish that the driving licence tendered in evidence by the owner of the vehicle as well as the driver was a fake one. Form 54 was never contested by the owner.

13. With these established facts it remains to be seen whether the insurance company can be absolved of its liability and whether entire liability of paying the

compensation has to be borne by the owner-appellant.

14. Non possession of a valid driving licence as a ground to deny the insurance cover or fasten liability upon the owner of the vehicle was in issue in a number of cases before various constitutional courts. These were cited at the Bar.

15. The discussion had advantage of good authorities in point which shall also determine the result of the appeal.

16. The question whether the insurance company could be permitted to avoid its liability only on ground that the driver of the offending vehicle at the time of accident was not duly licensed was in issue in **United India Insurance Company Ltd. v. Lehu and others**¹. The Supreme Court in **Lehu (supra)** held that the insurance company could be absolved of its contractual and statutory obligation only if it established wilful breach of condition of policy by the insured by holding thus:

"20. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a

licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be absolved of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in *Skandia 's Sohan Lal Passi 's and Kamla 's* case. We are in full agreement with the views expressed therein and see no reason to take a different view."

17. Whether fake or forged licence in itself was sufficient for constituting wilful breach of the conditions of the insurance policy or the contract of insurance arose for consideration in **National Insurance Co. Ltd. v. Swaran Singh and others**². The Supreme Court in **Swaran Singh (supra)** underscored the importance of "reasonable care" on part of owner to enquire into the validity of the driver's license by holding thus:

"2. In view of the fact that these petitions involve pure questions of law, it is not necessary to advert to the individual fact pertaining to each matter.

Suffice, however, is to point out that the vehicles insured with the petitioners were involved in accidents resulting in filing of claim applications by the respective legal representatives of the deceased(s) or the injured person(s), as the case may be.

3. Defences raised by the Petitioner company in the claim petitions

purported to be in terms of Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') were : (a) driving licence produced by the driver or owner of the vehicle was a fake one; (b) driver did not have any licence whatsoever; (c) licence, although was granted to the concerned driver but on expiry thereof, the same had not been renewed; (d) licence granted to the drivers being for one class or description of vehicle but the vehicle involved in the accident was of different class or description; and (e) the vehicle in question was driven by a person having a learner's licence.

34. The question as to whether an insurer can avoid its liability in the event it raises a defence as envisaged in Sub-section (2) of Section 149 of the Act corresponding to sub-section (2) of Section 96 of the Motor Vehicles Act, 1939 had been the subject matter of decisions in a large number of cases.

35. It is beyond any doubt or dispute that under Section 149(2) of the Act an insurer, to whom notice of the bringing of any proceeding for compensation has been given, can defend the action on any of the grounds mentioned therein.

36. However, Clause (a) opens with the words "that there has been a breach of a specified condition of the policy", implying that the insurer's defence of the action would depend upon the terms of the policy. The said sub-clause contains three conditions of disjunctive character, namely, the insurer can get away from the liability when (a) a named person drives the vehicle; (b) it was being driven by a person who did not have a duly granted licence; and (c) driver is a person disqualified for holding or obtaining a driving licence.

37. We may also take note of the fact that whereas in Section 3 the words used are 'effective licence', it has been

differently worded in Section 149(2) i.e. 'duly licensed'. If a person does not hold an effective licence as on the date of the accident, he may be liable for prosecution in terms of Section 141 of the Act but Section 149 pertains to insurance as regard third party risks.

38. A provision of a statute which is penal in nature vis-à-vis a provision which is beneficent to a third party must be interpreted differently. It is also well known that the provisions contained in different expressions are ordinarily construed differently.

39. The words 'effective licence' used in Section 3, therefore, in our opinion cannot be imported for sub-section (2) of Section 149 of the Motor Vehicles Act. We must also notice that the words 'duly licensed' used in sub-section (2) of Section 149 are used in past tense.

40. Thus, a person whose licence is ordinarily renewed in terms of the Motor Vehicles Act and the rules framed thereunder despite the fact that during the interregnum period, namely, when the accident took place and the date of expiry of the licence, he did not have a valid licence, he could during the prescribed period apply for renewal thereof and could obtain the same automatically without undergoing any further test or without having been declared unqualified therefor. Proviso appended to Section 14 in unequivocal term states that the licence remains valid for a period of thirty days from the day of its expiry.

64. The proposition of law is no longer *res integra* that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event, the insurance company fails to prove that there has been breach of conditions of policy on the part

of the insured, the insurance company cannot be absolved of its liability. (See *Sohan Lal Passi* (supra))

65. Apart from the above, we do not intend to lay down anything further i.e. degree of proof which would satisfy the aforementioned requirement inasmuch as the same would indisputably depend upon the facts and circumstances of each case. It will also depend upon the terms of contract of insurance. Each case may pose different problem which must be resolved having to a large number of factors governing the case including conduct of parties as regard duty to inform, correct disclosure, suppression, fraud on the insurer etc. It will also depend upon the fact as to who is the owner of the vehicle and the circumstances in which the vehicle was being driven by a person having no valid and effective licence. No hard and fast rule can therefore be laid down. If in a given case there exists sufficient material to draw an adverse inference against either the insurer or the insured, the Tribunal may do so. The parties alleging breach must be held to have succeeded in establishing the breach of conditions of contract of insurance on the part of the insurer by discharging its burden of proof. The Tribunal, there cannot be any doubt, must arrive at a finding on the basis of the materials available on records.

87. It may be true as has been contended on behalf of the petitioner that a fake or forged licence is as good as no licence but the question herein, as noticed hereinbefore, is whether the insurer must prove that the owner was guilty of the wilful breach of the conditions of the insurance policy or the contract of insurance. In *Lehru's* case (supra), the matter has been considered at some details. We are in general agreement with the approach of the Bench but we intend to point out that the observations made therein

must be understood to have been made in the light of the requirements of law in terms whereof the insurer is to establish wilful breach on the part of the insured and not for the purpose of its disentitlement from raising any defence or the owners be absolved from any liability whatsoever. We would be dealing in some details with this aspect of the matter a little later.

94. So far as the purported conflict in the judgments of Kamla (*supra*) and **Lehru (*supra*)** is concerned, we may wish to point out that the defence to the effect that the licence held by the person driving the vehicle was a fake one, would be available to the insurance companies, but whether despite the same, the plea of default on the part of the owner has been established or not would be a question which will have to be determined in each case.

95. The court, however, in **Lehru (*supra*)** must not read that an owner of a vehicle can under no circumstances has any duty to make any enquiry in this respect. The same, however, would again be a question which would arise for consideration in each individual case.

105. The summary of our findings to the various issues as raised in these petitions are as follows:

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(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or

disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case."

18. The insurance company in **Pepsu Road Transport Corporation v. National Insurance Company³**, resisted its liability by taking the defence that the driver of the vehicle involved in the accident was not duly licensed. The brief facts of the case in **Pepsu Road Transport Corporation (*supra*)** were stated in para 2 as under:

"2. Widow and two minor sons of late Gurjinder Singh Modi are claimants before the Motor Accidents Claims Tribunal, Chandigarh in M.A.C.T. No.

63/481 filed in the year 2002. The allegation was that Gurjinder Singh Modi died out of a motor accident on 04.10.2001 on account of the negligent driving of bus no. PB-11-K-8512 of the Pepsu Road Transport Corporation (for short, "PRTC"), Patiala, the appellant herein. Rs.30,00,000/- was claimed as compensation. Negligence was proved. The Tribunal awarded Rs.11,03,404/- as compensation. However, the insurance company was absolved of its liability since the licence issued to the driver was found to be fake. The insurance company took the Local Commissioner to licensing authority, Darjeeling, West-Bengal and, on verification of the available records, it was reported that no such licence as possessed by the driver has been issued by the said licensing Authority at Darjeeling. Thus, aggrieved, the owner of the vehicle, viz., PRTC, Patiala has come up in appeal."

19. In **Pepsu Road Transport Corporation (supra)**, the responsibility of the owner while employing a driver to avail the benefit of insurance was stated thus:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who

is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."

20. Breach of conditions under Section 149(2)(a) which absolve the insurer of its liability to be insured, and the conditions regarding driving licence under Section 142(2)(a) was once again was posed before the learned three judge bench of the Supreme Court in **Pappu and others v. Vinod Kumar Lamba and another**⁴. In **Pappu (supra)** heightened diligence was expected from a vehicle owner once the insurance company disputed its liability by asserting that the insurance policy had been breached and that the offending vehicle was not driven by a person with a valid driving licence. **Pappu (supra)** emphasised the need for the owner to take specific pleadings and adduce supporting evidence in this regard by stating thus:

"13. In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. **Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea.** The respondent No.2 Insurance Company in the Written Statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorised person and having valid driving licence. The respondent No.1 owner of the offending vehicle **did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorised to drive the vehicle in question at the relevant time.** Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of the offending vehicle - that the vehicle was not only duly insured but also that it was driven by an authorised person having a valid driving licence. Without disclosing the name of the driver in the Written Statement or producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of

a person who, in fact, was authorised to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle."

(emphasis supplied)

21. In **Premkumari v. Prahlad Dev**⁵, the Supreme Court once again reiterated the obligation of the owner to satisfy himself regarding the driving skills and validity of the driving license at the time of appointing him by holding thus:

"7. It is clear from the above decision when the owner after verification satisfied himself that the driver has a valid licence and driving the vehicle in question competently at the time of the accident there would be no breach of Section 149(2)(a)(ii), in that event, the Insurance Company would not then be absolved of liability. It is also clear that even in the case that the licence was fake, the Insurance Company would continue to remain liable unless they prove that the owner was aware or noticed that the licence was fake and still permitted him to drive."

22. The nature of verification to be undertaken by an owner while hiring a driver in order to defeat the insurance company's defence against its liability was directly and substantially in issue in **Nirmala Kothari v. United India Insurance Ltd**⁶. Upon consideration and in light of the authorities discussed in the preceding paragraphs, the Supreme Court reiterated the legal position in **Nirmala Kothari (supra)** by holding thus:

"12. While hiring a driver the employer is expected to verify if the driver has a driving licence. If the driver produces

a licence which on the face of it looks genuine, the employer is not expected to further investigate into the authenticity of the licence unless there is cause to believe otherwise. If the employer finds the driver to be competent to drive the vehicle and has satisfied himself that the driver has a driving licence there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would be liable under the policy. It would be unreasonable to place such a high onus on the insured to make enquiries with RTOs all over the country to ascertain the veracity of the driving licence. However, if the Insurance Company is able to prove that the owner/insured was aware or had notice that the licence was fake or invalid and still permitted the person to drive, the insurance company would no longer continue to be liable."

23. Similarly, the responsibility of an owner while engaging a driver was explained in **Rishi Pal Singh v. New India Assurance Co. Ltd. and others**⁷ in the following terms:

"10. The owner of the vehicle is expected to verify the driving skills and not run to the licensing authority to verify the genuineness of the driving license before appointing a driver. Therefore, once the owner is satisfied that the driver is competent to driver the vehicle, it is not expected from the owner thereafter to verify the genuineness of the driving license issued to the driver."

24. The undisputed facts on which the judgements of this Court in **Kedar Singh v. Sarla Devi and others**⁸ were founded are these. The driving licence of the driver at the time of the accident was found to be fake. The owner merely produced a photocopy of the driving license. The

driver was not examined by the owner of the truck nor did the owner enter the witness box. The insurance company filed Form 44 which established that the photocopy of the licence brought in the record by the owner was fake.

25. Siddharth, J. in these facts found that the owner had not taken due reasonable care while appointing the driver and was failed to prove the basic facts required of him in law to avail the benefit of insurance by holding thus:

"29. Regarding the second submission of the learned counsel for the owner of the truck/appellant of the discarding of the validity of driving licence of the truck driver by the tribunal, this court finds that only photocopy of the driving licence of the driver, Bhola was brought on record by the owner /appellant before the tribunal. The vehicle owner never appeared in witness box before the tribunal to prove that the driving licence was given to him by his driver, Bhola and he was satisfied that it is genuine. He also did not proved that he made efforts to see that the driver is competent to drive. He was required to prove before the tribunal that he had taken reasonable care in employing the driver, who was qualified and competent to drive the vehicle. The liability as between the insurer and the insured depends upon the reasonable care taken by the owner of the vehicle, while employing a qualified and competent driver. These basic facts are required to be proved by the owner of the vehicle before the tribunal so as to protect himself from the liability viz- a- viz insurance company before the Motor Accidents Claims Tribunal.

30. The insurance company in the present case produced the Form-54 before the tribunal which proved that the driving

licence produced by the owner of the truck/appellant was not of his driver, Bhola but it was of another person, Krishna Gopal. The owner of the truck/ appellant clearly did not proved that his driver supplied him fake/forged copy of the driving licence since the driver of the owner of the truck-appellant, namely, Bhola, was not produced before the tribunal to testify the correct facts.

31. Learned counsel for the insurance company has rightly pointed out to the judgment in the case of Pappu and another(supra) wherein Apex court has held that insurance company can be held liable only when foundational facts are pleaded and proved by the owner of the offending vehicle by the owner of the truck/appellant before the tribunal."

26. The argument on behalf of the Insurance Company that the Form 54 was not admissible in evidence is liable to be rejected. The certified copy of Form 54 introduced as evidence by the Insurance Company established that the driving licence. The said document was not successfully challenged and was rightly found to be genuine by the learned tribunal.

27. The judgement of this Court in **Kedar Singh (supra)** quoted the judgement rendered by this Court in **Oriental Insurance Co. Ltd. Vs. Smt. Poonam Kesarwani and others**⁹ with approval and held:

"16. The insurance company on its part investigated the validity of the driving licence(DL No. 2222/RJ/2005) and consequently filed the report received from the concerned R.T.O. under Form 54 before the tribunal. The bare perusal of the report received on Form 54 would go on to show that the driving licence no.

2222/RJ/2005 was issued in favour of one Krishna Goopal and not in the name of the alleged offending driver i.e, Bhola. As such the photocopy of the driving licence of Bhola filed by owner of the truck/appellant was a fake document. It is a settled proposition of law that Form 54 is a public document which does not requires further evidence of formal proof by examining a witness. It is further submitted that this Court in paragraph no.12 of Oriental Insurance Co. Ltd. Vs. Smt. Poonam Kesarwani and others, reported in 2009() ADJ,1 has held accordingly:-

"Form 54 being a certified copy of a public document namely the state register of driving licence, need not to be proved by examining a witness. Once a certified copy of the entries made in the register maintained under Section 26(1) read with Rule 23 is issued in form-54 it is admissible in evidence under section 77 of the Evidence Act and no further proof of form 54 by oral evidence by examining witnesses is required."

17. The insurance company on its part had duly discharged its burden by filing Form-54(which has been held to be a public document) which categorically established beyond doubt that the photocopy of the driving license brought on record by the owner/appellant was a fake document, as such, breach of policy condition was fully substantiated for which no liability whatsoever could have been fastened upon the insurance company /appellant."

28. The burden lies on the owner of proving foundational facts including the satisfaction of the authenticity of the driver's licence prior to the latter's appointment. This burden can be discharged in light of the standards and

criteria provided by authorities in point discussed earlier.

29. However, in the wake of the preceding discussion, this Court finds that the owner had failed to establish the aforesaid foundational facts. The owner did not appear in the witness box to prove that the driving licence of the driver was produced before him and that he was satisfied with its genuineness at the time of the driver's appointment. Further, pleadings entered by the owner-appellant before the learned tribunal too are deficient in this regard.

30. No case for interference in the impugned award is made out. The appeal is dismissed.

(2023) 5 ILRA 150
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.05.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

First Appeal From Order No. 238 of 2022

United India Insurance Co. Ltd., Lucknow
...Appellant
Versus
Smt. Sheela & Ors. ...Respondents

Counsel for the Appellant:
 Tarun Kumar Misra

Counsel for the Respondents:
 Raj Kumar Vishwakarma, Firoz Ahmad Khan, Jagjit Sodhi

A. Civil Law - Motor Vehicle Act, 1988 - Section 176-challenge to-claim-Tribunal awarded a sum of Rs. 18,69,280/- in favour of the claimant-the said award was

passed against the Insurance Company-the Insurance Company has escalated the matter on the premise that the driver of the offending Gas Tanker did not have a valid and an effective driving licence-Even though the driver had a licence but since it did not have the requisite endorsement as provided in Motor Vehicles Act permitting the driver to drive a transportation vehicle carrying dangerous/hazardous goods-Hence, the award is to be satisfied by the Insurance Company qua the claimant-respondent but the appellant-insurance company is entitled to recover the amount from the owner of the offending vehicle(Insured)-Thus, the Tribunal has erred in deciding the issue and fastening the entire liability on the Insurance company without granting the right to recovery to the insurer.(Para 1 to 32)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. NICL Vs Swaran Singh (2004) 3 SCC 297.
2. Gautam Filling Station Vs Munnu Singh & anr. (2016) 34 LCD 1669.
3. Sibbal Singh Vs The United India Ins. Co. Ltd. F.A.F.O. (Defective) No 378 of 2010
4. United India Ins. Co. Ltd. Vs Smt. Vimla Devi & ors. F.A.F.O No. 845 of 2006 (2021 Latest case Law 8677 ALL)
5. Oriental Ins. Co. Ltd. Vs Nanjappan & ors.(2004) 13 SCC 224

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard Sri Tarun Kumar Mishra, learned counsel for the appellant and Sri Firoz Ahmad Khan, learned counsel for the claimants-respondents no. 5 and 6. Sri Jagjit Singh Sodhi, learned counsel for the claimant-respondents no. 1 to 4

2. The insurance company, as appellants, have instituted the aforesaid appeal against the award dated 18.11.2021 passed by the Motor Accident Claims Tribunal (South), Lucknow in Claim Petition No. 564 of 2017 whereby the Claims Tribunal has awarded a sum of Rs. 18,69,280/- along with 7% interest from the date of the application till the date of the payment in favour of the claimant-respondents no. 1 to 4 and the said award has been passed against the Insurance Company.

3. The learned counsel for the appellant while assailing the award has raised a solitary contention. The thrust of the arguments is that the accident occurred on account of rash and negligent driving of the offending Gas Tanker bearing No. UP 17 AT 1890, however, though, no appeal has been preferred by the owner and the driver regarding the aforesaid finding but the Insurance Company has escalated the matter on the premise that the driver of the offending Gas Tanker did not have a valid and an effective driving license, inasmuch as, on the date of the accident i.e. 29.07.2017, the driver of the aforesaid Gas Tanker namely Rajesh Kumar did not have the requisite endorsement on his driving license authorizing him to drive a transportation vehicle containing hazardous goods.

4. It is further submitted that a specific issue was framed by the Tribunal to the effect whether the driver of the said tanker had a valid and effective driving license and while answering the same, the Tribunal held that the driver of the aforesaid tanker had a valid license and fastened the liability on the Insurance Company. It was of the view that since the accident did not occur on account of any leakage or as a direct

consequence of a hazardous good itself contained in the said tanker, therefore, the Insurance Company cannot be absolved of its liability.

5. It is further urged that the Tribunal completely misdirected itself, inasmuch as, it did not consider that the driver did not have the requisite endorsement on his license regarding the authorization to drive a transportation vehicle carrying hazardous goods and in absence of any such endorsement, it cannot be said that the driver was authorized, hence, this being contrary to the relevant Rule 9 (3) of Central Motor Vehicle Rules, 1989 read with Section 14 (2) (a) of the Motor Vehicles Act, 1988, it would indicate that the driver was not authorized which in effect amounts to driving the vehicle without an authority and as such the Insurance Company could not be fastened with the aforesaid liability and moreover the Tribunal has further erred in not even granting the recovery rights which has resulted in sheer miscarriage of justice.

6. Per contra, Sri Firoz Ahmad Khan, learned counsel for the respondents no. 5 and 6 submits that the vehicle in question was duly insured and the driver had a valid driving license and also noticing the fact that the accident occurred and the death was not on account of the use or consequence of the hazardous goods, therefore, it cannot be said that the view taken by the Tribunal was incorrect. It is also submitted that the driving license of the respondent no. 5 was valid and subsisting, accordingly, the appeal deserves to be dismissed.

7. The learned counsel for the claimant-respondents no. 1 to 4 has submitted that even though the award has

been passed in favour of the claimant-respondent nos. 1 to 4 yet because of the subsisting interim order passed in the appeal dated 21.06.2022, not a single penny has been provided to the claimant-respondent nos. 1 to 4 despite they have lost their earning family member and that appeal deserves to be dismissed.

8. The Court has heard the learned counsel for the parties and also perused the material on record.

9. Before advertng to the submissions of the respective parties, certain brief facts giving rise to the instant appeal are being noticed hereinafter:-

10. The claimants-respondents no. 1 to 4 preferred a Claim Petition No. 564/2017 before the Motor Accident Claims Tribunal (South) Lucknow with the averment that on 29.07.2017 at around 12:30 in the afternoon Ms. Arunima Chandra (the deceased) while moving out from the C.H.C. in District Unnao to attend her field duties was hit by a Gas Tanker bearing No. U.P. 17 AT 1890 and on account of the hit she suffered grievous injuries which led to her death on the spot. It was also stated that she was working on the post of B.L.P. in the office of Chief Medical Officer and was earning a sum of Rs. 15,600/- per month.

11. The driver and owner of the aforesaid offending Gas Tanker filed their separate written statement denying the accident. However, the owner took a plea that the said tanker had a subsisting fitness certificate which was valid till March, 2023 and the national permit was also valid w.e.f. 21st March, 2017 till 20th March, 2022 and the vehicle was duly insured with the appellant-company w.e.f. 24.02.2017 till 23.02.2018 and as such, if at all, any award

is made, the same is liable to be satisfied by the Insurance Company.

12. The driver on the other hand in his written statement reiterated the stand as taken by the owner but also took an additional stand that he had a valid and a subsisting driving license.

13. The Insurance Company on the other hand while filing its writing statement denied its liability to honour the award as the driver did not have a valid license.

14. In light of the aforesaid pleadings, the Tribunal framed four issues and after considering the evidence it decided the four issues in favour of the claimants-respondents holding that the accident was a result of rash and negligent driving of the driver of the Gas Tanker bearing No. U.P. 17 AT 1890 which led to the death of Arunima Chandra. It also found that the vehicle had the requisite fitness certificate, permit and the Insurance Policy which was valid for the relevant period. While dealing with issue no. 3, it held that the license of the driver was valid and since the accident was not caused by the hazardous goods, thus, the liability of the insurer could not be absolved and thereafter considering the issue of compensation, it allowed the claim petition awarding a sum of Rs. 18.69,280/- to the claimants-respondents no. 1 to 4 along with 7% interest per annum.

15. It is this award which is under challenge in the instant appeal on the grounds which have been noticed hereinabove.

16. The only issue which requires consideration is whether the driving license of the respondent no. 5 was valid and as he was driving a Gas Tanker then whether the

license ought to have the requisite endorsement authorizing him to drive a vehicle of transportation of hazardous goods and in absence thereof whether the award could be fastened on the Insurance Company.

17. In order to answer the aforesaid issue, it will be appropriate to take a glance at the relevant sections as well as the rules as framed under the Motor Vehicles Act, 1988 and the Central Motor Vehicle Rules, 1989. The relevant sections are reproduced as under:-

"Section 3. Necessity for driving licence.--(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle] hired for his own use or rented under any scheme made under sub-section (2) of Section 75] unless his driving licence specifically entitles him so to do.

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government.

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Section 14. Currency of licences to drive motor vehicles.--(1) A learner's licence issued under this Act shall, subject to the other provisions of this Act, be effective for a period of six months from the date of issue of the licence.

(2) A driving licence issued or renewed under this Act shall,--

(a) in the case of a licence to drive a transport vehicle, be effective for a period of three years: 1[***]

2[Provided that in the case of licence to drive a transport vehicle carrying goods of dangerous or hazardous nature be effective for a period of one year and renewal thereof shall be subject to the condition that the driver undergoes one day refresher course of the prescribed syllabus;

(b) x x x

(I) x x x

(A) x x x

(B) x x x

x x x

x x x

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Section 56. Certificate of fitness of transport vehicles.--(1) Subject to the provisions of sections 59 and 60, a transport vehicle shall not be deemed to be validly registered for the purposes of section 39, unless it carries a certificate of fitness in such form containing such particulars and information as may be prescribed by the Central Government, issued by the prescribed authority, or by an authorized testing station mentioned in sub-section (2), to the effect that the vehicle complies for the time being with all the requirements of this Act and the rules made thereunder: Provided that where the prescribed authority or the "authorized testing station" refuses to issue such certificate, it shall supply the owner of the vehicle with its reasons in writing for such refusal.

(2) x x x

(3) x x x

(4) x x x

(5) x x x

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66. Necessity for permits.--(1) No owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not

such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorising him the use of the vehicle in that place in the manner in which the vehicle is being used: Provided that a stage carriage permit shall, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a contract carriage: Provided further that a stage carriage permit may, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a goods carriage either when carrying passengers or not: Provided also that a goods carriage permit shall, subject to any conditions that may be specified in the permit, authorise the holder to use the vehicle for the carriage of goods for or in connection with a trade or business carried on by him.

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Section 147. Requirements of policies and limits of liability. --(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which--

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)--

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service

vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required--

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee--

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. --For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:--

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.,

(3) x x x

(4) x x x

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

9. Educational qualifications for drivers of goods carriages carrying dangerous or hazardous goods:-[(1) One year from the date of commencement of Central Motor Vehicles (Amendment) Riles, 1993, any person driving a goods carriage carrying goods of dangerous or hazardous nature to human life shall, in addition to being the holder of a driving licence to drive a transport vehicle, also has the ability to read and write at least one Indian language out of those [specified in the VIII Schedule of the Constitution] and English and also possess a certificate of having successfully passed a course consisting of following syllabus and periodicity connected with the transport of such goods:-

Period of training	3 days
Place of training	At any institute recognised by the State Government
Syllabus	

A. Defensive driving
Questionnaire Duration of training for A & B -1st and 2nd day

Cause of accidents
Accidents, statistics
Driver’s personal fitness
Car condition
Braking distance
Highway driving
Road/Pedestrian crossing
Railway crossing
Adapting to weather

Head-on collision
Read-end- collision
Night driving
Films and discussion

B. Advanced driving skills and training

(i) Discussion
Before starting
----Check list
----Outside/below/near vehicle
----product side
----inside vehicle

During driving ----Correct speed/gear
----Signalling
----lane control
----overtaking/giving side
----speed limit/safe distance
----driving on slopes

Before stopping condition
---- Safe stopping place, signaling, road width,

After stopping ----preventing vehicle movement
----wheel clocks
----vehicle attendance

[Night driving ---mandatory lightning requirements

-----headlamp alignment
 -----use of dipped beam]

(ii) Field test/training ----1 driver at a time

C. Product safety	Duration
-----Un classification	of training
UN Panel -----Hazchem Code	for (C)
-----Toxicity for (C)	Third day
-----flammability	
-----other definitions	

Product Information -----Tremcards
 -----CIS/MSDS
 -----Importance of temperature
 Pressure, level
 -----Explosive limits
 -----Knowledge about equipment

Emergency Procedure -----Communication
 ----- Spillage handling
 -----Use of PPE
 ---- Fire fighting
 -----First Aid
 ----Toxic release control
 -----Protection of wells, rivers, lakes, etc.
 -----Use of protective equipment
 -----Knowledge about valves etc.

(2) The holder of a driving license possessing the minimum educational qualification or the certificate referred to in sub-rule (1), shall make an application in writing on a plain paper along with his driving license and the relevant certificate to the licensing authority in whose jurisdiction he resides for making necessary entries in his driving license and if the driving license is in Form 7, the application shall be accompanied by the fee [as specified in the Table in rule 32].

(3) The licensing authority, on receipt of the application referred to in sub-rule (2), shall make an endorsement in the driving licence of the applicant to the effect

that he is authorised to drive a goods carriage carrying goods of dangerous or hazardous nature to human life.

(4) A licensing authority other than the original licensing authority making any such endorsement shall communicate the fact to the original licensing authority.

Rule 132. Responsibility of the transporter or owner of goods carriage.--

(1) x x x

(2) x x x

(3) x x x

(4) x x x

(5) It shall be the duty of the owner to ensure that the driver of the goods carriage carrying dangerous or hazardous goods holds a driving licence as per provisions of rule 9 of these rules."

18. From the conjoint reading of the aforesaid provisions, it is clear that insofar as the heavy goods motor vehicles is concerned, the licence issued to such a person is valid for a period of three years. However, where a driver is driving a transport vehicle carrying hazardous goods, for such vehicles, the driver must possess a separate endorsement and the said endorsement has to be renewed from time to time on an application made by the driver concerned as per the provisions and rules framed under the Act of 1988."

19. Having taken a look at the relevant provisions, now it will be appropriate to take a look at the license which was placed on record by the respondent no. 5 along with documents list bearing Paper No. C-17/1.

20. From the perusal of the aforesaid driving license, it would indicate that the driving license bearing U.P. 86 20130003803 was issued in the name of Rajesh Kumar Son of Chhatrapal on

03.07.2013 and was valid till 02.07.2033 and it also indicates that Rajesh Kumar was authorized to drive, a light motor vehicle and MCWG (motor vehicles with gear). The driver is also authorized to drive a transportation vehicle, however, this endorsement was effective from 22.09.2014. The said driving license has been issued from the office of R.T.O. Hathras, in the State of U.P.

21. From the perusal of the aforesaid documents it does not indicate that there is any endorsement for driving a transportation vehicle carrying hazardous goods as required in terms of Section 14 of the Act 1988 read with Rules 9 and 132 framed under the Central Motor Vehicles Rules, 1989. Thus, from the above, it would be clear that there is no dispute regarding the fact that the driver was authorized to drive a transportation vehicle, however, there is nothing on record to indicate that he was also permitted to drive a transportation vehicle carrying dangerous/hazardous goods. Tankers which carry petrol, gas and other inflammable articles and are permitted to transport such commodities and ply on public roads, the law has formulated certain rules and provisions and only after complying with the same, a vehicle of such category can be driven by a person authorized as per law. The authority or the license to drive a vehicle in a public place is in compliance of the statutory requirement under the Motor Vehicles Act, 1988. A person is entitled to compensation in terms of Section 166 of the Motor Vehicles Act only after establishing that the driver of the offending vehicle was rash and negligent whereas the issue as to who is liable to satisfy the award depends on the condition primarily it is the owner and the driver who is responsible but in view

of the insurance cover in terms of Chapter 11 of the Motor Vehicles Act, 1988, the liability is indemnified by the Insurance Company in terms of Section 149 of the Motor Vehicles Act, 1988.

22. Thus, it would be seen that there can be two separate situations; i) where a person may be negligent in driving but at the same time, he must be authorized to drive a particular type of vehicle in accordance with law and the other situation can be where a driver may not be negligent per-se, while driving, but an accident may occur on account of use of the said motor vehicle but even then the driver must not be authorized to drive that particular category vehicle;

(ii) The occurrence of an motor accident and the validity of the driving license will impact the liability of the Insurance Company and this aspect has been considered in detail by the Apex Court in ***National Insurance Company Vs. Swaran Singh (2004) 3 SCC 297.***

23. Whereas the contract of Insurance between the insured and the insurance company is based on '*Uberrima fides*'. It is a contract which has to be complied with in its letter and spirit.

24. Taking note of the aforesaid aspect of the matter and noticing that the driver of the offending gas tanker did not possess the requisite endorsement to drive or use the heavy goods vehicle carrying hazardous/dangerous goods, indicates that law did not authorize him to drive the said vehicle in a public place. The owner of the gas tanker permitted a person to use the said heavy goods vehicle carrying hazardous/dangerous goods in the public space in

violation of the law and it is per se violative of the policy condition.

25. The manner in which the accident occurred may not be necessary to absolve the owner of his liability, but this aspect of the matter has been taken note of by the Coordinate Bench of this Court in the case of **Gautam Filling Station Vs. Munnu Singh & Another; 2016 (34) LCD 1669**. In Paragraphs 26 and 27, it has been held as under:-

"26. Thus, if the statutory requirements as noted above are ignored or diluted on the basis of fact of the case or the factum of accident, say that the driver of the vehicle was admittedly negligent and the insurance company is not permitted to raise the defence that such statutory requirements were not fulfilled, it would amount to nullifying the limited protection granted to the insurance company under section 149 of the Act of 1988.

27. In such view of the matter, in my opinion, section 149 provides for statutory protection available to the company, which clearly shows that no sum shall be payable by the insurer under sub-section (1) in respect of any judgment or award and the insurer can defend the action on the ground as provided under section 149 which also includes that it can avoid its liability if the person driving the vehicle was not duly licensed. For this purpose, needless to say that the requirement of section 3 and section 14 of the Act of 1988 and Rule 9 and Rule 132(5) of the Central Motor Vehicles Rules, 1989, which have already been noted above and need no repetition, are to be fulfilled or complied with for holding a valid licence."

26. The learned counsel for the appellant has also relied upon a Division

Bench of this Court in the case of **Sibbal Singh Vs. The United India Insurance Co. Ltd., F.A.F.O. (Defective) No. 378 of 2010, decided on 13.08.2012**, however, from the perusal of the aforesaid decision, it appears that in case of Sibbal Singh (Supra), though, it does not deal with all the provisions of law yet it also arrives at the same conclusion as noticed in the case of **Gautam Filling Station (supra)**.

27. This Court in **United India Insurance Company Ltd. Vs. Smt. Vimla Devi and others; F.A.F.O. No. 845 of 2006 decided on 27.07.2021 (2021 Latest case Law 8677 ALL)** had the occasion to consider a similar issue and wherein after taking note of the earlier decisions, it arrived at a finding that even though the driver had a license but since it did not have the requisite endorsement as provided in the Motor Vehicles Act permitting the driver to drive a transportation vehicle carrying dangerous/hazardous goods, hence, the Court partly allowed the appeal and granted the recovery rights to the Insurance Company.

28. Considering the ratio laid in the case of **Gautam Filling Station (Supra) and Vimla Devi (Supra)** and applying the principles to the facts of the instant case, it would be clear as the day that though the respondent no. 5, the driver of the Gas tanker was authorized to driver a transportation vehicle but there is no evidence to suggest that he had the authorization to drive a transport vehicle carrying hazardous/dangerous goods. It is also not disputed by the learned counsel for the respondents nos. 5 and 6 Sri Firoz Ahmad Khan that on the relevant date when the accident occurred i.e. 29.07.2017, the driver did not possess any such authorization nor there was any

endorsement to the aforesaid effect of his license. No such material has been brought to the notice of this Court nor it finds place in the records of the Tribunal below. Thus, it can safely be concluded that the driving license of the Gas driver of the gas tanker did not authorize him to driver a transport vehicle carrying dangerous/hazardous goods.

29. Now, the issue arises as to whether the Insurance Company can absolve itself of its liability, however, this is settled in light of the decision of the Constitution Bench in **Swaran Singh (supra)** where the Apex Court considering the various types of discrepancies in the driving license and how the matter is to be dealt with has been considered in detail and the relevant portion thereof read as under:-

“110. The summary of our findings to the various issues as raised in these petitions is as follows:

“(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been

committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish “breach” on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply “the rule of main purpose” and the concept of “fundamental breach” to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find

out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third

party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

30. In light of the aforesaid decision of **Swaran Singh (supra)** it would be clear that the Insurance Company cannot absolve its liability absolutely, however, though, the driver had a license, hence, the award is to be satisfied by the Insurance Company qua the claimant-respondent but the appellant-insurance company is entitled to recover the amount from the owner of the offending vehicle (insured).

31. In view of the aforesaid detailed discussions, this Court is of the clear view that the Tribunal has erred in deciding issue

no. 3 and fastening the entire liability on the Insurance Company without granting the right of recovery to the insurer.

32. In view of the aforesaid, the award dated 18.11.2021 in so far as it relates to all the findings including the quantum is affirmed with the modification that the Insurance Company shall indemnify the award and shall be at liberty to recover the same from the respondent no. 5 who is the owner of the offending vehicle in accordance with law as provided in *Oriental Insurance Company Ltd. Vs. Nanjappan and Others; (2004) 13 SCC 224*. Subject to the aforesaid, the award dated 18.11.2011 is maintained. The ***appeal is partly allowed*** in the aforesaid terms. In the aforesaid facts and circumstances, there shall be no order as to costs. The record of the Tribunal shall be returned expeditiously.

(2023) 5 ILRA 161

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 17.03.2023

BEFORE

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

First Appeal From Order No. 303 of 1995

Smt. Ram Beti & Anr. ...Appellants
Versus
Suresh Chandra & Ors. ...Respondents

Counsel for the Appellants:

Sri P.K. Saxena, Sri S.C. Kesarwani

Counsel for the Respondents:

Sri S. Kumar, Sri Sushil Kumar Mehrotra,
Sri Swapnil Kumar

**A. Civil Law - Motor Vehicle Act, 1988 -
Section 176 - challenge to-enhancement**

of claim- deceased died leaving behind his wife and children-The tribunal awarded a sum of Rs. 61,160/- as compensation with interest at the rate of 12% per annum and has not granted future loss of income-The claimants are entitled to 40% enhancement in wages towards future prospects, consistent with the UP Rules, 1998-Total compensation would be Rs. 3,32,400/- and rate of interest would be 7.5% from the date of filing the claim petition till the award and 6% thereafter - the insurance company shall deposit the amount within 8 weeks. (Para 1 to 18)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. NICL Vs Pranay Sethi & ors. (2017) LawSuit SC 1093
2. Smt. Sarla Verma Vs DTC (2009) 6 SCC 121
3. NICL Vs Pranay Sethi (2014) 4 TAC 637 SC
4. Smt. Sarla Verma Vs DTC (2009) 2 TAC 677 SC
5. Kurvan Ansari @ Kurvan Ali & anr.. Vs Shyam Kishore Murmu & anr. (2021) 4 TAC SC
6. A.V. Padma Vs Venugopal (2012) 1 GLH SC 442
7. Smt. Hansaguri P. Ladhani Vs OICL (2007) 2 GLH 291
8. Bajaj Allianz Gen. Ins. Co. Pvt. Ltd. Vs UOI & ors.

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

1. By way of this appeal, the appellants has challenged the judgment and order dated 12.12.1994/14.12.1994 passed by Motor Accident Claims Tribunal / IIIrd Additional District Judge, Etah (hereinafter referred to as "Tribunal") in M.A.C.P. No. 115 of 1992 (Smt. Ram Beti and another Vs. Suresh Chandra and others) awarding a sum of Rs. 61,160/- as compensation to the

claimants/appellants with interest at the rate of 12% per annum from the date of filing the claim petition.

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

3. The brief facts of the case are that claimants-appellants filed a Motor Accident Claim Petition before the Tribunal for claiming the compensation under Motor Vehicles Act, 1988 for the death of Ram Bilas in a road accident with the averments that on 13.1.1991, Ram Bilas-deceased was going to his village from village Ambari on his bicycle. When he reached at village Kathauli, a scooter no. U.P. 82 2296, which was being driven very rashly and negligently by its driver. The aforesaid scooter being driven in such a manner dashed deceased's bicycle. In this accident, deceased sustained very serious injuries and died during the treatment in the hospital on 14.1.1991.

4. Aggrieved mainly with the compensation awarded, the appellants have preferred this appeal.

5. The accident is not in dispute. The issue of negligence has attained finality as neither the Insurance Company nor the owner of the vehicle has disputed the same even in oral submissions. The driver of the said vehicle was having valid and effective driving licence on the date of accident is also a decided fact. The vehicle being insured and there being no breach of policy condition is a finding, which has attained finality. The only issue to be decided is the quantum of compensation awarded by the Tribunal.

6. Learned counsel for the appellants has submitted that learned Tribunal has

considered the income of the deceased will have to be Rs.2,000/- per month to which 40% will have to be added towards future loss of income and 1/2 will have to be deducted for personal expenses. It is also submitted by learned counsel for the appellants that learned Tribunal has awarded amount of Rs.5,000/- for medical expenses. It is further stated that the learned Tribunal has not granted any amount under the head of non pecuniary damages. The deceased was 25 years of age at the time of accident, hence, the multiplier applicable would be 18. In support of the above arguments, learned counsel for the appellant has relied on the decision in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093 & Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121.**

7. As against this, learned counsel for the respondent-Insurance Company has contended that the quantum of compensation awarded by the Tribunal is just and proper. The income which is asked for cannot be granted in absence of any evidence to prove the same. It is also submitted that in the year of accident, the multiplier was that of the parents to be applied.

8. This Court cannot accept the submission of learned counsel for the respondent that amount is just and proper and the multiplier was that of the parents to be applied. The law on the point is now well settled that multiplier would be that of the deceased.

9. Having heard learned counsel for the parties, the income of the deceased can be considered to be Rs.2,000/- per month i.e. Rs.24,000/- per annum. The deceased

will fall within the category of self employed and his age was in the age bracket of 25-30 years at the time of accident, hence, 40% of income shall be added towards future loss of income and 1/2 shall be deducted for personal expenses as held by Hon'ble Apex Court in ***National Insurance Company vs. Pranay Sethi [2014 (4) TAC 637 (SC)]***. Keeping in view the age of the deceased, multiplier of 18 will be admissible in the light of the judgment of Hon'ble Apex Court in the case of ***Smt.Sarla Verma vs. Delhi Transport Corporation [2009 (2) TAC 677 (SC)]***.

10. As far as non-pecuniary damages are concerned, the Tribunal has not awarded any sum towards non pecuniary damages. The parents/claimants shall be entitled to get Rs.30,000/- for loss of consortium in the light of the judgment of Hon'ble Apex Court in the case of **Kurvan Ansari alias Kurvan Ali and another vs. Shyam Kishore Murmu and another [2021 (4) TAC (SC)]**.

11. Hence, the total amount of compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

- (i) Annual Income : Rs.24,000/-
Per annum (Rs.2,000 X 12)
- (ii) Percentage towards future prospects 40% : Rs. 9,600/-
- (iii) Total income : Rs. 24,000/- + Rs.9,600/- = Rs. 33,600/-
- (iv) Income after deduction 1/2: Rs.33,600/- - Rs.16,800/- = Rs.16,800/-
- (v) Multiplier applicable : 18
- (vi) Loss of Dependency : Rs. 16,800/- X 18 = Rs.3,02,400/-
- (vii) Amount under non pecuniary head : Rs. 30,000/-

(viii)	Total	compensation	:
Rs.3,02,400/-	+	Rs.30,000/-	=
Rs.3,32,400/-			

12. The rate of interest 12% cannot be granted on enhanced amount. The rate of interest would be 7.5% from the date of filing the claim petition till the award and 6% thereafter.

13. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within 8 weeks from today. The amount already deposited be deducted from the amount to be deposited.

14. Record and proceedings be sent back to the Tribunal forthwith. The amount be paid to the claimants and no amount be kept in fixed deposit.

15. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

16. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to

deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount. The said decision has also been reiterated by High Court Gujarat in R/Special Civil Application No.4800 of 2021 (The Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS) decided on 5.4.2022.

17. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of *A.V. Padma (supra)*. The same is to be applied looking to the facts of each case.

18. The Tribunal shall follow the guidelines issued by the Apex Court in *Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others vide order dated 27.1.2022*, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

(2023) 5 ILRA 164
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2023

BEFORE

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

First Appeal From Order No. 404 of 2001

Smt. Bindu Singh ...Appellant
Versus
Hari Pratap Singh & Anr. ...Respondents

Counsel for the Appellant:
 Sri Ram Singh, Sri Amit Kumar Sinha

Counsel for the Respondents:
 Sri Amaresh Sinha, Sri Abubhav Sinha

A. Civil Law - Motor Vehicles Act, 1988 - Section 173 - Tribunal rejected the claim on the ground that claimant lodged FIR after 2 and a half month, witnesses are husband and wife and also belies medico-legal evidence-Rather, the medico-legal evidence supports the claimant's case as the injuries were noticed to be fresh , the report is absolutely compatible with the initial and emergency examination in the case of a motor accident-The claimant's case would not stand discredited, because during treatment some other disease or problem was discovered-Merely because another injured on board the vehicle alongside the claimant has not been produced, would not render the claimant's case suspect, where by evidence aliunde it is proven-No reason to draw an adverse inference against the claimant- The matter remitted back to Tribunal to decide afresh.(Para 1 to 32)

The appeal is partly allowed. (E-6)

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

This is a claimant's appeal under Section 173 of the Motor Vehicles Act,

1988 (for short, 'the Act') arising out of a judgment and award passed by the Motor Accident Claims Tribunal/ the 10th Additional District Judge, Allahabad dated 02.09.2000 in MACP No.584 of 1996, rejecting the claim petition.

2. A claim petition was instituted by the claimant-appellant, Smt. Bindu Singh (for short, 'the claimant') before the Motor Accident Claims Tribunal/ the District Judge, Allahabad on 04.09.1996 with the case that on 15.06.1996, the claimant along with her family members was travelling on board Jeep, bearing registration No. UP-70F-1028 from Allahabad (now Prayagraj) towards Rewa. At about 9 o'clock in the evening when the Jeep was moving on the Allahabad-Rewa Road and had reached a place called Village Barethi, within the local limits of Police Station Kaundhiara, District Allahabad, the Jeep driver, driving the vehicle at a high speed and negligently, hit a stationary truck on the rear side. The truck was proceeding to Rewa and was parked on the road at a place, which was dark. The tail lamps of the truck were not alight nor was it displaying any other signal about its stationary position. The Jeep driver owing to his negligence hit the truck involving the left side of the Jeep in the collision. The Jeep was badly wrecked due to the impact. The claimant, who was sitting on the left hand side of the Jeep, sustained grievous injuries and her son Sameer Kumar Singh, who was sitting by her side and another Harish Chandra @ Lallan, sitting behind the claimant, also on the left hand side, too sustained injuries.

3. The claimant asserts that she is an educated woman and would work from home under a scheme of the State Government for informal education as an Anudeshika. The said work was part time.

In addition, she would carry on business of supplying milk on her own, take care of her family as well as carry on agriculture. On account of the injuries sustained in the accident, the claimant has been left incapable of performing any productive work in future. The claimant has also asserted that she was a healthy person, but after the accident, she is no longer in a position to work either for her family or outside, as she did before. Her body has been disfigured and the injuries have left her a depressed woman. In her personal life, she has to face difficulties and reverses. She has suffered a mental and physical setback on account of the injuries which are likely to be there throughout her life.

4. It is the claimant's case that after the accident, the owner of the Jeep and the Insurer did not take any action. She reported the matter to the Superintendent of Police, Trans Yamuna, Allahabad personally appearing before him on 23.08.1996. The Superintendent of Police aforesaid ordered the competent Officer at Police Station Kaundhiara, District Allahabad to lodge a report about the accident by his order dated 23.08.1996. Thereupon, Crime No.130 of 1996, under Sections 279, 337 IPC, Police Station Kaundhiara, District Allahabad was registered on 01.09.1996, where the claimant's husband, Ashok Kumar Singh is the informant. Hari Pratap Singh was impleaded as opposite party No.1 to the claim petition, who is the owner of the Jeep in question. He shall hereinafter be referred to as 'the owner'. The United India Insurance Company Limited, 5A, Sardar Patel Marg, Civil Lines, Allahabad through its Branch Manager are opposite party No.2 to the claim petition. The said Insurance Company are the Insurers of the Jeep. The

Insurance Company is impleaded as respondent No.2 to the appeal. The Insurance Company aforesaid shall hereinafter be referred to as 'the Insurer'.

5. A written statement dated 30.07.1997 was filed on behalf of the owner, bearing paper No.10-A. The owner generally denied the allegations in the claim petition. The owner came up with a plea that the claimant's allegation that the accident happened on account of the rash and negligent driving by the Jeep driver is incorrect and without basis. He denied the factum of the accident in Paragraph No.11 of his written statement; and in Paragraph No.12 more specifically. It was not denied that the owner is the registered owner of the Jeep in question. It was also not denied that the Jeep aforesaid was insured with the Insurer, where the policy was effective from 17.12.1995 to 16.12.1996. It was also pleaded that the vehicle, in any case, was being driven by a duly authorized driver, of course, maintaining the stance that the Jeep in question was not involved in any accident.

6. A separate written statement dated 10th July, 1998 was filed on behalf of the Insurer, bearing paper No.17-A. The allegations in the claim petition were generally denied in the first part of the Insurer's pleadings, and in the additional pleas, it was averred that the registration book, the driving licence and the route permit of the vehicle in question, besides other papers, have not been filed along with the claim petition. There is a queer sentence in Paragraph No.24 of the Insurer's written statement, which says, quite without any sense to it that 'The petition being infructuous and ambiguous, is liable to be dismissed'. The written statement being signed by an Advocate, who would have

certainly gone through its contents, one would not expect this kind of senseless pleading. It is then pleaded on behalf of the Insurer, on the same lines as the owner, that no accident ever took place, involving the Jeep in question. There is also a plea that the vehicle was being driven against the terms and conditions of the Insurance Policy at the time of the accident. There is a plea on behalf of the Insurer that the Jeep in question was being driven as a taxi at the time of the accident, and, as such, the claim petition is not maintainable. There is also a plea about non-joinder of necessary parties, urged on foot of the fact that the owner and the Insurer of the truck have not been impleaded. It is averred that at the time of the accident, the driver of the vehicle in question did not hold a valid and effective driving licence to drive the particular type of vehicle. The Insurer has pleaded that, therefore, they are not liable.

7. On the aforesaid pleadings of parties, the Tribunal has framed the following issues (translated into English from Hindi):

"1. Whether on the date of the alleged accident i.e. 15.06.1996, the driver of the vehicle, bearing registration No. UP-70F-1028 caused the accident (with vehicle, bearing registration No. CPA/3812) on account of driving the vehicle at a high speed and negligently? If yes, its effect?

2. Whether the driver of the said Jeep, bearing registration No. UP-70F-1028 at the time of the accident, did not possess a valid driving licence? Effect?

3. Whether the Jeep was being driven in contravention of the terms and conditions of the Insurance Policy? If yes, its effect?

4. The claimant is entitled to receive what amount of compensation and from which of the opposite party?

5. Whether the claim petition is bad for non-joinder on account of non-impleadment of the owner of vehicle No. CPA/3812? Effect?"

8. The claimant entered the witness-box testifying in support of her case as PW-1. Her husband, Ashok Kumar Singh was examined as PW-2. Through a list of documents, paper No.20-Ga, a carbon copy of the FIR dated 01.09.1996, a copy of the application dated 02.08.1996 moved before the Insurer, a carbon copy of the information sent to the S.S.P., Allahabad on 23.08.1996 and a cash-memo showing purchase of medicines etc. were filed. The owner filed a photostat copy of the driver's driving licence and Insurance Policy, besides the registration certificate of the Jeep.

9. This Court notices that apart from the summary of evidence which the Tribunal has noted in its judgment, there are also documents on record, such as the ultrasound scan report and injury report dated 16.06.1996 issued by the Emergency Medical Officer, S.R.N. Hospital, Allahabad, noting three injuries on the claimant's person with the remark that the injuries be kept under observation and advising an x-ray examination. There are also x-ray plates on record from a certain Raj Nursing and Maternity Home. In addition, there is a prescription dated 16.09.1996 by Dr. A.K. Pradhan, Plastic and Reconstructive Surgeon, Varanasi, noting it to be a case of accidental injury, already treated at Allahabad. There are prescriptions by other doctors as well.

10. The Tribunal in returning its findings on Issue No.1 has taken note of the fact that the Jeep in question being involved in the accident or the accident ever happening involving the vehicle has been denied. It has been remarked that the burden to prove the accident and the injuries sustained there, would, therefore, be upon the claimant. The Tribunal has noted that the claimant has testified herself as PW-1 and her husband, Ashok Kumar as PW-2. The Tribunal has remarked that both the witnesses are interested witnesses. It has been noted that both witnesses are said to be travelling on board the Jeep in question on 15.06.1996 in the evening hours at 9 o'clock when the accident is said to have happened, involving truck No. CPA/3812. The Tribunal has remarked that a prompt FIR about the accident has not been lodged by the driver of either vehicle. Ashok Kumar Singh has made his first written report on 01.09.1996, that is to say, after about two and a half months of the accident. No reason has been shown explaining this delay.

11. The Tribunal has observed that the natural course of action after an accident is that the driver or the injured would get an FIR lodged with the Police. The delay in lodging the FIR, therefore, leads to a situation, in the Tribunal's opinion, where the claimant's testimony in the witness-box, does not receive any support from it. The Tribunal has noted that PW-1 in her testimony has said that she was proceeding along with her family to Satna, Madhya Pradesh and PW-2, Ashok Kumar too has also said that the family were proceeding from Allahabad to Satna. The Tribunal has remarked that in the FIR dated 01.09.1996 lodged with the Police by Ashok Kumar Singh, it has been mentioned that the family were proceeding from Allahabad to

Maihar. By contrast, the Tribunal observes that in the claim petition it is stated that the family were proceeding from Allahabad to Rewa. The Tribunal has opined that this is a contradiction which makes the claimant's case suspect.

12. PW-2, Ashok Kumar has also been noted by the Tribunal to have said in his testimony that apart from the two witnesses, their family members were also travelling on board the Jeep and that in the accident, his wife and Harish Chandra alone sustained injuries. However, no injury report relating to Harish Chandra's injuries has been placed on record. Harish Chandra has also not been examined as a witness on behalf of the claimant. The Tribunal has opined that the claimant has, thus, not produced a material and important witness.

13. The Tribunal has gone on to say that the claimant has said in her testimony that after the accident, she lost consciousness and was examined at the S.R.N. Hospital, Allahabad on 16.06.1996 at 1.05 a.m. The Tribunal has observed that the medical examination report shows only three injuries, but does not record the fact that the claimant had fainted. Noting the injuries, the Tribunal records that according to the medico-legal report, the claimant had an injury between her forehead and cheek, measuring 1.5 cm x 3 cm, which was an open wound. She had a bone deep wound on her chin - 8 x 2cm, and a swelling on her chest 25x25 cm. The report, according to the Tribunal, notes that all injuries are simple in nature, caused by a blunt object. The injury report does not record the fact that the injuries have been sustained in a motor accident. It has been remarked that at the time of undergoing medical examination, the claimant had not said that

she has sustained injuries in a motor accident. The Tribunal has held that in view of all these facts, the medico-legal evidence does not support the claimant's case about the accident.

14. The Tribunal has then gone on to examine the cause for the delay assigned by the claimant in lodging the FIR. It has been noted that it is the claimant's case that the owner of the vehicle in question had promised the claimant that he would ensure that the Insurer paid the compensation due and that it is for the said reason that the claimant did not lodge an FIR. The Tribunal has taken note of the claimant's submission that the aforesaid assertion by the claimant in the claim petition has not been specifically denied by the respondents in their written statements. There is apparently no denial of the assertion. The Tribunal, however, has remarked that the provisions of Orders V and VI of the Code of Civil Procedure do not apply *proprio vigore* to the trial of a claim under the Act. As such, non-traverse of the said plea in the Tribunal's opinion is not of much consequence.

15. The Tribunal has remarked that the owner in his additional pleas has specifically denied the involvement of the vehicle in the accident. On this state of pleadings if the claimant wanted to prove that she had laid a claim before the Insurer, burden lay upon her to prove it. The Tribunal has observed that to discharge the said burden, the claimant has filed a copy of an application made before the Insurer by Ashok Kumar on her behalf, but the said application, bearing paper No.20-Ga/4 has not been proved in accordance with law. There is a remark by the Tribunal that this application has not been made to the Insurer by the owner, and, therefore, it

cannot be inferred that the owner had promised the claimant that he would secure compensation for her from the Insurer. There is then a mixed up remark by the Tribunal saying that if in a situation of this kind, the claimant wanted to benefit out of the fact, she had to specially prove it.

16. To all seeming the fact mentioned in this finding, which the Tribunal speaks about, appears to be about the claimed promise by the owner that he would ensure that the Insurer paid compensation to the claimant. The Tribunal next remarks that the said plea by the claimant is not liable to be accepted in the absence of evidence. The Tribunal says that it is noteworthy that Ashok Kumar, who had made the application to the Insurer, was examined as PW-2, but he has not proved the said application. Therefore, the claimant's case pleaded and her evidence are at variance.

17. The next reason to disbelieve the claimant's case assigned by the Tribunal is that the claimant was sitting not on the front seat, but the one behind it, whereas the owner of the vehicle in question and the claimant's son was sitting on the front seat, next to the driver. It is remarked by the Tribunal that the claimant does not speak about the injuries sustained by the owner and her son, Sameer, who were sitting on the front seat, next to the driver, and it is unnatural that they would not sustain injuries. The Tribunal has proceeded to hold that the aforesaid fact shows that the claimant's testimony is one based on imagination.

18. It is next observed by the Tribunal that PW-2, Ashok Kumar in his testimony says that on the front seat, the driver, the owner, Harish Chandra and another man, were sitting, but none of these men have

been produced in evidence by the claimant. It is also observed that the stationary truck's driver, cleaner or other person, who had witnessed the accident, have not been produced as witnesses too. The Tribunal has opined that on the basis of the said evidence, it cannot be held that the Jeep in question was involved in the accident, that is alleged to have happened on 15.06.1996 on account of the driver's mistake and negligence, and wherein the claimant sustained injuries.

19. The Tribunal has not ended its opinion on Issue No.1 with the aforesaid remark, but has gone ahead to consider some unnecessary submissions by the learned Counsel appearing for the Insurer. The Tribunal has noted the submission of the learned Counsel for the Insurer to the effect that the claimant is habitual in laying claims for compensation. In support of his submission, the learned Counsel for the Insurer before the Tribunal had come up with a case that the claimant had purchased cattle after securing a loan. She had shown the cattle to have died and realized compensation from the Insurance Company. Papers in regard to loss on account of cattle heads dying have been noticed as paper Nos. 20-Ga/13 to 20-Ga/16.

20. There is then note of another argument by the learned Counsel for the Insurer, which says that papers relating to treatment undertaken by the claimant at the Jeevan Jyoti Hospital relate to breast cancer and the purchase vouchers for medicines also relate to drugs, which are meant for treatment of cancer. The Tribunal has remarked that there is nothing on record to show that the claimant has suffered from cancer on account of the injuries sustained in the accident. If the claimant wanted to

prove that she suffered cancer on account of the injuries, burden lay upon her to prove it by medical evidence. The Tribunal has remarked that apparently the claimant has not suffered breast cancer in consequence of the accident. On the basis of these added remarks, the Tribunal has reiterated its opinion that the alleged accident on 15.06.1996 involving the Jeep in question never happened.

21. Issue No.2 has been decided against the Insurer as also Issue No.3, both for want of evidence being led by the Insurer. Issue No.5 has also been decided against the owner and the Insurer holding that the owner and the Insurer of the truck are not necessary parties. Issue No.4 has been decided against the claimant, being a sequitur to the findings on Issue No.1, holding that the accident never happened.

22. Heard Mr. Amit Kumar Sinha, Advocate holding brief of Mr. Ram Singh, learned Counsel for the claimant and Mr. Anubhav Sinha, Advocate holding brief of Mr. Amaresh Sinha, learned Counsel for the Insurer. No one appears on behalf of the owner. The lower court records have been perused.

23. The Tribunal has commenced appreciation of the testimony of PW-1 and PW-2 on a note of suspicion for no good reason. The Tribunal has observed that both the witnesses are interested witnesses, though not much is said thereafter. This remark of the Tribunal seems to have coloured its vision in appreciating the testimony of the two eye-witnesses. PW-1 is one of the injured and she has testified in intricate detail about the manner in which the accident happened, which has been largely corroborated by the testimony of PW-2, Ashok Kumar, her husband, also a

passenger on board the ill-fated vehicle. There is no principle or even a rule of prudence by which the testimony of two passengers on board an ill-fated vehicle is to be held suspect merely because they are man and wife and one of them is the claimant. It is the claimant's case that she was travelling on board the ill-fated vehicle along with her family. In her testimony, she has given the details of the family members, who were travelling. It includes her husband, PW-2, Ashok Kumar, besides her two sons. In the circumstances, the Tribunal was not right in suspecting the testimony of PW-1 and PW-2 for reason that they are man and wife.

24. The next finding, which is more effectual than the first inchoate one, is that the FIR having been lodged on 01.09.1996 by the claimant's husband, Ashok Kumar Singh with no report being lodged about the accident earlier, does not lend support to the claimant's case. This finding by the Tribunal, though true about the fact that the FIR was registered two and a half months after the occurrence, is not sustainable. It is imperative to note that in Paragraph No.6 of the claim petition under Column No.23, there is a specific averment that information with the Police was not lodged, because the owner and his son R.K. Jaiswal, who are men of high reputation in the locale, had assured the claimant and her husband that they would ensure payment of compensation to the claimant, which later on they did not fulfil; and this averment has not been denied or rebutted in the least measure in the written statement filed on behalf of the owner, or for that matter the Insurer. The Tribunal has made small of this non-traverse by saying that the principles of Orders V and VI CPC do not apply *proprio vigore* to proceedings before the Tribunal. Non-denial of a material fact,

whether in proceedings before a Court of civil jurisdiction governed by the Code of Civil Procedure or otherwise, would lead to the same result. A non-traverse leads to the inference that some kind of a promise was made by the owner and his son to the claimant that they would ensure payment of compensation. If in those circumstances, in a case of injury, an ordinary man does not promptly lodge an FIR, where there is other tangible evidence about the happening of the accident, the delay would not work to discredit the claimant's case. The lodging of an FIR is not a pleasant task for an ordinary man. It is common experience that unless the offence is serious, men of the world avoid interacting with the Police to lodge informations, though that is not the explanation here. In the opinion of this Court, it is certainly a relevant factor to judge the conduct of the claimant in not promptly reporting the accident to the police, in the face of a promise by the owner and his son that compensation would be ensured to her for the injuries. The FIR, in the opinion of this Court for the said reason, cannot be discounted altogether, though its probative value may be far lesser than an information promptly lodged with the Police.

25. The next finding, which the Tribunal has recorded to disbelieve the claimant's case is that in their testimony PW-1 and PW-2 have said that they were proceeding from Allahabad to Satna whereas in the FIR lodged by PW-2 on 01.09.1996, it is alleged that the claimant and her family were proceeding to Maihar; as against this in the claim petition the averment is that the claimant was proceeding to Rewa. All this has been held to be a contradiction that renders the claimant's case undependable and suspect. A perusal of the testimony of PW-1 and

PW-2, no doubt says that the family were proceeding from Allahabad to Satna, but to find a contradiction in it with reference to the FIR, because it mentions that the claimant and her family were proceeding to Maihar, is based on a pedantic reading of the evidence instead of one that is realistic. Maihar is a Tehsil of District Satna in Madhya Pradesh, reputed for its position as a place of pilgrimage. If, therefore, the claimant and her witnesses mentioned their destination as Satna in her testimony, but PW-2 has described it as Maihar in the FIR lodged, it may not be a contradiction at all. It would be a contradiction, if the respondents had confronted PW-2 with reference to his previous statement in the FIR, and he had not explained satisfactorily why the destination was differently described. Since that was not done, the evidence has to be liberally viewed in favour of the claimant, unless the discrepancy be inexplicable. It has to be liberally viewed, because after all a motor accident claim is a proceeding under a beneficial piece of legislation, which is not to be tried with the stickler approach of a money suit.

26. So far as the pleading in this regard is concerned, the Tribunal has observed in manifest error that in the claim petition, the claimant has asserted that the family were proceeding from Allahabad to Rewa. In Column No.9, the place of accident has been mentioned as 'Allahabad-Rewa Road'. In Column No.26, where the case has been descriptively set out, the pleading is: 'जीप वाहन सं० UP-70F-1028 जिसमें याचिनी अपने परिवार के सदस्यों के साथ इलाहाबाद से रीवा की तरफ यात्रा कर रही थी'. The said plea does not show it to be a case that the claimant has asserted that she and her family were proceeding from Allahabad for destination Rewa. It rather says that the vehicle was

moving towards Rewa. It is a fact of which judicial notice must be taken that in order to proceed to Maihar, which is located in District Satna, one has to take the Allahabad-Rewa Road, reach Rewa first before entering Tehsil Maihar, the pilgrimage being located 42 kilometers from Satna. Reading the evidence holistically, one can unmistakably infer that there is absolutely no contradiction in the claimant's testimony about their destination. In the claim petition, it may be a contextual reference to Rewa and elsewhere an incomplete reference to the destination. The Tribunal has completely lost sight of these facts and lost touch with reality while evaluating the claimant's evidence on this score. The finding of the Tribunal based on the contradiction about the destination cannot be sustained.

27. The other reason to disbelieve the claimant's testimony about the accident ever happening is that the claimant has not produced Harish Chandra, the other passenger on board besides her, who had sustained injuries. It has been held that failure to produce the aforesaid witness leads to withholding important evidence. From this, though not said explicitly, an adverse inference has been drawn. The said finding is also not sustainable. Merely because another injured on board the vehicle alongside the claimant has not been produced, would not render the claimant's case suspect, where by evidence *aliunde* it is proven. Also, there is no reason to draw an adverse inference against the claimant, because another injured on board the ill-fated vehicle has not been produced as a witness.

28. It is next held by the Tribunal that the claimant's case is belied by medico-legal evidence. It is remarked that the

claimant has said in her testimony that she had fainted at the time of the accident, but the medical report from S.R.N. Hospital dated 16.06.1996 recorded at 1.05 a.m. does not say that the claimant was unconscious. Lapse on the part of a doctor of this kind cannot be read to disbelieve that the claimant never sustained injuries.

29. The further feature of this finding about the medico-legal evidence is that the Tribunal has, after a description of the injuries, held that all injuries were found to be simple in nature, caused by a hard and blunt object. The said part of the finding suffers from an error apparent on the face of the record. A perusal of the report dated 16.06.1996, authored by the Emergency Medical Officer, S.R.N. Hospital, Allahabad in original (which a document torn at some places) clearly shows in the 'opinion' that the injury was caused by a hard and blunt object, which was to be kept under observation with an advice for x-ray examination. The duration is fresh. The report further reads that the patient be admitted. It also says that the Police and RSO were informed. All this part of the report has been utterly misread by the Tribunal. The medico-legal report nowhere says that the injury is simple. Rather, it has opined it to be one that was to be kept under observation with an advice for x-ray examination. The Police too have been informed showing the medico-legal character of the injuries. If, therefore, the Doctor has omitted to mention that the case is one relating to a motor accident, the omission again is by the Doctor and not of any consequence to the claimant. The Tribunal, therefore, has erred in holding that the medico-legal report not mentioning the fact that the injuries were sustained in a motor accident casts doubt on the claimant's case. The concluding part of the

finding by the Tribunal which says that the claimant's case is not supported by medico-legal evidence, for all the reasons above indicated, is not at all sustainable. Rather, the medico-legal evidence supports the claimant's case as the injuries were noticed to be fresh and the Doctor instructed the Police to be informed. The injuries were kept under observation and advised for x-ray examination. The report is absolutely compatible with the initial and emergency examination in the case of a motor accident. It is, accordingly, held.

30. The Tribunal has also discredited the claimant's case, because an application dated 02.08.1996 moved before the Insurer for claiming compensation by the claimant's husband, Ashok Kumar Singh, though filed on record, has not been proved. Even if the said document has not been proved by PW-2 in the witness-box, it can be excluded from evidence, but that by itself would not discredit the claimant's case, which is otherwise well proved by the parole evidence of both witnesses. Both the witnesses, who were on board the vehicle, are broadly consistent about the evidence, which is supported not only by the medico-legal examination done initially, but by other medical evidence. There is a treatment-cum-prescription memo dated 16.09.1996 by Dr. A.K. Pradhan, Surgeon, who has mentioned in his prescription that the case is one of accidental injury. The said prescription is by a Plastic Surgeon, who was consulted later on for reconstructive surgery. The patient has been for the most part treated at Raj Nursing Home, Allahabad and also NEMA Eye Hospital, Varanasi. The prescription by the Doctor at the NEMA Eye Hospital again mentioned it to be a case of accident. PW-1 has testified in her examination-in-chief that she was treated from 16.06.1996 to

30.06.1996 at Raj Nursing Home, Allahabad and thereafter as an outdoor patient. It is mentioned that Dr. A.K. Pradhan of Dr. Shiv Prasad Gupta Hospital, Varanasi also treated her. The medical prescriptions and the medicine vouchers on record from Raj Nursing Home and the prescription from Dr. Pradhan prove that the claimant was in the first instance treated for her injuries and then undertook treatment for some reconstructive facial surgery. She also had to undergo some treatment in respect of her eyes. All this evidence would go to show that the accident, which the claimant asserts was a reality. It is not a farce as the Tribunal has held. The remarks by the Tribunal that the claimant was treated for cancer are completely misplaced. The medical records show that there was some kind of a lump somewhere that was suspected and an FNAC advised. The findings of the Tribunal that she was prescribed medicines for breast cancer do not appear to be justified at all. In any case, the development of a subsequent problem or a chance discovery alongside the treatment for injuries suffered in consequence of the accident, cannot benefit the owner or the Insurer. The claimant's case about the accident and the injuries sustained in it, would not stand discredited, because during treatment some other disease or problem was discovered, which too was treated, if that be the case.

31. In the considered opinion of this Court, the findings recorded by the Tribunal on Issue No.1 cannot be sustained. The findings on the the said issue are **set aside**. Issue No.1 is, accordingly, answered in favour of the claimant and against the owner and the Insurer. Issues Nos.2, 3 and 5 have already been answered in favour of the claimant by the Tribunal. These need

not be examined further either by this Court or by the Tribunal in consequence of the order that this Court proposes to make. This leaves this Court with the fourth Issue, about which there are no comments by the Tribunal at all. The issue has not at all been examined in consequence of the findings on Issue No.1. Since the findings on Issue No.1 have been reversed by this Court, Issue No.4 is required to be determined by the Tribunal in the first instance and the quantum of the award decided on the basis of the evidence of record. Parties would be at liberty to lead further evidence, if they so desire on the issue of quantum alone. No other matter is required to be re-determined by the Tribunal.

32. In the result, this appeal succeeds and is **allowed in part**. The impugned judgment and award dated 02.09.2000 is **set aside**. The matter is remanded to the Tribunal for hearing parties afresh on Issue No.4 and passing an award in accordance with law determining just compensation. The matter shall be decided afresh within a period of **three months** next from the date of receipt of certified copy of this judgment by the Tribunal.

33. Let the record be sent down at once to the Tribunal which now has jurisdiction in the matter.

(2023) 5 ILRA 174

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 14.03.2023

BEFORE

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

First Appeal From Order No. 560 of 1997

Smt. Malti Devi & Anr. ...Appellants
Versus
Virendra Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Madhav Jain

Counsel for the Respondents:
Sri Amaresh Sinha, Sri Amresh Singh, Sri
Anubhav Sinha

**A. Civil Law - Motor Vehicles Act, 1988 -
Section 173 - challenge to-quantum of
compensation of a minor child-Tribunal
considered notional income of 14 years
deceased child to be 300/-p.m and
ultimately assessed the total
compensation to be 52,000/- with 12%
interest-The accident occurred in the year
1994 therefore the amount of Rs.
1,56,000/- would be just and proper as
held by Apex Court in catena of decisions-
More so, rate of interest is too, it is
modified upto 7.5% after making a
substantial enhancement in the award
amount. (Para 1 to 13)**

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Kurvan Ansari @ Kurvan Ali Vs Shyam Kishore Murmu (2021) 0 SC 687
2. R.K.Malik & anr.. Vs Kiran Pal & ors. (2009) 0 SC 1113
3. Sarla Dixit Vs Balwant Yadav (1996) 3 SCC 179
4. Late Wadhwa Vs St. of Bih. (2001) 8 SCC 197
5. Kishan Gopal & anr.. Vs Lala & ors. (2014) 1 SCC 244
6. NICL Vs Mannat Johal & ors. (2019) 2 TAC 705 SC

7. A.V. Padma Vs Venugopal, 2012 (1) GLH (SC) 442,

8. Bajaj Allianz Gen. Ins. Co. Pvt. Ltd. Vs UOI & ors.

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

1. Heard Sri Madhav Jain, learned counsel for the appellant-claimants who are the parents of the minor child who succumb to death at the age of 14 of years and Sri Anubhav Sinha, learned counsel appearing on behalf of Sri Amaresh Sinha, learned counsel for the respondents.

2. This appeal, at the behest of the claimants, challenges the judgment and order dated 18.03.1997 passed by M.A.C.T/Xth-Additional District Judge, Agra (hereinafter referred to as "Tribunal") in M.A.C.P. No. 81 of 1994 awarding a sum of Rs. 52,000/- as compensation with interest at the rate of 12%.

3. Five issues are granted in favour of the claimants. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute and was decided against the respondents. The issue whether the vehicle was insured and there was any breach of policy was also answered in favour of the appellant. The respondent-Insurance Company has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. Brief facts as culled out from the record are that on 27.01.1994, deceased Rakesh Kumar was travelling in a bus bearing registration no. U.P.-80E-9416 which due to rash and negligent driving met with an accident as a result of which

deceased Rakesh Kumar sustained grievous injuries. Rakesh Kumar was admitted to S.N. Hospital, Agra where he succumb to his injuries on 29.01.1994.

5. The tribunal comes to the conclusion that the deceased was 14 years of age and therefore was not contributing to the income of the claimants and therefore considered notional income to be Rs. 600/- p.m but thereafter held that his income would be Rs. 300/- p.m namely Rs. 36,00/- p.a., granted multiplier of 15 which would be Rs. 36,000/- and granted what is known as amount under no fault liability to be Rs. 50,000/-, granted Rs. 2000/- for funeral and ultimately assessed the total compensation to be Rs. 52,000/- with 12% interest.

6. The accident occurred on 27.01.1994. It is contended by Sri Madhav Jain, learned counsel for the appellant that even in the year of accident i.e in 1994, the law was that a sum of Rs. 2,25,000/- was admissible. It is further submitted that recently the Apex Court discussing all the judgments as in the case of **Kurvan Ansari alias Kurvan Ali Vs. Shyam Kishore Murmu, 2021 0 (SC) 687** has held that for a child of 7 years also the Court has granted a sum of Rs. 4,70,000/-. After discussing all the judgments on the question of grant of compensation for the death of a minor children he has heavily relied upon the judgment of **R.K. Malik & Another Vs. Kiran Pal & Others, 2009 0 SC 1113**.

7. As against this, the learned counsel for the Insurance Company submitted that the accident occurred in the year 1994. The judgment of the Apex Court in what is known as **Upahar tragedy** be considered. The judgement of **Sarla Dixit Vs. Balwant Yadav, (1996) 3 SCC 179** and that of **Lata Wadhwa Vs. State of Bihar, (2001)**

8 SCC 197 be considered. He has further relied on the judgment of the undersigned and has contended that in the year of accident the amount of Rs. 1, 56,000/- would be just and proper.

8. Having considering all the facts and circumstances of the case, the oral objection raised under Order 43 Rule 1 C.P.C, the learned counsel for the respondent objected that the 12% rate of interest is too high, the rate of interest in the year 1997 also requires reconsideration. The amount would be for 14 year minor child in the year 1994 where the parents who are aged 45 and 47 years would be Rs. 1,56,000/- as held by Apex Court in catena of decisions. The decision of Apex Court in case of **Kurvan Ansari (supra) and Kishan Gopal and Another Vs. Lala and others (2014) 1 SCC 244** deal with the accident post year 2000.

9. As far as issue of rate of interest is concerned, it would be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

10. No other grounds are urged orally when the matter was heard.

11. In view of the above, the appeal is partly allowed. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be deposited by the respondent-Insurance Company within a period of 12 weeks from today with interest as directed above. The amount already deposited be deducted from the amount to be deposited.

12. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

13. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

14. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of

claimants in Nationalized Bank without F.D.R.

15. Record be sent back to tribunal forthwith.

16. This Court is thankful to both the learned Advocates for ably assisting this Court.

(2023) 5 ILRA 177
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2023

BEFORE

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

First Appeal From Order No. 616 of 1996

Smt. Shyam Sundari Devi ...Appellant
Versus
Ajay Kumar Gupta & Ors. ...Respondents

Counsel for the Appellant:
 Sri R.C. Srivastava, Sri S.K. Srivastava

Counsel for the Respondents:
 Sri H.N. Singh, Sri B.N. Singh

Civil Law - Motor Accident Claim -
 Appellant are claimant-accident and negligence is not in dispute-quantum of compensation is disputed-deceased was 28 years of age-working as homeguard-survived by his widow and two sons-income should be at least Rs. 1500/-per month-1/3rd to be deducted-50% of the income added for future loss-multiplier of 17 and pecuniary damages calculated.

Appeal partly allowed. (E-9)

List of Cases cited:

1. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

2. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291

3. Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna & ors. Vs Hari Singh & anr.)

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

1. Heard learned counsel for the appellant and learned counsel for respondent. Officers of National Insurance Company are present.

2. This appeal, at the behest of the claimants, challenges the judgement and decree dated 24.04.1996 passed by M.A.C.T/I-Additional District Judge, Mau (hereinafter referred to as "Tribunal") in M.A.C.P. No. 54 of 1992. The accident is not in dispute. His death by the accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The only issue to be decided is, the quantum of compensation awarded.

3. Brief facts as culled out from the record are that deceased Virendra Kumar Srivastava was working as a homeguard at police station Netpura, District Varanasi. On 07.06.1992 at about 4:00 a.m when deceased Virendra Kumar Srivastava was returning back with Sup-Inspector Kedarnath Pandey in a jeep bearing registration no. M.P.-7B/0927 after completing their work from Mau, at cemented road near dandi village near Rajdev Ram baag a truck bearing registration no. URQ-6354 going towards Gorakhpur from Mau driven by its driver rashly and negligently dashed into Jeep as a result of which deceased died on the spot along-with three other persons travelling with him.

4. The deceased was 28 years of age at the time of accident and he was working as a homeguard in Police Station Naitpura, District Varanasi. He was survived by his widow and two sons. Time has elapsed and his widow has become 63 years of age today and his sons who were minor at the time of accident have also become major, may that as it may be. He was earning Rs. 600/- p.m as a homeguard and Rs. 1400/- p.m from his medicine selling business which amounts to Rs. 2000/- p.m. The tribunal has granted a lumpsum amount of Rs. 64, 800/-.

5. It is submitted by learned counsel for the appellant that the tribunal has considered income of the deceased but has granted a lumpsum amount of Rs. 64, 800/- as far as issues are concerned.

6. After hearing the counsel for the parties and perusing the judgment and order impugned, this Court feels that deceased was a homeguard and therefore, his income atleast should be considered to be Rs.1500/- per month, 1/3rd to be deducted. To which as the deceased was 28 years at the time of accident, 50% of the income would have to be added as future loss of income to the deceased, multiplier would be of 17 and Rs. 50,000/- can be considered towards non pecuniary damages.

7. Further, this Court feels that the quantum/compensation requires to be recalculated. Hence, the total compensation payable to the appellants is computed herein below:

i. Income : Rs.1500/- p.m

ii. Percentage towards future prospects : 50% namely Rs.750/-

iii. Total income : Rs. 1500 + 750 = Rs. 2250/-

iv. Income after deduction of 1/3rd : Rs. 1500/-

v. Annual loss : Rs. 1500 x 12 = Rs. 18,000/-

vi. Multiplier applicable : 17

vii. Total loss : Rs. 18,000 x 17 = Rs. 3,06,000/-

xii. Amount under non-pecuniary head : Rs.50,000/-

xiii. Total compensation : 3,56,000/-

8. As the parties have decided to settle the issue the rate of interest would be 6% on enhanced amount from date of filing the claim petition till deposit of enhanced amount.

9. No other grounds are urged orally when the matter was heard.

10. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the additional amount within a period of 12 weeks from today with interest as directed above.

11. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

12. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The**

Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another**) while disbursing the amount.

13. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

14. The Tribunal will now not keep any amount in fixed deposit as more than 30 years have elapsed from the date of filing of the claim petition.

15. Record be sent back to the tribunal.

16. This Court is thankful to the learned counsels for ably assisting this Court.

(2023) 5 ILRA 179

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 14.02.2023

BEFORE

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

First Appeal From Order No. 651 of 1996

M/s United India Insurance Co. Ltd.

...Appellant

Versus

Suresh & Anr.

...Respondents

Counsel for the Appellant:

Sri Anubhav Sinha, Sri Vipul Kumar

Counsel for the Respondents:

Sri A.K. Singh

Civil Law - Motor Accident Claim - Respondent injured-denied by insurance company-issue of negligence decided –driver negligent-composite negligence qua the claimant who was cleaner on the vehicle –driver was negligent-injured was 26 years of age-suffered 40% disability-amount calculated is just compensation.

Appeal dismissed. (E-9)

List of Cases cited:

1. First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors.) decided on 19.7.2016

2. Khenyei Vs New India Assurance Company Limited & ors., 2015 LawSuit (SC) 469

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

1. Heard Sri Anubhav Sinha, learned counsel for the appellant. None is present for the respondent.

2. This appeal, at the behest of M/s United India Insurance Company Limited challenges the judgment and award dated 31.5.1996 passed by VIth Additional District Judge/ Motor Accident Claims Tribunal, Etah in Claim Petition No.252 of 1995 whereby the learned Tribunal has awarded Rs. 1,72,800/- as compensation with interest at the rate of 10% per annum with a direction upon the appellant herein to pay the above.

3. Be that as it may, as 27 years have elapsed, this Court deems it fit to decide this appeal where the Court had granted stay vide order dated 4.3.1997.

4. Brief facts as culled out from the record are that the respondent-injured Suresh Kumar along with one another person namely Jasveer Singh were traveling in the truck owned by respondent No.2 on the fateful day i.e. 27/28.7.1995. At about 3.00 a.m. in the morning, they were going to Ghaziabad after loading the goods in Tata 407 No. HR29A/9974 from Kashganj. The vehicle was driven by one Chhote Singh who drove the vehicle rashly and negligently. When the vehicle reached near Bulandshahr, at Sikandrabad-Delhi Road, the Tata 407 rammed into a stationery truck which injured the respondent and Jasveer Singh. From where both of them have rushed to Sikandrabad PHC. After being treated there for 24 hours, the injured was brought to Dr. Virendra Pal, the Orthopaedic surgeon who treated him.

5. On the claim petition being filed, the Insurance Company filed its reply which was one of denial they even denied

that the vehicle was insured with it. The owner of the vehicle also filed reply which was also of denial but he has accepted that Suresh Kumar was an employee/cleaner and was being paid Rs.500/- per month. However, his permanent partial disablement as cleaner has been denied. They have contended that as the owner and Insurance Company of the other vehicle has not been joined as party, the claim petition would liable to be dismissed. The Tribunal framed issues and decided issue of negligence in favour claimant holding that driver of Tata 407 was negligent.

6. It is submitted by learned counsel for the appellant that the award is bad in the eye of law as the other vehicle's owner and Insurance Company has not been joined as party. It is further submitted that the finding of the Tribunal as far as issue of negligence is concerned is bad. It is further submitted that the quantum of compensation awarded by the Tribunal is also on the higher side and requires to be modified.

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

8. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental though it is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled

by the negligent party then he is directly liable otherwise the principle of "*res ipsa loquitur*" meaning thereby "the things speak for itself" would apply.

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

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

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends

upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

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

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

19. *In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the*

point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

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

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of *res-ipsa loquitor* as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits **(per three-Judge Bench in**

Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).

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

emphasis added

11. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasons. In a case of accident caused by negligence of joint tort feasons, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasons in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasons are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feason vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasons for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In

the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in **T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]** has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of

his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in **Challa Bharathamma & Nanjappan (supra)** has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be

applied to the instant cases as the liability of the joint tortfeasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other

after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

emphasis added

12. Looking to the factual averments, the principle for deciding negligence has been properly evaluated. The vehicle in which injured was traveling rammed into the stationery truck. It was early morning when the incident took place. The driver has absented himself. The oral testimony is truthful and nothing contrary is proved by the Insurance Company. Hence, the finding is affirmed.

13. The next submission is that the owner and driver of the other vehicle involved in the accident was not joined as party. The said ground fails as it was case of composite negligence qua the claimant who was cleaner on the vehicle whose driver drove the vehicle negligently.

14. The injured was 26 years of age. He had suffered 40% disability. He was a cleaner. The injured lost his teeth, his eye sight is damaged. The amount calculated by

the Tribunal is just compensation and no inference is called for.

15. In view of the above, this appeal stands dismissed. Record and proceedings be sent back to the Tribunal forthwith. The amount kept in fixed deposit be forthwith disbursed to the respondent No.1.

16. This Court is thankful to Anubhav Sinha, learned counsel for the appellant for getting this old matter disposed of.

(2023) 5 ILRA 185
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.04.2023

BEFORE

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

First Appeal From Order No. 962 of 1994

Shrimati Kamlesh & Ors. ...Appellants
Versus
Rajendra Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Y.S. Bohra

Counsel for the Respondents:
Sri Arvind Kumar, Sri Anubhav Sinha

Civil Law - Motor Accident Claim- Impugned award-accident and issue of negligence not dispute-quantum of compensation to be decided-deceased was 27 years-Tribunal – wrongly assessed monthly income as Rs. 600-it would be at least Rs. 900 per month in the year of accident-deceased was in age bracket of 26-30- 40 % can be granted-1/3 deduction granted-multiplier would be 17-no-pecuniary damages granted.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 LawSuit (SC) 1093

2. Sarla Verma & ors. Vs Delhi Transport Corporation & anr., 2009 LawSuit (SC)

3. Gobald Motor Service Ltd. & anr. Vs R.M.K Veluswami & ors., 1962 SCR(1) 929

4. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

5. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

6. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291

7. Review Application No.1 of 2020 in First Appeal From Order No. 23 of 2001 (Smt. Sudesna & ors. Vs Hari Singh & anr.)

8. R/Special Civil Application No.4800 of 2021 (The Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS) decided on 5.4.2022.

9. Bajaj Allianz General Insurance Company Pvt. Ltd. Vs U.O.I.

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

1. Heard Sri Y.S. Bohra, learned counsel for the appellant, Sri Anubhav Sinha, learned counsel for respondent - insurance company and perused the judgment and order impugned. None appears for owner.

2. This appeal, at the behest of the claimant, challenges the judgment and award dated 11.05.1994 passed by the Motor Accident Claims Tribunal/Additional District Judge, Bulandshahr (hereinafter referred to as 'Tribunal') in M.A.C.P No.29 of 1984 awarding a sum of Rs.85,000/- as compensation with interest at the rate of 12%.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The only issue to be decided is the quantum of compensation awarded.

4. The accident took place on 08.07.1984. The deceased was 27 years of age and was an agriculturist. Deceased-Nanak Chand who was 27 years of age left behind him, his widow and three minor children which fact is not in dispute. The Tribunal considered his income to be Rs.600/- per month, granted multiplier of 20 and that is how the Tribunal has calculated the total compensation to be Rs.85,000/-

5. Sri Y.S. Bohra, learned counsel for the appellant submits that the income of the deceased should be considered to be at least Rs.1,500/- per month. It is further submitted by learned counsel for the appellants that the Tribunal has not added any amount under the head of future loss of income which should be granted in view of decision in of the Apex Court in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093**. It is also submitted that the Tribunal has applied the multiplier of 20, which would be 17 in view of the decision of the Apex Court in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC)**.

6. As against this, Sri Anubhav Sinha, learned counsel for respondent-Insurance Company has contended that multiplier of 20 granted by Tribunal is exorbitant and it would suffice for non grant of amount under the head of non pecuniary loss and future loss of income. Learned counsel further submits that in the year of accident in the State of U.P., no future prospect was

granted. Learned counsel further submits that even in the year of accident in 1984, the repo rate was not 12% and interest granted at the rate of 12 % is exorbitant.

7. Heard the learned counsels for the parties and considered the factual data. It is an admitted position of fact that the Insurance Company has accepted the award and has not challenged the same. This Court finds that the accident occurred on 08.07.1984 causing death of Nanak Chand who was 27 years of age at the time of accident. The Tribunal has assessed his income to be Rs.600/- per month which according to this Court, in the year of accident, would be at least Rs.900/- per month as he was farmer. To which as the deceased was in the age bracket of 26-30, 40% of the income will have to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. Looking to the general trend even in **Gobald Motor Service Ltd. and another Vs. R.M.K Veluswami and other, 1962 SCR(1) 929**, the addition of 40% can be granted and 1/3 deduction will have to be granted. The multiplier would be 17 to which looking to the pendency of the matter which has been pending here since more than 30 years. Rs.1,00,000/- under the head of non pecuniary damages would suffice for claimants.

8. Hence, the total compensation payable to the appellants is computed herein below:

i. Annual Income Rs.10,800/- (Rs.900/- per month)

ii. Percentage towards future prospects : 40% namely Rs.4,320/-

iii. Total income : Rs.10,800/- + Rs.4,320/- = Rs.15,120/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.10,080/-

v. Multiplier applicable : 17vi. Loss of dependency: Rs.10,080 x 17 = Rs.1,71,360/-

vii. Amount under non pecuniary heads : Rs.1,00,000/-

viii. **Total compensation : Rs.2,71,360/-**

9. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

10. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest as directed above. The amount already deposited be deducted from the amount to be deposited. Record and proceedings be sent back to the Tribunal forthwith.

11. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

12. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in **First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount. The said decision has also been reiterated by High Court Gujarat in R/Special Civil Application No.4800 of 2021 (**The Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS)**) decided on 5.4.2022.

13. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The

Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

14. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India** and others vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

15. This Court is thankful to both the counsels for getting this matter decided.

(2023) 5 ILRA 188
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 1109 of 2019

Tata A.I.G. General Insurance Co. Ltd.,
Aligarh **...Appellant**

Versus

Vishnu & Ors. **...Respondents**

Counsel for the Appellant:
 Sri Sushil Kumar Mehrotra

Counsel for the Respondents:
 Sri A.T. Pandey, Sri Anupam Shyam Dwivedi, Sri Sudhir Dixit, Sri Utkarsh Dixit, Sri Ashutosh Pandey

Civil Law - Motor Accident Claim-claimants-respondents was injured-sustained permanent disability up to 40 % -established by applicable standard of evidence- unbroken chain of evidence in the record links the accident, injuries, medical treatment and the permanent disability-accident caused by offending vehicle- permanent disability led to regular loss of income-claimant is a public performer-claimant entitled for future prospects-compensation increased from Rs.5,00,800 to Rs. 6,77,920/.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Pappu Deo Yadav Vs Naresh Kumar, 2020 0 AIR (SC) 4424
2. APSRTC represented by its General Manager Vs M. Ramadevi & ors., 2008 (3) SCC 379
3. Cholamandalam Ms. General Insurance Co. Ltd. through its Branch Manager Vs Sumitra & ors., 2018 (2) ACC 826
4. Jitendra Kimshankar Trivedi & ors. Vs Kasam Daud Kumbhar & ors., (2015) 4 SCC 237
5. Arun Kumar Agarwal & anr. Vs National Insurance Company Ltd. & ors., (2010) 9 SCC 218
6. Mahant Dhangir & anr. Vs Madan Mohan & ors., AIR 1988 SC 54
7. Delhi Electric Supply Undertaking Vs Basanti Devi, AIR 2000 SC 43
8. National Insurance Co. Ltd. Vs Smt. Vidyawati Devi & ors., First Appeal From Order No.2389 of 2016
9. New India Assurance Co. Ltd. Vs Smt. Suman Mishra & ors., 2019 (5) ADJ 669

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This instant appeal arises from the judgment and decree/award dated on 22.2.2019, rendered by the Motor Accident Claims Tribunal/13th Additional District

Judge, Aligarh in M.A.C.P. No.731 of 2014 (Vishnu vs. Tata A.I.G. General Insurance Company Ltd. and others).

I. Facts of the Case:

2. Briefly, the case of the claimants-respondents before the learned tribunal was that the claimant-respondent was injured in an accident on 26.8.2014 which was caused by the rash and negligent driving of offending driver of Bolero Jeep No. U.P. 81-X/0168. Apart from grievous injuries the respondent-claimant also sustained a permanent disability in the accident. Among losses suffered by the claimants-respondents were recurring a huge loss of income caused by the permanent disability. The Insurance-company resisted the claim of the respondent-claimant before the learned tribunal by filing pleadings.

3. Both parties adduced evidence before the learned tribunal. The learned tribunal partly allowed the claim petition and awarded compensation to the respondents-claimants which is depicted in a tabulated form hereinunder :-

S.No.	Heads	Awarded by the Tribunal
1	Monthly Income (A)	Rs. 5,000/-
2	Annual Income (A x 12 = B)	Rs. 60,000/-
3	Percentage of Income towards Loss of Future Prospects (C)	Nothing
4	Annual Income + Future Prospects (B+C = D)	Rs. 60,000/-
5	Deduction towards Personal Expenses (E)	-
6	Annual Loss of Dependency/Income (D-E = F) (41% of Annual Income)	= Rs. 24,600/-

7	Multiplier (G)	18
8	Total Loss of Dependency/Income	Rs. 4,42,800/-
9	Medical Expenses (if any)	Rs. 48,000/-
10	Loss of Love, Affection & Consortium	Nil
11	Loss of Estate	Nil
12	Pain	Rs. 10,000/-
13	TOTAL COMPENSATION	Rs. 5,00,800/-
14	Interest	7.00%

II. Arguments of learned counsel for the parties:

4. Shri Sushil Kumar Mehrotra, learned counsel for the appellant-Insurance company submits that though various grounds have been raised in the memo of appeal, only two grounds are being pressed. Firstly, it was a case of contributory negligence which the learned tribunal failed to consider negligence. Secondly, the loss of income awarded to the respondent-claimant was excessive and cannot be justified from the evidence.

5. Shri Ashutosh Pandey, learned counsel for the respondents-claimants raised an oral objection and submits that the future prospects were liable to be added to the compensation which was awarded. The learned tribunal by neglecting to do so has failed to award a just compensation and has also acted in teeth of the law laid down by the Supreme Court in **Pappu Deo Yadav vs. Naresh Kumar**¹.

6. He further contends that this Court can correct the award even in the absence of cross appeal in case it is not consistent with the long held standards of grant of compensation awarded by settled judicial

authorities. Reliance is placed upon the judgment of the Supreme Court passed in **APSRTC represented by its General Manager vs. M. Ramadevi and others² and Chola mandalam Ms. General Insurance Co. Ltd. through its Branch Manager vs. Sumitra and others³**

7. After some arguments, learned counsel for the parties jointly contend that the following issues fall for consideration in this appeal :-

"a). Whether the accident in which the injured sustained injuries was a result of contributory negligence for which the Insurance Company alone cannot be held liable ?

b) Whether loss of income as determined by the learned tribunal was excessive ?

c) Whether the appellant can raise oral cross-objections at the stage of appeal ?

d) Whether the future prospects are liable to be computed while granting just compensation to the appellants ?"

III. Issue of contributory negligence:

8. The claimant-respondent appeared as PW-1 to establish the fact of the incident and negligence of the offending vehicle.

9. PW-1 Vishnu testified that on the fateful day he was returning after a Ragini performance. He disembarked from the bus and started walking on the right side of a *Kachha* path. The offending vehicle which was being driven rashly and negligently, suddenly deviated from the main road onto the *kachha* path and ran over him. He suffered serious injuries and was hospitalized after the accident. He also

saw the offending vehicle colliding with a motor cycle. The two persons riding the motorcycle died at the spot. The driver fled the spot after the accident, however, he recorded the number of the motor vehicle. The police arrived at the spot about 15-20 minutes after the accident. The testimony of witness was not impeached nor his credit was shaken under cross-examination. The learned tribunal which had the benefit of observing the demeanour of the witness found him to be a reliable witness and believe his testimony.

10. The claimant also introduced as evidence the site plan drawn by the police authorities during the police investigation. The site plan corroborates the testimonies of the eye-witnesses before the tribunal.

11. This facts are thus established by the evidence in the record and in accordance with the applicable standards of proof. The claimant-respondent was a pedestrian, who was walking on the correct side of the road. The offending vehicle was over-speeding and driver of the said vehicle was rash and negligent. The offending vehicle ran over three people successively. Two persons died at the spot, while the claimant was severely injured. The respondent claimant cannot be faulted with in any manner for the accident. The offending driver of the vehicle of Bolero Car was solely responsible for causing the accident. This is not a case of contributory negligence.

12. The vehicle was insured by the appellant-insurance company and the appellant is fully liable to pay the compensation to the respondents-claimants.

IV. Tribunal finding - Discussion:

13. The submission of Shri Sushil Kumar Mehrotra, learned counsel for the insurance company that this is a case of contributory negligence since the respondent-claimant was walking ahead of the motorcycle which also collided with the offending vehicle. The argument is not only misconceived but also supports the case of the claimant-respondent. The Bolero vehicle was being driven in flagrant violation of permissible speed limits and norms of prudent driving and had run over three people successively before it came to the halt.

14. I am afraid that in view of the preceding discussion, the contentions are entirely misconceived and are rejected. The issue of contributory negligence is found against the appellant-Insurance company and in favour of the respondents - claimants.

V. Issue of loss of earning:

15. The injured-claimant has introduced both documentary as well as oral evidence to establish the nature of the disability and consequential loss of income. The discharge bill of Shivam Care Centre where the injured underwent treatment for fracture of his leg after the accident has been duly proved. The disability certificate issued by the Physical Disability Board immediately after the respondent-claimant was discharged, records that the extent of permanent physical disability is 41%. The disability certificate has also been proved.

16. PW-2 - Dr. H.N. Singh Pundir, had testified that he is an ortho surgeon and a member of the Disability Board which had issued the disability certificate to the respondent-claimant. He has duly identified his signature over the disability certificate.

PW-2 has deposed that disability certificate depicts weakness caused to a particular part as well as the body of the injured. The disability was caused by a fracture. The testimony of PW-2 was not impeached in the cross-examination. The trial court which had the benefit of observing the witness opined that he is credit worthy and his testimony is liable to be relied upon.

17. In these circumstances, this Court is not persuaded to take any other view on the credit of PW-2 Dr. H.N. Singh Pundeer.

18. In this wake, this Court finds that the permanent disability in which the right leg of the respondent-claimant to the extent of 40% is established by applicable standards of evidence. The unbroken chain of evidence in the record links the accident, injuries, medical treatment and the permanent disability. The disability is directly relatable to the accident caused by the offending Bolero vehicle.

19. The respondent-claimant has asserted that the permanent disability had led to a regular loss of income. The respondent-claimant is a public performer who sings and dances at various public functions. The disability will impede his rhythmic dance movements and reduce his public appeal.

20. The learned tribunal has awarded Rs.5,000/- as notional income for determining the compensation. Nothing from the record has been shown to dispute the said finding. The income so computed by the learned tribunal is upheld.

21. The learned tribunal neglected to award any amount under the head of future prospects. The respondent-claimant is entitled for future prospects to the extent of

40% on account of the permanent disability as laid down in the judgment of Supreme Court in **Pappu Deo Yadav (Supra)**.

22. The relevant holding is extracted below in **Pappu Deo Yadav (Supra)**:

"21. This court is also of the opinion that the courts below needlessly discounted the evidence presented by the appellant in respect of the income earned by him. Working in the informal sector as he did, i.e. as a typist/data entry operator in court premises in Delhi, his assertion about earning ₹12,000/- could not be discarded substantially, to the extent of bringing it down to ₹ 8,000/- per month. Such self employed professionals, it is noticeable, were not obliged to file income tax returns for AY 2011-2012, when no levy existed for anyone earning less than ₹ 1,60,000/- per annum.²⁹ The advocate who deposed about the earnings of the appellant was believed to the extent that the tribunal fixed the appellant's monthly earnings at ₹ 8,000/-. If one takes into account contemporary minimum wages for skilled workers (which was in the range of ₹ 8,500/-) the realistic figure would be ₹10,000/- per month. Adding future prospects at 40%³⁰, the income should be taken as ₹14,000 for the purpose of calculation of compensation. Accordingly, this court finds that the compensation payable for the disability of loss of an arm (assessed at 65%) would be ₹19,65,600/- (i.e., ₹ 14,000/- x 12 x 65% x 18) or Rupees Nineteen lakhs sixty five thousand six hundred only."

23. Shri Ashutosh Pandey, learned counsel for the respondent-claimant has raised the cross-objections to the extent that the tribunal neglected to compute future prospects while determining the

compensation and is liable to be entertained.

VI. Issue of oral cross objection:

24. The question whether oral objections can be raised for an enhancement of compensation at the stage of appeal has been well settled by good authorities in point.

25. The jurisdiction of the appellant court to allow a party to take oral objections is traceable to the power of the court of appeal enumerated in Order XLI Rule 33 of the CPC. The Order XLI Rule 33 of the CPC is reproduced hereinafter :-

"Rule 33. Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and **to pass or make such further other decree or order as the case may require**, and this order may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decree." (emphasis supplied)

26. The amplitude of the provision ensures that the arms of law are long enough to reach injustice, and the arms of the Court are enough to serve justice. Drawing its power from the aforesaid provision, the appellate court may pass orders to serve the ends of justice.

27. More specifically the beneficent nature of the legislation and the statutory mandate of the Motor Vehicles Act, 1988 enjoin the appellate court to exercise its powers under Order 41 Rule 33 to award just compensation. [See: **Jitendra Kimshankar Trivedi and others vs. Kasam Daud Kumbhar and others**⁴, **Arun Kumar Agarwal and another vs. National Insurance Company Ltd. and others**⁵]

28. The scope of Order 41 Rule 33 of the CPC the Supreme Court in **Mahant Dhangir and another v. Madan Mohan and others**⁶ held:-

"11. The next question for consideration is whether the cross-objection was maintainable against Madan Mohan, the co-respondent, and if not, whether the Court could call into aid Order 41 Rule 33 CPC. For appreciating the contention it will be useful to set out hereunder R. 22 and R. 33 of order 41:

"R. 22 Upon hearing, respondent may object to decree as if he had preferred separate appeal. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree (but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour, and may also take any cross-objection) to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

R. 33 Power of Court of Appeal.

The Appellate Court shall have power to pass any decree and make any

order which ought to have been passed or made and to pass or make such further other decree or order as the case may require, and this order may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decree."

29. The same view was reiterated in **Delhi Electric Supply Undertaking vs. Basanti Devi**⁷.

30. Adverting to the extent of powers under Order XLI Rule 33 of the CPC, this Court in **National Insurance Co. Ltd. vs. Smt. Vidyawati Devi and others**⁸ held thus:

"Order XLI Rule 33 of the Code of Civil Procedure prescribing the power of court of appeal clearly provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made as the case may require, and this power may be exercised in favour of all or any of the respondents or parties though they may not have filed any cross appeal or objection."

31. Following **Vidyawati Devi (supra)** was followed in **New India Assurance Co. Ltd. v. Smt. Suman Mishra and others**⁹. Wherein Thaker, J. permitted counsels to raise oral objections and enhanced the compensation even in absence of written cross objections in appeal by holding:

"44. It is submitted that the amount which is granted is not just

compensation and it is orally submitted that the amount of compensation requires to be enhanced in light of Division Bench decision of this High Court in First Appeal From Order No.2389 of 2016 (National Insurance Co. Ltd. Versus Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016 wherein it is held that under Order 41 Rule 33 of Code of Civil Procedure, amount of compensation can be enhanced even if there is no written appeal or written cross objection. This applies to this case also recently it has been held by Apex Court in North East Karnataka Road Transport Corporation Vs. Smt. Sujatha, AIR 2018 SC 5593 that for beneficial legislation the Court should grant enhancement even if other side is not present.

45. The principles of law pertaining to grant of just compensation cannot be said to have been adhered by Tribunal and therefore, it will have to be re-decided as per the decision in First Appeal From Order No.2389 of 2016 (National Insurance Co. Ltd. Versus Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016."

32. When the conditions precedent for raising cross objections were satisfied, this Court in **Vidyawati Devi (supra)** was not found wanting in entertaining the cross objections by holding thus:

"We are of the considered view that the conditions as laid down in provisions of Order XLI Rule 33 are satisfied in the present case. In Delhi Electric Supply Undertaking (Supra) the Hon'ble Apex Court has observed that when circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the court cannot be found wanting when it comes to exercise its powers."

33. In wake of the preceding discussion and authorities in point, the oral cross objections on behalf of the claimants-respondents are liable to be heard. However, this Court may mould the relief appropriately to obviate prejudice to either parties.

34. The head of future prospects is well settled by good authorities. There is no dispute about applicability of the said authorities to this case and also the entitlement of the claimant-respondent to future prospects. The grant of future prospects in the facts and circumstances of this case does not require any laboured examination of evidence or elaborate arguments. It is a simple primary level.

35. In this wake, the oral cross objections on behalf of the claimant-respondent are liable to be entertained and allowed to the extent indicated above.

VII. Determination of Compensation to which claimant-respondent is entitled:

36. In the wake of preceding discussion, the amount of compensation awarded to the claimant-respondent is tabulated below:

- i. Date of Accident - 26.08.2014 at 8.00 P.M.
- ii. Name of the injured -Vishnu
- iii. Age of the injured -21 years
- iv. Occupation of the deceased -To sing in the Jagaran programme
- v. Income of the injured - Rs.10,000/-

vi. Name, Age and Relationship of claimant with the deceased/injured

Sr. No.	Name	Age	Relation
1	Vishnu	21	

S.No.	Heads	Amount (in Rupees)
1	Monthly Income (A)	Rs. 5,000/-
2	Annual Income (A x 12 = B)	Rs. 60,000/-
3	Future Prospects (C)	40% of Rs. 60,000/- (Rs. 24,000/-)
4	Annual Income + Future Prospects (B+C = D)	60,000 + 24,000 = Rs. 84,000/-
5	Deduction towards Personal Expenses (E)	
6	Annual Loss of Dependency (D-E = F)	(41% of Annual Income) = Rs. 34,440/-
7	Multiplier (G)	18
8	Total Loss of Dependency/Income	Rs. 6,19,920/-
9	Medical Expenses (if any)	Rs. 48,000/-
10	Conventional Heads Loss of Love, Affection & Consortium Loss of Estate Pain	Nil Nil Rs. 10,000/-
13	TOTAL COMPENSATION	Rs. 6,77,920/-
14	Interest	7%

VIII. Conclusion and Directions:

37. The amount of compensation to which the claimant-respondent has thus been found entitled shall be deposited by the corporation within three months before the learned tribunal. Thereafter the learned tribunal shall release the amount to the claimants without delay. The amount already disbursed to the claimants (if any) shall be duly adjusted.

38. With the aforesaid directions, this appeal is partly allowed.

(2023) 5 ILRA 195
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2023

BEFORE

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

First Appeal From Order No. 1938 of 2010

Umashanker & Anr. ...Appellants
Versus
Smt. Kusumlata & Anr. ...Respondents

Counsel for the Appellants:
Sri Namit Kumar Sharma

Counsel for the Respondents:
Jyotsna Srivastava, Sri S.D. Ojha

Civil Law - Motor Accident Claim - Deceased was a housewife-survived by six months old son and husband-income can be considered to be Rs. 2000/- per month-category of self employed-age bracket-20-25 years-40% of income added towards future loss-1/2 deducted for personal expenses-multiplier of 18-also entitled for non pecuniary damages-rate of interest-7.5%.

Appeal partly allowed. (E-9)

List of Cases cited:

- 1. National Insurance Company Vs Pranay Sethi [2014 (4) TAC 637 (SC)]
- 2. Smt.Sarla Verma Vs Delhi Transport Corp. [2009 (2) TAC 677 (SC)]
- 3. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr. [2021 (4) TAC (SC)]
- 4. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

5. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

6. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

7. Bajaj Allianz General Insurance Company Private Ltd. v. U.O.I. & ors. vide order dated 27.1.2022

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

1. Heard learned counsel for the appellant and Mr. S.D. Ojha, learned counsel for the respondents.

2. The accident occurred in the year 2009. The deceased was a house wife, who has behind six months old son and her husband. Income of the deceased can be considered to be Rs.2000/- per month i.e. Rs.24,000/- per annum. The deceased will fall within the category of self employed and her age was in the age bracket of 20-25 years at the time of accident, hence, 40% of income shall be added towards future loss of income and 1/2 shall be deducted for personal expenses as held by *Hon'ble Apex Court* in **National Insurance Company vs. Pranay Sethi [2014 (4) TAC 637 (SC)]** as it was her minor child where keeping in view the age of the deceased, multiplier of 18 will be admissible in the light of the judgment of *Hon'ble Apex Court* in the case of **Smt.Sarla Verma vs. Delhi Transport Corporation [2009 (2) TAC 677 (SC)]**.

3. As far as non-pecuniary damages are concerned, the claimants shall be entitled to get Rs.70,000/- for loss of consortium in the light of the judgment of *Hon'ble Apex Court* in the case of **Kurvan Ansari alias Kurvan Ali and another vs. Shyam Kishore Murmu and another [2021 (4) TAC (SC)]**.

4. Hence, the total amount of compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:-

(i) Annual Income : Rs.24,000/-
Per annum (Rs.2,000 X 12)

(ii) Percentage towards future prospects 40% : Rs.9,600/-

(iii) Total income : Rs. 24,000/- + Rs.9,600/- = Rs. 33,600/-

(iv) Income after deduction 1/2: Rs.33,600/- ? Rs.16,800/- = Rs.16,800/-

(v) Multiplier applicable : 18

(vi) Loss of Dependency : Rs. 16,800/- X 18 = Rs.3,02,400/-

(vii) Amount under non pecuniary head : Rs. 70,000/-

(viii) Total compensation :
Rs.3,02,400/- + Rs.70,000/- = Rs.3,72,400/-

5. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

6. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount forthwith with interest as directed above. The amount already deposited be deducted from the amount to be deposited.

7. Record and proceedings be sent back to the Tribunal forthwith. The amount be paid to the claimants and no amount be kept in fixed deposit.

8. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the *Hon'ble Apex Court* in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

9. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this

High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount. The said decision has also been reiterated by High Court Gujarat in R/Special Civil Application No.4800 of 2021 (The Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS) decided on 5.4.2022.

10. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of *A.V. Padma (supra)*. The same is to be applied looking to the facts of each case.

11. The Tribunal shall follow the guidelines issued by the Apex Court **in Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others vide order dated 27.1.2022**, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

(2023) 5 ILRA 197

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.04.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 2155 of 2017

Smt. Nilofar

...Appellant

Versus

Smt. Sarika Arora & Ors.

...Respondents

Counsel for the Appellant:

Sri Bijai Prakash Tiwari

Counsel for the Respondents:

Ms. Aarushi Khare

A. Civil Law - Motor Vehicle Act, 1988 - Section 176 - challenge to-enhancement of claim- deceased died leaving behind his wife-the tribunal considered the deceased income Rs. 3000/- per month in place of 10,000/- per month and has not granted future loss of income-The claimant/ wife is entitled to 50% enhancement in wages towards future prospects, consistent with the UP Rules, 1998-Total compensation would be Rs. 19,74,000/- and rate of interest would be 7% -the insurance company shall deposit the amount within 3 months .(Para 1 to 13)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. NICL Vs Pranay Sethi & ors. (2017) 16 SCC 680

2. New India Assur. Co. Ltd. Vs Urmila Shukla & ors.(2021) SCC Online SC 822

3. Sarla Verma (Smt.) & ors. Vs DTC & anr. (2009) 6 SCC 121

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The appeal arises out of a judgment and award dated 03.04.2017 rendered by the Motor Accident Claims Tribunal/Additional District Judge, Court No.4, Kanpur Nagar in Claim Petition No.75 of 2013 (Nilofar v. Sarika Arora and others) partly allowing the claim of the claimant. This appeal has been filed by the claimant/appellant for enhancement of the amount awarded by the tribunal in the impugned judgment.

2. The brief case of the claimant before the learned tribunal was that the deceased died in an accident on 14.08.2012 which was caused entirely by rash and negligent driving of the driver of the offending truck bearing registration No.U.P.-T/1360. On the fateful day, the deceased was riding a motorcycle when the truck collided with him. At the time of his death, the deceased was 28 years old. The claimant-appellant was dependent on the deceased.

I. Compensation awarded by the learned tribunal:

3. The learned tribunal in the impugned judgment dated 03.04.2017 awarded compensation which is depicted in a tabulated form hereunder:

Sr. No.	Heads	Amount (in rupees)
1	Monthly Income (A)	3000/-
2	Annual Income (A x 12 = B)	3000 x 12 = 36,000/-
3	Future prospects (C)	50% of 36,000=18,000
4	Annual Income + Future Prospects (B + C = D)	36,000 + 18,000/- =54,000/-
5	Total income after deduction (E)	1/3 of 54,000/- =18,000/-
6	Annual Loss of Dependency (D-E = F)	54,000-18,000/- =36,000/-
6	Multiplier (G)	18
7	Total loss of dependency (F x G = H)	36000 x 18 =6,48,000/-
8	Compensation (H)	6,48,000/-
9	Conventional Heads: (I) (a) Loss of love and affection (b) Loss of consortium (c) Loss of Estate (d) Funeral	15,000/-
10	Total compensation (H+ I = J)	6,63,000/-

11	Interest	7.00%

4. Shri Bijai Prakash Tiwari, learned counsel for the appellant-claimant and Ms.Aarushi Khare, learned counsel for the respondent-insurance company agree that only the following questions fall for consideration in this appeal:-

A. Whether the learned tribunal had correctly determined the income of the deceased in the record?

B. Whether learned tribunal correctly computed the compensation under these various heads :-

- (i) conventional heads,
- (ii) future prospects,
- (iii) multiplier, and
- (iv) interest while computing the compensation?

4.(A) Income of the deceased:

5. The claimant asserted in the claim petition that the deceased was engaged in the sale of garments. The income of the deceased from his business was Rs.15,000/- per month. The claimant-appellant introduced both the oral and documentary evidences to establish the income of the deceased. The learned tribunal assessed the income of the deceased at Rs.3000/- per month. Learned tribunal while declining to accept the income as asserted by the claimant held as under:

"32. With profound respect for Hon'ble High Court and Hon'ble Supreme Court of India, I am of the opinion that both the above case laws do not help the claimant in as much as the papers pertaining to income tax return have not been specifically pleaded and the evidence is beyond the pleadings.

33. There is also no supporting evidence regarding his business. If he the deceased was engaged in the business, there should have been evidence regarding sale and purchase of the garments. There is no registration in the sales tax. There is no Books of accounts, bills vouchers, balance sheet, etc. In the absence of any supporting evidence, the source of income of the deceased could not be proved by the claimant.

34. Even in the case of absence of source of income, it cannot be said that an young major man would not have been earning anything. The deceased must have been earning reasonable amount for the livelihood of himself and his family. Hon'ble Supreme Court of India has rule in Laxmi Devi and others v. Mohd. Tabbar 2008(2) T.A.C. 304 (SC) that in absence of the source of income, the income may be assessed at the rate of Rs.100 per day. Keeping in view of this settled law, the income of the deceased is assessed Rs.3000/- per month and multiplied to 12, the annual income becomes Rs.36000/-."

6. P.W.1-Nilofar (wife of the deceased) admitted in her testimony that she was not aware of various details of the business of the deceased like name of the firm, registration certificate, statutory licences and as to whether the deceased was the proprietor or engaged in a partnership with others. She also admitted under cross examination that she is not in a position to give any book of accounts or any document relating to the business.

7. The claimant had also introduced the income tax return of the deceased which was filed a few months prior to his death as evidence before the learned tribunal. P.W.1 deposed that she came to know about the income tax return only

when she received a notice from the income tax authority after the death of her husband.

8. The perusal of the testimony of the P.W.1 Smt. Nilopher, wife of the deceased is truthful. In many families ladies often do not have information about the details of the business or documentations relating to the same. It is unsurprising that the claimant failed to produce documentary evidence relating to the business and the same cannot be held against the claimant. However, it is noteworthy that the P.W. 1 was never confronted with the question as to whether the deceased was in fact running a garment business or not. The assertion in the claim petition that the deceased ran a garments shop was never challenged and is liable to be believed.

9. The question regarding his income is slightly more vexed. However, reasonable start point is the income tax return which was introduced as evidence and marked as paper no.77(c). The return was filed a couple of months prior to the death of the deceased. The income tax return reflects the gross total income of the deceased. The statement of account which records the day to day expenses incurred while running the business have not been produced. Garments trade involves some regular expenditures to keep the business going. The amounts so incurred are liable to be deducted from the gross return which has been depicted in the income tax return. The income tax return is reliable document. However true income can be ascertained after making deductions towards transportation, storage, staff salary and the like.

10. Upon considering these issues, the monthly income of the deceased is assessed at Rs.10,000/- per month by this Court.

11. In the peculiar facts of this case, the failure of the claimant-appellant to take specific pleadings regarding the income tax returns was credibly explained by P.W.1- Nilofar in her deposition before the court. Admittedly the claimant had produced the income tax returns whose authenticity remains undisputed. Income tax returns are a credible basis for determining income. In the claim petition, a specific clause regarding the income tax return was left empty. In the column regarding the income tax, the words "not applicable" have been transcribed. In the wake of the preceding discussion, the deficiencies discussed above cannot lead to any inference adverse against the claimant. Learned tribunal erred in law and fact on this issue.

4.(B) (i) Calculation of Conventional Heads:

12. The amount determined under conventional heads in the impugned award is at variance with **National Insurance Company Ltd. v. Pranay Sethi and others**¹. The conventional heads were fixed in **Pranay Sethi (supra)** by holding as under:

"54. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is

applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seems to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- funeral expenses should be Rs. 15,000/-, Rs. 40,000/- And Rs. 15,000/- respectively."

13. The figure under conventional heads determined in ***Pranay Sethi (supra)*** shall be applicable to the facts of this case. The award is modified accordingly.

4.(B)(ii) Future Prospects:

14. The future prospects are liable to be calculated in accordance with the Uttar Pradesh Motor Vehicles Rules, 1998. Rule 220A-3(i) of the Rules is relevant and is reproduced hereunder:

"(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under--

(iii) Below 40 years of age : 50% of the salary."

15. The UP Rules, 1998 came up for consideration before the Supreme Court in ***New India Assurance Co. Ltd. vs. Urmila Shukla and others***³. In ***Urmila Shukla (supra)*** upon consideration of various judgements including ***Pranay Sethi (supra)*** held:

"10. The discussion on the point in ***Pranay Sethi*** was from the standpoint of arriving at "just compensation" in terms of

Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in ***Pranay Sethi*** cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in ***Pranay Sethi*** cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. ***If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.***" (emphasis supplied)

16. The Rules of the Uttar Pradesh Motor Vehicles Rules, 1998 were not under consideration before the Supreme Court in ***Pranay Sethi (supra)*** or ***Sarla Verma (Smt.) and others v. Delhi Transport Company and another***⁴. Future prospects in ***Pranay Sethi (supra)*** were determined without noticing the U.P. Rules, 1998. This fact was adverted to in ***Urmila Shukla (supra)***:

"8. It is submitted by Mr. Rao that the judgment in ***Pranay Sethi*** does not show that the attention of the Court was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in ***Pranay Sethi***. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in ***Pranay Sethi*** ought not to be considered to

limit the application of such statutory Rule."

17. The U.P. Rules, 1998 are statutory in nature and their operation is not stymied by *Pranay Sethi* (supra). The U. P. Rules, 1998 have the force of law and shall apply with full force in appropriate cases. The U.P. Rules, 1998 are more beneficial for the claimants than the provisions made in *Pranay Sethi* (supra) for them. The holdings in *Pranay Sethi* (supra) can not dilute the advantages conferred by U.P. Rules, 1998 upon the eligible beneficiaries.

18. This Court finds that the claimant-appellant is entitled to 50% enhancement in wages towards future prospects, consistent with the UP Rules, 1998. The necessary changes in the award shall be accordingly made.

19. In this wake, this Court finds for the appellant-claimant on the issue of grant of future prospects.

4(B)(iii) Multiplier:

20. The age of the deceased was 28 years at the time of death. Multiplier of 17 has been correctly applied by the learned Tribunal and is in line with **Pranay Sethi (supra) and Sarla Verma (supra)**.

4(B)(iv) Interest

21. Interest of 7% and the manner of payment does not call for interference. However, the claimant-appellant shall not be entitled to interest on the enhanced income determined in this judgement.

II. Determination of Compensation to which claimant-appellant is entitled:

22. In the wake of preceding discussion, the amount of compensation awarded to the claimant-appellant is tabulated below:

- i. Date of Accident
-14.08.2012
- ii. Date of death
-14.08.2012
- iii. Name of the deceased
-Shahban Ahmad
- iv. Age of the deceased
-28 years
- v. Occupation of the deceased
-Garment Shop
- vi. Income of the deceased
- Rs.10,000/-
- vii. Name, Age and Relationship of claimants with the deceased

Sr. No.	Name	Age	Relation
1	Smt. Nilofar	26	Wife

viii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1	Monthly Income (A)	10,000/-
2	Annual Income (B) (A x 12 = B)	10,000/- x 12 = 1,20,000/-
3	Future Prospects (C)	40% of 1,20,000/- = 48,000/-
4	Annual Income + Future Prospects (B + C = D)	1,20,000+ 48,000/- =1,68,000/-
5	Deduction towards Personal Expenses (E)	1/3 of 1,68,000/- =56000/-
6	Annual Loss of Dependency (D-E=F)	1,68,000-56000 =1,12,000/-
7	Multiplier (G)	17
8	Total Loss of Dependency (FxG = H)	1,12,000/- x 17 =19,04,000/-

8	Compensation (H)	19,04,000/-
9	Conventional Heads: (I) (a) Loss of love and affection (b) Loss of consortium (c) Loss of Estate (d) Funeral	70,000/-
10	Total compensation (H+ I = J)	19,74,000/-
11	Interest	7.00%

III. Conclusion and Directions:

23. The amount of compensation to which the claimant-appellant has thus been found entitled shall be deposited by the corporation within three months before the learned tribunal. Thereafter the learned tribunal shall release the amount to the claimant-appellant without delay. The amount already disbursed to the claimant (if any) shall be duly adjusted.

24. The amount of Rs.25,000/- deposited by the appellant-claimant while instituting the appeal shall be forthwith remitted to the learned tribunal.

25. The instant appeal is partly allowed as indicated above.

(2023) 5 ILRA 203
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2023

BEFORE

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

First Appeal From Order No. 2740 of 2006

Smt. Kamini & Ors. ...Appellants
Versus
New India Assurance Co. Ltd., Bareilly & Ors. ...Respondents

Counsel for the Appellants:

Sri Shivendra Singh, Sri Mohd. Naushad
Siddiqui

Counsel for the Respondents:

Sri Aditya Singh Parihar, Sri Aditya Singh
Parihar

Civil Law - Motor Accident Claim-

Impugned award-accident and issue of negligence not dispute-quantum of compensation to be decided-deceased was 40 years-in service of U.P. Co-operative Federation-Tribunal assessed income Rs. 7000/- per month-but according to the salary slip monthly income would be Rs. 7974- assesment bad-deceased was in age bracket of 36-40-50% of income be added-deduction towards personal expense-1/3rd as seven dependents-entitled for non-pecuniary head plus 10 % rise-Rate of interest to be 7.5% instead of 6 %..

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 LawSuit (SC) 1093

2. Sarla Verma & ors. Vs Delhi Transport Corporation & anr., 2009 LawSuit (SC)

3. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 LawSuit (SC) 1093

4. Vimal Kanwar & ors. Vs Kishore Dan & ors.,
2013 (3) T.A.C. 6 (S.C.).

5. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

6. A.V. Padma V/s. Venugopal, Reported in 2012
(1) GLH (SC), 442

7. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291

8. Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna & ors. Vs Hari Singh & anr.)

9. Bajaj Allianz General Insurance Company Pvt. Ltd. v. U.O.I. & ors.

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

1. Heard Sri Mohd. Nausad Siddiqui, learned counsel for the appellants and Sri Aditya Singh Parihar, learned counsel for the respondent and perused the judgment and order impugned. None appears for owner.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 18.9.2004 passed by the Motor Accident Claims Tribunal/ District Judge, Bareilly (hereinafter referred to as 'Tribunal') in M.A.C.P No.375 of 2001 awarding a sum of Rs.6,20,800/- as compensation with interest at the rate of 6%.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The only issue to be decided is the quantum of compensation awarded.

4. The accident took place on 22.4.2001. The deceased was 40 years of age and was in service in U.P. Co-Operative Federation as Centre In-charge. The Tribunal considered his income to be Rs.7000/- per month, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 11 and awarded Rs.5,000/- towards non pecuniary damages. The Tribunal has calculated the total compensation to be Rs.6,20,800/- payable to the legal representative.

5. Learned counsel for the appellants submit that the income of the deceased should be considered to be at least

Rs.7974/- per month as per pay slip. The deductions made by Tribunal could not be considered as **P.F.** contribution cannot be deducted. It is further submitted by learned counsel for the appellants that the Tribunal has not added any amount under the head of future loss of income which should be granted. The Apex Court in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093** has suggested guidelines for grant of future loss of income. It is also submitted that the Tribunal has applied the multiplier of 11. Though it is proved that the age of deceased was 40 years. The deduction of 1/3rd for personal expenses is also bad, should be 1/4th as there were seven dependants of the deceased who was the sole breadwinner. The multiplier should be 15 in view of the decision of the Apex Court in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC).**

6. It is also submitted by learned counsel for the appellant that the amount awarded under non pecuniary damages is on the lower side and is required to be enhanced in view of the decision in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093.**

7. Learned counsel for the appellant has lastly submitted that the rate of interest awarded by Tribunal is on the lower side and it should be as per the repo rate prevailing in those days.

8. As against this, learned counsel for respondent- insurance company has contended that Tribunal has rightly not considered any amount under the head of future loss of income as it was not proved by claimants as to what would be increment

in salary. It is submitted by learned counsel for respondent- insurance company that he Tribunal has considered the multiplier of 11 as per the age of the deceased which is just and proper as it was the law prevailing in the day when the accident occurred. Learned counsel for the respondent has lastly contended that the compensation awarded by the Tribunal is just and proper and does not call for any interference of this Court.

9. It is further submitted by learned counsel for the respondent that the accident is of the year 2001 whereas the judgment of the Tribunal is prior to the decision in **Pranay Sethi (Supra)** and, therefore, non addition of future loss of income is just and proper.

10. Heard the learned counsels for the parties and considered the factual data. This Court finds that the accident occurred on 22.4.2001 causing death of Bhanu Pratap Singh who was 40 years of age at the time of accident. The Tribunal has assessed his income to be Rs.7000/- per month which according to this Court, in the year of accident, would be at Rs.7974/- per month looking to his salary slip, therefore, the assessment of income to be Rs.7,000/- made by Tribunal is bad in view of the mandate of the Apex Court in the case of **Vimal Kanwar and Others Vs. Kishore Dan and others**, 2013 (3) T.A.C. 6 (S.C.). The deceased was in the age bracket of 36-40, 50% of the income will have to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. The deduction towards personal expenses of the deceased would be 1/3rd as the deceased has left behind him seven dependents.

11. As far as amount under non-pecuniary heads is concerned, the

appellants would be entitled to Rs.70,000/- plus 10% rise in every three years in view of the decision of the Apex Court in **Pranay Sethi (Supra)** and, therefore, we round up the figure to Rs.1,00,000/- under this head.

12. Hence, the total compensation payable to the appellants is computed herein below:

- i. Income: Rs.7974/-per month (Rs.95688 per year)
- ii. Percentage towards future prospects : 50% namely Rs.47844/-
- iii. Total income : Rs.95688 + Rs.47844 = Rs.143532/-
- iv. Income after deduction of 1/3rd towards personal expenses : Rs.95,688/-
- v. Multiplier applicable : 15
- vi. Loss of dependency: Rs.95,688 x 15 = Rs.14,35,320/-
- vii. Amount under non pecuniary heads : Rs.1,00,000/-
- viii. Total compensation : Rs.15,35,320/-.

13. As far as issue of rate of interest is concerned which is granted is 6%, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others**, 2019 (2) T.A.C. 705 (S.C.) wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award

amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

14. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest as directed above. The amount already deposited be deducted from the amount to be deposited. Record and proceedings be sent back to the Tribunal forthwith.

15. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

16. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the

certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another**) while disbursing the amount.

17. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

18. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

19. This Court is thankful to both the counsels for getting this matter decided.

(2023) 5 ILRA 206

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.04.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 3389 of 2018

Smt. Rajawati & Ors.

...Appellants

Versus

**IFFCO Tokio General Insurance Co. Ltd.
New Delhi & Ors.**

...Respondents

Counsel for the Appellants:

Sri Sanjay Singh, Sri Amrendra Nath Rai

Counsel for the Respondents:

Sri Pranjal Mehrtora, Sri Ashish Gupta

Civil Law - Uttar Pradesh Motor Vehicles Rules, 1998

- Appeal for enhancement-Deceased vegetable vendor-evidences submitted -Tribunal misread the evidence-deceased worked in informal sector of the economy-where account books, etc not maintained-absence of such documents cannot adversely impact determination of income-income decided is set aside-future prospects liable to be calculated-The holdings in Pranay Sethi cannot dilute the advantages conferred by the U.P. Rules, 1998-claimant entitled to 50% enhancement in wages towards future prospects.

Appeal partly allowed. (E-9)**List of Cases cited:**

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 (16) SCC 680

2. New India Assurance Co. Ltd. Vs Urmila Shukla & ors., 2021 SCC OnLine SC 822

3. Sarla Verma (Smt.) & ors. Vs Delhi Transport Company & anr., 2009 (6) SCC 121

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Sanjay Singh, learned counsel for the appellants and Shri Ashish Gupta, learned counsel holding brief of Shri Pranjal Mehrotra, learned counsel for the respondent-insurance company.

2. The appeal arises out of a judgment and award dated 02.05.2018 rendered by the Motor Accident Claims Tribunal/District Judge, Bareilly, in M.A.C.P. No.452 of 2015 (Smt. Rajwati and others v. IFFCO Tokio General Insurance Co.Ltd. and others) partly allowing the claim of the claimants. This

appeal has been filed by the claimants/appellants for enhancement of the amount awarded by the tribunal in the impugned judgment.

3. The brief facts of the claimants-appellants before the learned tribunal was that the deceased died of injuries sustained in an accident on 22.08.2015 which was caused entirely by rash and negligent driving of the driver of the offending vehicle of Tata-407 model bearing registration No.UK-08-CA/3528. The deceased was driving a motorcycle when the offending vehicle collided with him. The offending vehicle was insured by the respondent-insurance company. The claimants are dependant on the deceased. The deceased worked as a vegetable vendor.

I. Compensation awarded by the learned tribunal:

4. The learned tribunal in the impugned judgment dated 03.04.2017 awarded compensation which is depicted in a tabulated form hereunder:

Sr . No.	No. Heads	Amount (in rupees)
1	Monthly Income (A)	3600/-
2	Annual Income (B) (A x 12 = B)	3600 x 12 =43,200/-
3	Future prospects (C)	40% of 43,200/- =17,280/-
4	Annual Income + Future Prospects (B + C = D)	43,200 + 17,280/- =60,480/-
5	Deduction towards Personal Expenses (E)	¼ of 60,480/- = 15,120/-
6	Annual Loss of Dependency (D-E = F)	60,480-15,120/- =45,360/-
6	Multiplier (G)	17

7	Total loss of dependency (F x G = H)	45,360 x 17 =7,71,120/-
8	Compensation (H)	7,71,120/-
9	Conventional Heads: (I) (a) Loss of consortium (b) Loss of love, affection (c) Loss of Estate (d) Funeral expenses	70,000/-
10	Total compensation (H+I = J)	7,71,120/- + 70,000/- = 8,41,120/-
11	Interest	7.00%

5. Shri Sanjay Singh, learned counsel for the appellants contends that the tribunal erred in law by incorrectly determining the income of the deceased and also awarding the amounts under various heads which were at variance with settled authorities in point.

6. Shri Ashish Gupta, learned counsel holding brief of Shri Pranjal Mehrotra, learned counsel for the respondent-insurance company contends that the compensation paid was just lawful, valid and requires no alteration.

7. After advancing their arguments, learned counsel for both the parties agree that only the following questions fall for consideration in this appeal:-

A. Whether the learned Tribunal had correctly determined the income of the deceased in the record?

B. Whether learned Tribunal correctly computed the compensation under these various heads :-

- (i) conventional heads,
- (ii) future prospects,
- (iii) multiplier, and

(iv) interest while computing the compensation?

7.(A) Income of the deceased:

8. The claimants-appellants specifically pleaded that the deceased was a vegetable vendor who earned Rs.600/-to Rs.700/- per day. The appellants-claimants also introduced one witness to establish the income of the deceased. PW1-Rajwati before the learned tribunal testified that her husband worked as a vegetable vendor. The entire family was dependant on his income. Under cross examination the witness stated that the deceased did not maintain any documentation of his business like receipt of sale vouchers, registration with the Nagar Nigam, etc. The credit of PW1-Rajwati remained intact under cross-examination. Her testimony clearly establishes that the deceased was a vegetable vendor and his family was supported by his income. Learned tribunal which had the benefit of observing the demeanor also did not reject the testimony insofar as it relates to the deceased engaged in the business of selling vegetables.

9. Learned tribunal clearly misread the evidence and determined the income by relying on the admission of P.W.1 that the business of the deceased was not documented.

10. The deceased worked in the informal sector of the economy as a vegetable vendor. The activities in this sector are often undocumented. Running account books, or receipt of sale vouchers, registration with Nagar Nigam and the like are not maintained by vegetable vendors. Absence of such documents cannot adversely impact determination of income in such cases. Vegetable vendors require a

certain skill in doing business which include identifying vegetables, understanding the market, and giving the right sales pitch. These skills are mostly acquired on the job. The income of the deceased would be examined the light of the skills required to earn a livelihood as a vegetable vendor. The aforesaid considerations were not factored in by the learned tribunal while determining the income of the deceased. The income determined by the learned tribunal is accordingly set aside.

11. The minimum wages as notified by the State Government factor in all relevant considerations and is a reliable guide to take the enquiry forward. Considering the perennial need of vegetables, it can be concluded that the deceased had a regular source of employment. The minimum wage as notified by the State Government at the relevant time for skilled labourers is Rs.8,298/-.

12. In the wake of preceding discussion, the total monthly income of the deceased is fixed at Rs.8,500/- per month.

7.(B)(i) Calculation of Conventional Heads:

13. The amount determined under conventional heads in the impugned award is at variance with **National Insurance Company Ltd. v. Pranay Sethi and others**¹. The conventional heads were fixed in **Pranay Sethi (supra)** by holding as under:

"54. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said

heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- funeral expenses should be Rs. 15,000/-, Rs. 40,000/- And Rs. 15,000/- respectively."

14. The figure under conventional heads determined in **Pranay Sethi (supra)** shall be applicable to the facts of this case. The award is modified accordingly.

7.(B)(ii) Future Prospects:

15. The future prospects are liable to be calculated in accordance with the Uttar Pradesh Motor Vehicles Rules, 1998. Rule 220A-3(i) of the Rules is relevant and is reproduced hereunder:

"(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under--

(i) Below 40 years of age : 50% of the salary."

16. The UP Rules, 1998 came up for consideration before the Supreme Court in

New India Assurance Co. Ltd. vs. Urmila Shukla and others³. In **Urmila Shukla (supra)** upon consideration of various judgements including **Pranay Sethi (supra)** held:

"10. The discussion on the point in *Pranay Sethi* was from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in *Pranay Sethi* cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in *Pranay Sethi* cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. **If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.**" (emphasis supplied)

17. The Rules of the Uttar Pradesh Motor Vehicles Rules, 1998 were not under consideration before the Supreme Court in **Pranay Sethi (supra)** or **Sarla Verma (Smt.) and others v. Delhi Transport Company and another**⁴. Future prospects in **Pranay Sethi (supra)** were determined without noticing the U.P. Rules, 1998. This fact was adverted to in **Urmila Shukla (supra)**:

"8. It is submitted by Mr. Rao that the judgment in *Pranay Sethi* does not show that the attention of the Court

was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in *Pranay Sethi*. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in *Pranay Sethi* ought not to be considered to limit the application of such statutory Rule."

18. The U.P. Rules, 1998 are statutory in nature and their operation is not stymied by **Pranay Sethi (supra)**. The U. P. Rules, 1998 have the force of law and shall apply with full force in appropriate cases. The U.P. Rules, 1998 are more beneficial for the claimants than the provisions made in **Pranay Sethi (supra)** for them. The holdings in **Pranay Sethi (supra)** can not dilute the advantages conferred by U.P. Rules, 1998 upon the eligible beneficiaries.

19. This Court finds that the claimants-appellants are entitled to 50% enhancement in wages towards future prospects, consistent with the UP Rules, 1998. The necessary changes in the award shall be accordingly made.

20. In this wake, this Court finds for the appellants-claimants on the issue of grant of future prospects.

7.(B)(iii) Multiplier:

21. The age of the deceased was 28 years at the time of death. Multiplier of 17 has been correctly applied by the learned Tribunal and is in line with **Pranay Sethi (supra)** and **Sarla Verma (supra)**.

7.(iv) Interest:

22. Interest of 7.50% and the manner of payment does not call for interference. However, the claimants-appellants shall not be entitled to interest on the enhanced income determined in this judgement.

II. Determination of Compensation to which claimants-respondents are entitled:

23. In the wake of preceding discussion, the amount of compensation awarded to the claimants-appellants is tabulated below:

- i. Date of Accident - 22.08.2015
- ii. Date of death - 22.08.2015
- iii. Name of the deceased - Vijay Raj
- iv. Age of the deceased - 28 years
- v. Occupation of the deceased - Vegetable Vendor
- vi. Income of the deceased - Rs.8,500 per month.
- vii. Name, Age and Relationship of claimants with the deceased

Sr. No.	Name	Age	Relation
1	Smt. Raywati	28	Wife
2	Km. Rsohni	4	Daughter
3	Vishal	2	Son
4	Smt. Nemwati	58	Mother
5	Khyalram	60	Father

viii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1	Monthly Income (A)	8500
2	Annual Income (B)	8500 x 12

	(A x 12 = B)	= 1,02,000/-
3	Future Prospects (C)	50% of 1,02,000 = 51,000/-
4	Annual Income + Future Prospects (B + C = D)	1,02,000 + 51,000/- = 1,53,000/-
5	Deduction towards Personal Expenses (E)	¼ of 1,53,200/- = 38,300/-
6	Annual Loss of Dependency (D-E=F)	1,53,000-38,300 = 1,14,700/-
7	Multiplier (G)	17
8	Total Loss of Dependency (FxG = H)	17 x 1,14,750 = 19,49,900/-
9	Compensation (H)	19,49,900/-
10	Conventional Heads: (I) (a) Loss of consortium (b) Loss of Love, Affection (c) Loss of Estate (d) Funeral Expenses	70,000/-
11	Total Compensation (H+I = J)	19,49,900/- + 70,000/- = 20,19,900/-
12	Interest	7.50%

III. Conclusion and Directions:

24. The amount of compensation to which the claimants-appellants have thus been found entitled shall be deposited by the corporation within three months before the learned tribunal. Thereafter the learned tribunal shall release the amount to the claimants without delay. The amount already disbursed to the claimants (if any) shall be duly adjusted.

25. The amount of Rs.25,000/- deposited by the appellants-claimants while instituting the appeal shall be forthwith remitted to the learned tribunal. The amount shall be paid to the claimants-appellants as part of the awarded compensation amount.

26. The instant appeal is partly allowed as indicated above.

(2023) 5 ILRA 212

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 21.02.2023

BEFORE

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

First Appeal From Order No. 4116 of 2017
&
other connected cases

**M/s Oriental Insurance Co. Ltd., Hari
Nagar, Meerut**

...Appellant

Versus

Ram Kishan Agarwal & Ors.

...Respondents

Counsel for the Appellant:

Sri S.K. Jaiswal, Sri N.K. Srivastava

Counsel for the Respondents:

Sri K.S. Amist

A. Civil Law - Motor Vehicles Act, 1988-Section 173-composite negligence-in the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers-the vehicle – trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd –it would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings-Had there been no determination of the of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law-Apex

Court latest decision in Khenyei one further aspect that the deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimized if he had taken care- the ground raised even on the compensation being awarded is on higher side cannot succeed as the compensation awarded is without granting any future loss of income, the amount awarded to the heirs of driver of bus is meager, there shall be no recoveries from the claimants-Hence, all these appeals fail- (Para 1 to 24)

The appeals are dismissed. (E-6)

List of Cases cited:

1. Bajaj Allianz Gen. Ins. Co. Ltd. Vs Smt. Renu Singh & ors.. FAFO No. 1818 of 2012
2. Rylands Vs Fletcher (1868) 3 HL (LR) 330
3. Jacob Mathew Vs St. of Punj. (2005) 0 ACJ (SC) 1840
4. Khenyei Vs New India Assr. Co. Ltd. & ors. (2015) LawSuit (SC) 469
5. T.O. Anthony Vs Karvarnan & ors. (2008) 3 SCC 748

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

1. This group of matters are preferred by Oriental Insurance Co. Ltd and The New India Assurance Company Ltd respondents in the claim petitions which arose out of the same accident. The Insurance Companies have requested for settling the liability on the other insurance company as far as negligence of the driver driving the vehicle involved in accident.

2. The Insurance Companies have raised the issue of driving licence but it is held by tribunal that have not proved the

same to be defective before the tribunal which would permit the tribunal to exonerate them. The insurance companies have not proved that there is breach of policy condition. The second contention raised by both the appellants-Insurance companies is that the tribunal did not apportion the negligence of drivers of both the vehicles. The tribunal having not apportioned the negligent, the amount receivable by heirs of driver is not deducted which is bad in law.

3. The brief facts of the case are that on 19.6.1988 at about 11.15 a.m., Bus No. URJ 7389, in which all the deceased/injured persons along with the other passengers were traveling, met with an accident at Bijoli Tiraha, Meerut-Hapur Road, within the circle of P.S. Kharkhoda, District Meerut with Truck No. DHL 3616. It was a head on collision. The bus was going from Meerut to Hapur where as the truck was coming from the opposite direction towards Meerut, when the accident took place. As a result of collusion, the aforesaid bus over turned to left side. On account of this accident, Km. Kaushalya Devi, Ajay Kumar Agarwal, Smt. Mithlesh Agarwal, Bashir, Hariya, Devendra and Ashraf died where as the claimants Smt. Urmila, Km. Lovy, Shyam Lal, Raghuvir and Rajendra Singh sustained various injuries which will be described and narrated later on. The petitioners have alleged that the accident in question is the result of gross rash and negligence in driving the vehicles on the part of the drivers involved in the accident.

4. The owners of bus No. URJ 7389 have contested the claim petitions mainly on the ground that their driver-Ashraf, who also died in the accident was not rash and negligent in causing the accident. On the

other hand, the driver of the motor truck No. DHL 3616 was negligent who caused the accident and collided with the bus no. URJ 7389 on their wrong side.

5. The claim petitions had been filed by the legal representatives of the deceased and by the injured persons, who sustained injuries in a motor accident which occurred on 19.6.1988 at about 11.15 a.m. at Bijoli Tiraha on Meerut-Hapur Road, within the circle of Police Station Kharkhoda, District Meerut, for compensation under Sections 92-A and 110-A of Motor Vehicle Act, 1939.

6. It may be stated that since claim petitions related to the same accident, by an order dated 17.1.1990 the claim petitions No.197/88, 198/88 & 230/88 were consolidated and the claim petition No.197/88 was treated as leading case, by order dated 22.5.1990 M.A.C. No.154/88, 155/88 and 156/88 were consolidated with M.A.C. No.197/88, by an order dated 8.11.1995 M.A.C. No.312/88 were consolidated with M.A.C. No.197/88. M.A.C. No.243/88 was consolidated with the M.A.C. No.197/88 vide order dated 29.7.1991 in M.A.C. No.243/88. M.A.C. No.298/88, 299/88 and 311/88 were consolidated with leading case No.197/88 vide order dated 4.7.1991, M.A.C. No.28/1989 was consolidated with the leading case M.A.C. No.197/88 vide order dated 22.9.1993 were to be heard together.

7. The owners of the motor truck No. DHL 3616 have not contested the claim petitions.

8. New India Insurance Company is the insurer of the bus URJ 7389, the Insurance Company has contested the claim petitions mainly on the ground that the

alleged accident took place due to rash and negligence of the driver of motor truck No. DHL 3616.

9. The Oriental Insurance Company being the insurer of motor truck DHL No.3616 have contested the claim petitions on the ground that the driver of the motor truck DHL No.3616 was not having any valid driving licence to drive the said truck on the date of accident. Hence the Insurance company was not liable to pay the compensation as per Section 96 of Motor Vehicle Act, 1939.

10. The applicant M/s. Oriental Insurance Co. Ltd in some of the connected appeals has raised the following grounds to challenge the common judgment/award of tribunal.

"(i). that the award of compensation granted by the learned Tribunal suffers from illegality and perversity on behalf of the appellant, it was specifically pleaded through Additional Written Statement that the driver of Truck No.DHL 3616 Zahid Husain was not holding any valid driving licence. In view of Section 96 of the Motor Vehicles Act and also in terms of the policy of Insurance the appellant/was not liable at all. The liability if any, was fixed, the truck owners were liable.

(ii). The learned Tribunal failed to giving finding on rash and negligent driving. All the passengers of the bus had deposed that the bus, was at a very high speed.

(iii) The learned Tribunal failed to give a clear finding as to the quantum of the liability fixed on the appellant and the new India Assurance Co. the Insurer of the bus. Thus vitiates the finding.

(iv) The tribunal committed an error of law as he ignored the vital pleading with regard to the driving licence not held by the driver of the said truck. Although attested true copies of the driving licence and its verification from the office have been produced before the learned Tribunal.

(v) In a written argument filed on behalf of appellant it was clearly stated that in view of law laid down by the Hon'ble Supreme Court and this Hon'ble Court also, the insurance company (appellant) is absolved to indemnify the insured truck as its driver was not holding a valid licence (driving licence)

(vi) Even otherwise the findings given by the learned Tribunal is erroneous arbitrary and against the well settled principal of law and hence is liable to be set aside."

11. The appellant-New India Assurance Co. Ltd. in the connected appeals has challenge the award on the following grounds:

(i) Once the court below found that accident took place by Bus No.URJ 7389 and Truck No.DHL3 3616 due to contributory negligence of both the vehicles and as such the court below ought to have passed an award after apportionment of the amount liable to be paid by insurer of each vehicle this having not been done the award of the court below is wholly illegal and erroneous.

(ii) The accident took place on 19.6.1988 and at that time Motor Vehicles Act, 1939 was enforced and as per term of insurance policy under Section 92 of the Motor Vehicle Act, 1939 maximum statutory liability of the appellant could be fixed to Rs.15,000/- per passenger and since it was a case of contributory

negligence has found by the court below the liability of the appellant will be of Rs.7,500/- only per passenger but view to the contrary taken by the tribunal is wholly illegal and erroneous.

(iii) The court below has awarded the compensation excessively though a maximum compensation against the appellant which could have been awarded is Rs.7500/- in this view of the matter the award of the tribunal is highly excessive and is liable to be set aside by this Hon'ble Court.

(iv) The compensation awarded against the appellant could be paid only to the dependents of the deceased or injured and where there was no dependency no amount was liable to be paid unless the claims proved before the court below that they were dependent upon the deceased or injured and in this view of the matter the quantum of compensation is highly excessive.

(v) According to the terms and condition of the Insurance Policy of Bus No.URJ 7389 which was insured by the appellant the bus was insured for carrying 69 passengers and in the premium charge from the owner was Rs.828/- only at the rate of Rs.12/- per passenger and accordingly the liability of the appellant was maximum Rs.15,000/- per passenger as per rule contained under the Act and Rules. It is further stated that Rs.75/- was charged by the appellant for enhancing the third party risk and it had nothing to do for the enhancement of compensation for the passengers but view to the contrary taken by the court below is wholly illegal and erroneous.

(vi) The Court below have wrongly applied multiplier system in the present case.

(vii) The quantum of compensation and rate of interest is highly

excessive and is liable to be set aside by this Hon'ble Court.

(viii) The driver of the bus was not entitled for any compensation as he could claim compensation from the owner of the bus under the Workman compensation Act.

(ix) The claimant respondents do not come within the definition of family as provided under the Fatal Accidents Act and are not entitled to claim any compensation.

(x) The judgment and award of the Tribunal is wholly illegal and is against the weight of oral and documentary evidence available on record of this case and is liable to be set aside.

12. Heard the learned counsel for the appellant-Insurance Companies. The common ground of challenge by both the Insurance Companies relates to negligence of drivers of vehicles involved in the accident, let us consider the question of negligence from the perspective of the law laid down and where two vehicles are involved.

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

14. The term negligence has been discussed time and again. A person who

either contributes or is author or co-author of the accident would be liable for his contribution to the accident having taken place.

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

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the

duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

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

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

may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

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

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (**per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840**).

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

emphasis added

16. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasons. In a case of accident caused by negligence of joint tort feasons, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasons in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasons are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feason vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasons for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in **T.O. Anthony v. Karvannan & Ors. [2008 (3) SCC 748]** has held that in

case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in **Challa Bharathamma & Nanjappan (supra)** has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feisor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after

making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

emphasis added

17. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimized if he had taken care.

18. While going through the records, it is clear that the tribunal below has not apportioned the negligence. It was not suppose to quantify the negligence as qua passengers, it was case of composite negligence, it is held that the tribunal cannot determine the extent of composite negligence of the drivers. There is impleadment of both the joint tortfeasors and the other tortfeasors, therefore, would be liable of its share and that would be 50% as two vehicles of equal magnitude had dashed with each other. However, the passengers in the bus were not the co-authors of the accident having taken place. In these appeals, there are no cross appeals by the claimants. Hence, this Court usurped the compensation granted and the compensation awarded cannot be said to be on the higher-side as the tribunal has not considered the case of the claimants and

under the head of future loss of income, no amount has been granted.

19. As far as Oriental Insurance Company is concerned, the main ground of the challenge is that the driver of truck No. DHL 3616 did not hold valid driving licence and, therefore, the insurance company could not have been held liable to indemnify the owner and they have claimed breach of policy condition under Section 96 of motor vehicles Act, 1931.

20. The owner has produced the driving licence of the driver. The Insurance company before the tribunal tried to show their driving licence who has driven the vehicle. Unfortunately, the Investigating Authority rather the surveyor had gone to the RTO with licence of one Zaheer Ahmad whose father is also different, namely, Hafiz Ali Aziz. In our several cases, driver cannot be said that there was no driving licence. The judgment of the tribunal cannot be found fault with and the appeals of Insurance Companies on this ground will have to be failed.

21. Thus, the appeals preferred by Oriental Insurance Company cannot succeed. This Court now decides the contention of the New India Assurance Co. Ltd. namely that their liability was a limited liability. However, this was never pressed into service before the tribunal rather additional Rs.70 was charged by the appellants for taking higher the third party risk.

22. In that view of the matter, the contention of New India Assurance Co. Ltd. is that it was a limited policy cannot be accepted once the parties contract for unlimited liability.

23. Hence, all these appeals fail. The ground raised even on the compensation being awarded is on higher side cannot succeed as the compensation awarded is without granting any future loss of income. The said finding cannot be interfered with. Appeals are disposed of as the amount awarded to the heirs of driver of bus is meager, there shall be no recoveries from the claimants.

24. In view of the above, all these appeals being devoid of merits are dismissed.

25. Record be transmitted to tribunal. The tribunal shall disburse all amounts kept in fixed deposit by orders of this Court. Amount deposited in High Court be transmitted to tribunal, if yet not transmitted.

(2023) 5 ILRA 220

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 20.04.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR

UPADHYAYA, J.

THE HON'BLE OM PRAKASH SHUKLA, J.

First Appeal No. 85 of 2023

Vikram Chaturvedi ...Appellant

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Appellant:

Shikhar Chaube, Saubhagya Mishra

Counsel for the Respondents:

**Civil Law - Hindu Marriage Act, 1955 -
Section 24 - Maintenance pendente lite
and expenses of proceedings - Issue -**

'Whether allegation of second marriage of the wife during the pendency of the divorce petition raised by the husband would deter the Court from granting a statutory right vested upon the wife': Held - Learned Principal Judge rightly awarded a lump sum amount of Rs. 2000/- towards expenses for filing the written statement and Rs. 3000/- per month towards travel expenses, litigation expenses, and interim maintenance till the disposal of the suit. Only an allegation of second marriage of the wife has been raised by the husband against the wife, and it is a fact yet to be proved by adducing cogent evidence by the husband to the satisfaction of the Court concerned. If such a position is not accepted, in every case, an unscrupulous husband or wife, as the case may be, can always raise such an allegation against the spouse to avoid any liability to pay the litigation expenses and interim maintenance, which would not be the legislative intent while enacting such a beneficial provision in the Act, 1955. (Para 12)

Dismissed. (E-5)

List of Cases cited:

Jitendra Pratap Singh Vs Nidhi Singh, First Appeal Defective No. 17 of 2023, dated 11.04.2023

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

(1) Heard Shri Shikhar Chaube, learned Counsel representing the appellant. Having regard to the averments made in the application seeking deletion of respondent no.1 from the array of the parties, application is allowed.

(2) Let the name of respondent no.1 be deleted from the array of the parties and respondent no.2 be renumbered as respondent no.1. Necessary corrections in the memo of appeal shall be

incorporated by learned Counsel for the appellant during course of the day.

Order on Appeal

(3) Through the instant First Appeal under Section 19 (1) of Family Courts Act, 1984, the appellant/husband, **Vikram Chaturvedi**, has challenged the order dated 06.02.2023 passed by the learned Principal Judge, Family Court, Sultanpur, whereby application filed by respondent no.1/wife (Smt. Priyanka alias Roli) under Section 24 of Hindu Marriage Act, 1955 in Regular Suit No. 884 of 2021 : *Vikram Chaturvedi Vs. Smt. Priyanka Chaturvedi*, under Section 13 of Hindu Marriage Act, 1955, has been allowed and she has been awarded lump sum amount of Rs.2000/- towards expenses for filing written statement and Rs. 3000/- per month towards travel expenses, litigation expenses and interim maintenance till disposal of the suit under Section 13 of Hindu Marriage Act, 1955.

(4) The brief facts of the case culled out from the record available before us are that the appellant/husband has filed a suit, numbered as Regular Suit No. 884 of 2021, seeking divorce under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as "**Act, 1955**" for the sake of brevity). In the aforesaid suit, the respondent no.1/wife filed an application under Section 24 of the **Act, 1955**, wherein she pleaded that her marriage was solemnized with the appellant on 01.12.2020 according to Hindu rites and rituals; on 30.08.2021, the appellant and his family members have turned her out of her matrimonial home and have deserted her and after having been turned out of her matrimonial home, she is residing with her

parents. Respondent no.1/wife further pleaded that her husband (appellant) is working in a Limited Company at New Delhi, from which he earns Rs.50,000/- as salary and in addition to that, he also has an additional agriculture income of Rs.20,000/-. Respondent no.1/wife has further pleaded that she does not have any source of income nor has she any skill by which she can maintain herself. In this backdrop, the respondent no.1/wife prayed to award Rs.5000/- towards expenses for filing written statement and Rs. 5000/- per month towards fee of Advocate and legal expenses etc.

(5) The appellant filed objection against the aforesaid application under Section 24 of the **Act, 1955**, wherein he admitted the fact that the respondent no.1 is his wife. The appellant has further stated in his objection that during the stay at the parental house, the parents of respondent no.1/wife got her married to Sunil Kumar Tiwari *alias* Guddu Tiwari, son of late Ram Sakal Tiwari, resident of Arisiya, hamlet of Sanvardhir, Police Station Haiderganj, District Ayodhya and on coming to know about the second marriage, it has been stated by the appellant that he has filed a complaint case under Section 190 of the Code of Criminal Procedure, 1973, bearing Criminal Case No. 557 of 2022 : *Vikram Vs. Priyanka and others*, under Sections 494, 504, 506 I.P.C. before the Additional Chief Judicial Magistrate, Court No.18, Police Station Lambhua, District Sultanpur. Appellant has also stated that presently, his wife/respondent no.1 is pregnant of about five months. Appellant has also enclosed a photograph of his wife/respondent no.1 along with the said Sunil Kumar in his objection. In this background, appellant has prayed for

rejection of the application filed by his wife/respondent no.1 under Section 24 of the **Act, 1955**.

(6) Apparently, vide an order dated 06.02.2023, the learned Principal Judge, Family Court, Sultanpur, has allowed the application under Section 24 of the **Act, 1955** of the respondent no.1/wife, awarding lump sum amount of Rs.2000/- towards expenses for filing written statement and Rs.3000/- per month towards travel expenses, litigation expenses and interim maintenance to her, till disposal of the regular suit under Section 13 of the **Act, 1955**.

(7) The learned Counsel for the appellant has invited our attention to questionnaire annexed as Annexure No.6 to the instant First Appeal and has argued that in compliance of the order dated 26.09.2022 passed by the Additional Chief Judicial Magistrate, Sultanpur in the Criminal Case No. 236 of 2022, the Station House Officer, Lambhua has investigated the matter under Section 202 (i) of the Code of Criminal Procedure, 1973 and submitted its report before the Additional Chief Judicial Magistrate, Court No.37, Sultanpur, stating therein that accused-Priyanka *alias* Roli (respondent no.1/wife herein) has performed the second marriage but the name of the husband to whom she has married could not be traced out during the investigation. Submission is that from the aforesaid report of the Station House Officer, Lambhua, *prima facie*, it is established that even before the dissolution of the marriage between the appellant and his wife/respondent no.1, the respondent no.1/wife has solemnized second marriage with one Mr. Sunil Kumar Tiwari *alias* Guddu Tiwari and as such the appellant has no obligation to provide maintenance to his

wife, but while passing the impugned order, learned Principal Judge, Sultanpur, has failed to consider the aforesaid facts and also the fact that respondent no.1/wife has committed the offence of bigamy punishable under Section 494 I.P.C., hence, in the aforesaid background, the impugned order dated 06.02.2023 is not sustainable and is liable to be set-aside.

(8) We have considered the submissions advanced by the learned Counsel representing the appellant and have also perused the records available before us on this appeal.

(9) Before analyzing the submissions advanced by the learned Counsel for the appellant, it would be apt to discuss the intent of Section 24 of the **Act, 1955**. For this purpose, Section 24 of the **Act, 1955**, which is relevant in the present context, reads as under :-

"24. Maintenance pendente lite and expenses of proceedings: Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable."

(10) A plain reading of the aforesaid provision shows that intention of the legislature is that where, in any proceedings, it appears to the Court that either the wife or the husband, as the case

may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, order the respondent to pay the expenses of the proceedings and monthly maintenance during the proceeding. These words make the intention of the legislature quite clear that expenses have to be allowed by the Court, as a support system, if the requirement as provided under Section 24 of **Act, 1955** are fulfilled for a period during the pendency of the suit or proceeding.

(11) The cause of action for filing a case under Section 24 of the **Act, 1955** would arise only when there is a matrimonial proceeding initiated by the husband or wife. Therefore, the primary requirement for claiming maintenance under Section 24 of the **Act, 1955** is the pendency of a matrimonial proceeding. This provision was introduced with a laudable object of ensuring "support and maintenance" to a party in the proceeding so as to enable him or her to maintain themselves during the pendency of such proceedings. This provision also permits the Court to award a reasonable amount for the purpose of conducting the matrimonial proceeding. There is no ceiling limit prescribed for the purpose of granting maintenance under Section 24 of the **Act, 1955**. Section 24 of the **Act, 1955** seeks to maintain an equilibrium between the two parties to the litigation during the pendency of the proceeding as it makes provision for payment of as and towards support and maintenance for a party who is in a disadvantageous position to maintain and to diligently contest the proceeding on account of poor economic condition.

(12) In the instant case, the question before us, under the facts and

circumstances of the case, would be *"whether allegation of second marriage of the respondent no.1/wife during pendency of the divorce petition raised by the husband/appellant, would deter the Court to grant a statutory right vested upon the wife"*. It is to be remembered in this context that only an allegation of second marriage of respondent no.1/wife has been raised by the appellant/husband against the respondent no.1/wife and it is a fact yet to be proved by adducing cogent evidence by the appellant/husband to the satisfaction of the Court concerned. Therefore, the view taken by the learned Principal Judge, Family Court, Sultanpur, in allowing a special benefit bestowed upon a party in view of the objective to be achieved by the provision of Section 24 of the **Act, 1955**, cannot be faulted with for the simple reason that the allegation by the appellant are at a very nascent stage, veracity of which is still to be examined by a competent Court of law and in any case if such a position is not accepted, in every case an unscrupulous husband or wife, as the case may be, can always raise such an allegation against the spouse to avoid any liability to pay the litigation expenses and interim maintenance, which, according to this Court, would not be the legislative intent while enacting such a beneficial provision in the **Act, 1955**.

(13) Recently, this Court in First Appeal Defective No. 17 of 2023 (*Jitendra Pratap Singh Vs. Nidhi Singh*), vide order dated 11.04.2023, had an occasion to observe the meaning and import of Section 24 of the **Act, 1955**, which is squarely applicable to the present case in hand. This Court, in paragraph-14 of the aforesaid case, has held as under :-

"14. It is pertinent to mention that the provisions of Section 24 of the Act, 1955 is a piece of beneficial legislation and as such, duty is cast on the Court to exercise its discretion in awarding amount for support and maintenance during the litigation proceedings, so that the indigent spouse may not suffer at the instance of the affluent spouse, who has filed proceedings under any of the provisions of the Act, 1955. The very objective of interim maintenance is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of the failure of the marriage. The Court, while considering the merits of an application for grant of an interim maintenance under Section 24 of the Act, 1955, has to necessarily arrive at prima facie determination about the earning capacity of the rival claimant. The determination cannot be made with exactitude as it is essentially interim in nature. The Court is called upon to make a summary consideration of amount which the applicant is to be awarded by way of maintenance pendente lite and litigation expenses in accordance with the financial resources of the parties."

(14) It is relevant to add here that the right to claim maintenance and expense during pendency of proceedings under the **Act, 1955**, is a special right bestowed on the disadvantaged spouse, irrespective of the result of the main relief under Section 13 of the **Act, 1955**. Therefore, in the present case, allowing the claim of the respondent no.1/wife for interim maintenance and litigation expenses by means of the impugned order by the learned Principal Judge, Family Court, Sultanpur, cannot be faulted with as the same is legally sustainable and is not liable to be interfered with.

(15) For all the aforesaid reasons, the instant First Appeal fails and as such is hereby dismissed.

(2023) 5 ILRA 225
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2023

BEFORE

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

Second Appeal No. 108 of 2008
 And
 Second Appeal No. 26 of 2020

Nagar Kshetra Samiti, Sadabad, Mathura
...Appellant
Versus
Kanchan Singh & Ors. ...Respondents

Counsel for the Appellant:

Sri Kshitij Shailendra, Sri V.M. Zaidi, Sri V.K. Agarwal

Counsel for the Respondents:

Sri V.K. Srivastava, Sri Anil Kumar, Sri J.B. Singh, Sri J. Singh, Sri Jeevan Singh, Sri Preet Pal Rathore, Sri V.A. Agarwal, Sri Vinod Kumar Agarwal

A. Civil Law - Code of Civil Procedure, 1908-Order 41 Rule 33-Appellate Court by exercising the power under Order 41 Rule 33 varied the decree of demolition substituting it by a direction to the plaintiffs to pay for the constructions raised-the constructions were, on the concurrent findings of the court below, raised without title by defendant no. 4, disturbing the plaintiffs' possession- defendants no. 4 out of 4 to 7 defendants, who contested the suit, did not appeal the Trial's court decree-it was the defendant's no. 1 alone that appealed the decree, therefore to direct some benefit to defendants no. 4 to 7 by the lower appellate court is absolutely without basis i.e. in the absence of a

'cross -objection' under Order 41 Rule 22 of the code-Thus, the Lower Appellate Court is not at all justified in granting relief to the defendants no. 4 to 7 to recover costs of the constructions from the plaintiffs-The decree passed by the Lower Appellate Court is set aside.(Para 1 to 74)

The appeals are disposed of.(E-6)

List of cases cited:

1. St. of Ori. & anr. Vs Bamadeb Panigrahi & anr. (1971) AIR Ori 227
2. Dhian Singh Sobha Singh & anr. Vs UOI (1958) AIR SC 274
3. Munuswami Chetty & ors. Vs Commr.H.R.& C.E (Admn). Madras (1993) AIR Mad 144
4. St. of A.P. & ors. Vs Pioneer Builders, A.P.(2006) 12 SCC 119
5. K. Muthuswami Gounder Vs N. Palaniappa Gounder (1998) 7 SCC 327
6. Banarsi & ors. Vs Ram Phal (2003) 9 SCC 606

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

1. This judgment will decide Second Appeal No.108 of 2008 and Second Appeal No.26 of 2020, both of which arise out of the same suit. The Trial Court decided the suit by the same judgment, leading to a single appeal from the original decree by one of the defendants. The judgment and decree passed by the Lower Appellate Court has left both the plaintiffs and the defendants dissatisfied, leading to these two appeals, arising out of the appellate decree.

2. Original Suit No.389 of 1986 was instituted on 14.11.1986 by Kanchan Singh and Man Singh, both sons of Babu Lal in the ex-Court of the Civil Judge, Mathura

(now Civil Judge, Senior Division) against seven defendants, shortly to be specified.

3. By the said suit, the plaintiffs sought relief of permanent prohibitory injunction to the effect that the defendants be restrained from interfering with the plaintiffs' title or possession in *Khasra* No.216, admeasuring -61 decimals, *Khewat* No.1, situate at Villate Neelkanth, District Mathura, or on the basis of rights created amongst themselves from demolishing (any construction) or digging up a foundation on the said property and constructing anything thereon or interfere with the plaintiffs raising a boundary wall around the said property, and further forbear from interfering with the plaintiffs' possession in any manner or take possession of the property themselves.

4. The defendants to the suit are the Town Area Committee, Sadabad through its Officer In-charge. The Town Area Committee aforesaid was then included in the district of Mathura, but is now part of District Hathras. The District Magistrate, Mathura is the second defendant to the suit, whereas the third defendant is the Government of Uttar Pradesh, represented by the Collector, Mathura. The fourth defendant to the suit was the Station House Officer, P.S. Sadabad, District Mathura (now District Hathras). The fifth defendant to the suit was the Superintendent of Police, Mathura. The sixth defendant was the Director General of Police, Uttar Pradesh, Lucknow and the last defendant was the Deputy Inspector General of Police, Agra Range, Agra.

5. It may be mentioned at the outset that though pending suit, many of the defendants would have changed, because Town Sadabad came to be included in the

district of Hathras, but the suit was contested by defendant Nos.1 and 4 alone, who put in their written statements and led evidence. The other defendants did not file any written statement or otherwise contest. After the reverse in the Trial Court suffered by the defendants, it was defendant No.1 alone, which appealed the original decree to the District Judge, and losing there, has carried Second Appeal No.108 of 2008. Defendant No.4 gave up contest after the Trial Court's judgment.

6. In Second Appeal No.108 of 2008, which is being treated the leading case, the Town Area Committee, Sadabad, District Mathura through its Officer In-charge/ Chairman, is the sole defendant-appellant. Hereinafter, the defendant-appellant shall be referred to as defendant No.1. Respondent Nos.1 and 2 to this appeal are the plaintiffs. The other defendants to the suit in the present appeal are arrayed as defendant-respondent Nos.3, 4, 5, 6, 7 and 8, and described as defendant/ proforma respondents. The said defendants shall be called hereinafter as defendant Nos.2, 3, 4, 5, 6 and 7 for the ease of reference.

7. In Second Appeal No.26 of 2020, Kanchan Singh and Man Singh are the two plaintiff-appellants and respondent Nos.1 to 7 are defendant Nos.1 to 7 in the suit. Kanchan Singh died pending Second Appeal No.108 of 2008 and before Second Appeal No.26 of 2020 was instituted. Both the plaintiff are now represented on record by their heirs and LRs, who have contested and pursued these appeals, representing the plaintiffs' interest. For the ease of reference, therefore, the plaintiffs shall be referred to as 'the plaintiffs', wherever there is a collective reference and should individual reference be necessary, they would mentioned by their names as 'Kanchan

Singh' or 'Man Singh', it being understood that it bears reference to their heirs and LRs now on record.

8. The plaintiffs' case is that they are owners in possession of the property, part of *Khewat* No.1, *Khasra* No.16, admeasuring -61 decimals, situate at Village Neelkanth, Pargana Sadabad, District Mathura with boundaries to identify, being set out at the foot of the plaint. The said property shall hereinafter be called 'the suit property'. It is the plaintiffs' case that the suit property was earlier owned by Kisan Swarup, Raman Bihari, Jaiveer Singh, sons of Bankey Lal, and Ram Autar and Ram Kumar sons of Sohan Lal, who were in possession of the same. A more detailed mention of the plaintiffs' vendors shall be made later on, indicating the line of inheritance, as the plaintiffs' vendors claimed the suit property to be ancestral. The suit property was recorded in the name of the plaintiffs' vendors as a '*Pajawa*'. The plaintiffs' vendors would fire this brick kiln, the byproduct of which was ash, that would collect on the suit property. The then owners would give away the collected ash on a contract for sale. The former owners earlier and the plaintiffs for the present, still sell off ash that lies on the suit property.

9. The plaintiffs' case further is that the suit property, on account of large deposits of ash from the brick kiln, has become undulated and they have got one part of it levelled. The plaintiffs entered into an agreement dated 15.03.1979 contracting to buy the suit property from their vendors, paying in earnest a sum of Rs.2000/-. It is the plaintiffs' case that they got a sale deed of the suit property to the extent of -13 $\frac{1}{4}$ decimals executed in their favour by Bhagwati Prasad, Raj Bahadur,

Chandra Prakash, all sons of Bankey Lal. The sale deed aforesaid was executed and registered on 23.03.1979 for a total sale consideration of Rs.6000/-. The plaintiffs further purchased an area of 43-4/7 decimals by means a registered deed dated 16.05.1979 executed by Kisan Swarup, Raman Bihari, Jaiveer sons of Bankey Lal and Ram Autar, Ram Kumar sons of Sohan Lal, for a total sale consideration of Rs.20,000/-.

10. The vendors aforesaid put the plaintiffs in possession of the suit property thus transferred. The plaintiffs' name was duly mutated in the revenue records on the basis of the sale deeds aforesaid. The plaintiffs expended money and got a room constructed, 15' long and 12' wide, towards the north-eastern part of the suit property. The plaintiffs got a part of the suit property levelled and intended to get the same done for the remainder for the purpose of raising constructions. The suit property was in the joint possession of the plaintiffs' vendors and the defendants could have had no concern with it. It is the plaintiffs' case that Ranveer Singh son of Pancham Singh, a resident of Vedai, Tehsil Sadabad and Roshan Lal stirred up a bogus controversy, because they wanted to extort money from the plaintiffs. In order to vindicate their rights against the two men last mentioned, the plaintiffs had to institute O.S. No.152 of 1979 in the Court of the Munsif, Mahawan, District Mathura, titled Kanchan Singh and others vs. Ranveer Singh and others.

11. The plaintiffs say that they needed to raise a loan and, therefore, mortgaged the suit property with the State Bank of India, Sadabad Branch, which holds rights over the suit property to the extent of all its -61 decimals. The plaintiffs sold away a part of the suit property to Ranveer Singh,

the man they later had to sue and delivered possession to him, openly in terms of their deed. The sale deed, the plaintiffs' executed in Ranveer Singh's favour, related to that part of the suit property, over which they had constructed a room. The plaintiffs say that some men from Sadabad harbour ill-will and malice against them and some employees of the Town Area Committee, Sadabad (defendant No.1) are inclined to trouble the plaintiffs. Accordingly, defendant No.1 are designing to usurp the suit property and have incorrectly informed defendant No.2 that the suit property belongs to defendant No.1.

12. It is the plaintiffs' further case that defendant Nos.1 and 2 doing some transfer by writing amongst themselves are intending to assign the suit property to defendant Nos.5, 6 and 7 for the purpose of construction of a Police Chowki. The said defendants (Nos.1 and 2) do not have the right to do that. The plaintiffs assert that defendant No.4 is unnecessarily interfering with the the plaintiffs' use of the suit property. The plaintiffs allege raising a boundary wall over the suit property, which defendant No.4 interfered with and got the construction illegally stopped, threatening the plaintiffs with arrest and detention in jail. All the defendants are said to be in connivance, on account of which, they have been impleaded as defendants to the suit.

13. It is the plaintiffs' case that they are scared of defendant Nos.1, 3, 4 and 6, because they are extending threats to the plaintiffs, asking them to transfer rights in favour of defendant Nos.1-3 and 4-6, so that they may construct the Kotwali there soon. The local Patwari is scared of defendant No.2 and does not speak the truth for that reason. There is an averment in paragraph No.16 of the plaint that in case

the plaintiffs were to serve a notice under Section 80 CPC and wait for the statutory period of two months before instituting the suit, the purpose of instituting the suit would become futile. Defendant Nos.1-3, 5, 6 and 7 would amongst themselves, doing the necessary paper work, raise construction over the suit property, dispossessing the plaintiffs, which would cause irreparable loss and injury to the plaintiffs. It is also averred that for the said reason, leave ought to be granted to the plaintiffs to institute the suit, without service of the statutory notice and waiting for the statutory period of two months. Disclosing the aforesaid cause of action involving threatened dispossession and forcible construction on the suit property, the plaintiffs instituted the suit, giving rise to this appeal, for the relief of permanent injunction per details already indicated.

14. Defendant No.1 filed a written statement. The said defendant admitted the fact that the suit property was indeed located in *Khasra* No.216, but denied that the plaintiffs were the owners thereof. Defendant No.1 further admitted the fact that in the revenue records, the suit property was entered as a *Pajawa* and about this entry, it is said in a plea of avoidance that it has been wrongly made in those records. The other allegations in the plaint were denied and it was pleaded that neither the plaintiffs nor their transferers hold title to the suit property; nor any of them were in possession. The case about the plaintiffs' predecessor running a brick kiln on the suit property, leading to the accumulation of ash there, was all denied. The fact of execution of sale deeds for whole of the suit property was also denied. It was also denied that the plaintiffs' transferers were owners of the entire suit property. It was pleaded that for the said

reason, they did not have the right to transfer the entire suit property to the plaintiffs. The plaintiffs' case about construction of a room there has also been denied. The reason assigned is that the plaintiffs never presented any building plan for sanction before defendant No.1, authorizing them to raise that construction.

15. It is the case of defendant No.1 that a perusal of the *Khewat* relied upon by the plaintiffs shows that the entire area is 2.80 decimals. Bankey Lal son of Kanhaiya Lal and Sohan Lal son of Jagannath (ancestors of the plaintiffs' transferers) are recorded over a total area of 35 49/107 decimals. The revenue records show that the concerned persons have got forged entries made therein. It is then pleaded on behalf of defendant No.1 that through their former Chairman, they got an application under Section 39 of the U.P. Land Revenue Act made for correction of the revenue records, which was registered as Case No.8 of 1975-76. The application was moved for correction of records relating to *Khasra* Nos.240, 241 and 242, all situate in Village Neelkanth. Bhagwati Prasad and others were parties to the said case.

16. It is then pleaded that defendant No.1 got the aforesaid plot numbers acquired along with other plot numbers, as would appear from the order of the Land Acquisition Officer, Mathura. It is also pleaded that Bankey Lal, Sohan Lal and others, who were recorded as tenure holders were also paid compensation. Accordingly, the Town Area Committee was delivered possession over the suit property on 30.05.1953. It is on account of connivance with the former Lekhpal that names of the plaintiffs' predecessors were entered in the *Khewat* for the purpose of extending undue benefit to them. It is the

said defendant's case that the entry relating to 1376 *Fasli* is wrong.

17. It is also pleaded that according to orders passed on 20.12.1975 in Mutation Case No.8 of 1975-76, the names of Bhagwati Prasad, Bishan Swarup, Raj Bahadur, Bankey Lal, Sohan Lal and others were mutated out and their revision against the said order was dismissed by the Additional Commissioner, Agra Division, Agra *vide* his order dated 25.08.1976. Earlier, Village Gadhi Neelkanth was part of *Gram Sabha* Koopa and after extension of the boundaries of the Town Area, the suit property came to fall within the local limits of the Town Area. All properties of the *Gaon Sabha* stood vested in the Town Area Committee.

18. It is also the case of defendant No.1 that in the records, the plaintiffs' ancestors were never recorded as ones in possession. The plaintiffs have taken possession on the basis of a sale deed, which confers no title on them. According to defendant No.1, it is evident from the documentary evidence that plot Nos.240, 241 and 242 had old numbers 139, 131, 132 and 133. It is also the case of defendant No.1 that the suit property adjoins land that was acquired for defendant No.1. The plaintiffs have, in collusion with their vendors, got a sale deed executed in their favour and on that flawed basis claimed themselves to be titleholders of the suit property, a fact which is absolutely incorrect. The sale deed executed by the former owners in favour of the plaintiffs is void and confers no title upon them. The plaintiffs can neither be owners of the entire *Khasra* No.216 nor co-sharers therein.

19. The plaintiffs got a notice dated 02.12.1985 under Section 80 CPC served

upon defendant No.1 on incorrect premises, and without awaiting expiry of the notice period, instituted the suit. According to defendant No.1, the Collector of Mathura, is their Administrator and it is upon his directions that the suit property has been handed over to the Police Department. The decision has been taken in the interest of the local population, which the plaintiffs have no right to frustrate by presenting the instant suit. At the time of institution of the suit, the plaintiffs were not in possession. The suit is barred by Section 34 of the Specific Relief Act. The suit is undervalued. The entire suit property is worth at least Rs.2,50,000/-. The court-fee paid is insufficient. The plaintiffs have got incorrect entries made (in the revenue records) and appropriate steps to rectify the records are being taken after seeking necessary legal advice. It is pleaded that defendant No.1 does not accept the plaintiffs' title to the suit property. The suit has been instituted on incorrect facts, which ought to be dismissed with costs.

20. Defendant No.4 filed a separate written statement denying the plaint allegations, but admitting the fact that the suit property is located in *Khasra* No.216. It has been denied that any cause of action has arisen to the plaintiffs to institute this suit, which according to defendant No.4 is founded in incorrect premises. The plaintiffs are not in ownership possession of the suit property. They were never owners of the said property. The plaintiffs' vendors never had title to the suit property. It is defendant No.1, who was always the titleholder of the suit property and in possession thereof, and now, it is defendant No.4, who holds possession.

21. According to defendant No.4, the population of Tehsil Sadabad has

considerably increased. The Police Station, that is existing, is very small, which does not allow work to be done properly. It is in view of this fact that it was considered appropriate that the police station be expanded and a new one constructed. The Superintendent of Police, for the purpose of securing some land, invited the attention of the State Government, represented by the Collector. Accordingly, defendant No.3 (the Collector) gave away the suit property to defendant No.4, because at the relevant time, defendant No.1 were under the control of the Collector, who had all authority to transfer defendant No.1's land in favour of defendant No.4.

22. In order to construct a new police station, tenders were invited and a contract for the purpose was granted for a sum of Rs.8 lacs in favour of one C.P. Singh Chaudhary. He was paid out of the settled sum, under the contract, a sum of Rs.2 lacs. The contractor has commenced work at site and laid foundation for the construction of four rooms, a verandah, a lavatory and a bathroom. Building materials worth Rs.2 lacs, belonging to the contractor, are lying stacked at site. The plaintiffs have no concern with the suit property nor did they ever hold title or possession of the same. The plaintiffs have not complied with the provisions of Section 80 CPC. The plaintiffs' suit is not maintainable.

23. Here, it may be noticed that pending suit, the plaintiffs came up with a case that defendant Nos.2 to 7, in connivance with defendant No.1, violating the temporary injunction order, that was operating in favour of the plaintiffs, forcibly took possession of the suit property and have raised construction on the same, which they have no right to do. In the circumstances, the plaintiffs are entitled

to possession of the suit property, after demolition of constructions raised with liberty to the defendants to carry away the building material.

24. An amendment to the above effect was sought by the plaintiffs through an application, that was granted *vide* order dated 29.01.1991. A further amendment was sought to the relief clause, where after deleting the relief of permanent prohibitory injunction, the plaintiffs sought relief of possession after demolition of constructions raised by the defendants with liberty to them to carry away the building material. Court-fee was paid *ad valorem* on the relief of possession.

25. Defendant Nos.1 and 4 have filed two additional written statements in answer to the pleas raised on behalf of the plaintiffs through amendments. Both the defendants in their additional written statements denied the amended pleas, including the assertions that the defendants, by connivance amongst themselves, have taken possession of the suit property, in violation of the temporary injunction by force and raised constructions thereon. It was pleaded that the suit property's owner was defendant No.1 and it is the said defendant, which had given possession to the Government of U.P. It was also pleaded that on the suit property, a building to house the Police Station Sadabad has already been constructed, wherein the Government have spent a sum of Rs.5 lacs. It was, therefore, urged that the plaintiffs are not entitled to relief of possession.

26. On the pleadings of parties, the following issues were framed (translated into English from Hindi):

"(1) Whether the plaintiffs are owners of the property in dispute?

(2) Whether on the date of institution of the suit, the plaintiffs were in possession of the suit property?

(3) Whether the suit is undervalued?

(4) Whether the suit is barred by Section 34 of the Specific Relief Act?

(5) To what relief are the plaintiffs entitled?

(6) Whether the defendants have dispossessed the plaintiffs pending suit?

(7) Whether the suit is undervalued and the court-fee paid insufficient?"

27. On behalf of the plaintiffs, six witnesses were examined, to wit, Man Singh, plaintiff No.1, who testified as PW-1, Munshi son of Gaffur as PW-2, Udai Ram, *Ahalmad*, Civil Court, Mathura was examined as PW-3, Kishan Swarup son of Bankey Lal testified as PW-4, Sultan Singh Pachauri was examined as PW-5 and Chandrabhan Gautam, Advocate appeared in the witness-box as PW-6.

28. On behalf of the defendants, four witnesses were examined: Ram Kishan, DW-1 and Pusaram Santoshi, DW-2, both these witnesses being examined on behalf of defendant No.1; and, Sub-Inspector R.P. Tyagi and Chandrapal Singh, Inspector C.B. C.I.D., Agra, were examined as DW-3 and DW-4, respectively on behalf of defendant No.4. A wealth of documentary evidence was produced on behalf of the plaintiffs, details whereof are summarized in the judgments of the Courts below; particularly, that of the Trial Court. Likewise is the position on behalf of defendant Nos.1 and 4, who too produced some documentary evidence. It is not necessary to set forth the summary of the documentary evidence filed by parties, the relevant of which would be noticed during the course of this judgment.

29. So far as Issue Nos. 3 and 7 are concerned, the same were disposed of in terms of an order dated 13.02.1991 with the issues being answered in favour of the plaintiffs.

30. Insofar as Issue No.4 is concerned, the Trial Court held that this issue was not pressed at the hearing and, therefore, answered against the defendants.

31. Issue No.2 was answered in favour of the plaintiffs and against the defendants, holding that evidence led by the plaintiffs was stronger and more dependable as compared to that on behalf of defendants, which shows for all the reasons assigned, based on evidence discussed, that it was the plaintiffs, who were in possession at the time of institution of the suit.

32. Issue No.1 was also answered for the plaintiffs and against the defendants holding, after a very elaborate discussion of the evidence on record, that the plaintiffs are owners of 46 9/14 decimals of land out of the total 61 decimals, and that they are entitled to be declared so. It was also held that the Police Department had taken possession of the suit property without right, illegally.

33. Likewise, Issue No.6 was answered in favour of the plaintiffs holding that the defendants had taken possession of the suit property after dispossessing the plaintiffs during pendency of the suit. In working out the relief, which the Trial Court dealt with while deciding Issue No.5, it was held that out of the total area of 61 decimals of plot No.216, the plaintiffs purchased through the two sale deeds, an area 56-9/14 decimals. Out of this area, they transferred 10 decimals in favour of Ranveer. This has left the plaintiffs with an

area 46-9/14 decimals, of which they are owners. It was further held that the plaintiffs are entitled to possession over 46-9/14 decimals of land out of the suit property, after demolition of the existing constructions raised thereon by the defendants. The suit was, accordingly, decreed for possession of 46-9/14 decimals of land out of the suit property after dispossessing the defendants therefrom. The defendants were ordered to deliver possession of 46-9/14 decimals of land to the plaintiffs out of the suit property within two months of the date of the decree and to do so after removal, within the said time, of constructions raised thereon. It was also ordered that constructions that have been raised over the suit property by defendant Nos.4 and 7 could be dismantled and the materials carried away by the said defendants. In the event, the decree was not carried out within the time allowed, the plaintiffs would be at liberty to cause the constructions to be demolished at the cost of defendant Nos.4 and 7 and recover possession of the suit property.

34. Defendant No.1 alone appealed the decree, which was initially presented before this Court, but on account of amendment to the Bengal, Agra and Assam Civil Courts Act, 1887, was sent down to the District Judge, who was the Appellate Court of competent pecuniary jurisdiction. The appeal ultimately came up for hearing before the Additional District Judge, Hathras, the Tehsil of Sadabad by then being included within the territories of the newly created district of Hathras. The Additional District Judge vide his judgment and decree dated 08.10.2007 substantially affirmed the Trial Court, but modified the decree only to the extent that after separating the area of 46 9/14 decimals out of the suit property, regarding which the

suit for demolition and possession has been decreed, the part of the constructions raised by defendant Nos.4 to 7, that fall within the said area, be valued and the cost thereof directed to be paid by the plaintiffs to defendant Nos.4 to 7, after their dispossession.

35. Aggrieved by the appellate decree, defendant No.1 has preferred Second Appeal No.108 of 2008, seeking its reversal, whereas Second Appeal No.26 of 2020 was preferred by the plaintiffs from that part of the Lower Appellate Court's decree, which has directed costs of the construction illegally raised by defendant No.4 to be paid by the plaintiffs to defendant Nos.4 to 7. Second Appeal No.108 of 2008 was admitted to hearing on 20.07.2012, though instituted much earlier on 23rd January, 2008, on the following substantial questions of law:

"(a) Whether the courts below were justified in not advertng to the provisions of U.P. Municipalities Act, 1916 wherein every notified area committee has been assigned the status of a Municipality/ Nagar Panchayat and as such non-compliance with the mandatory requirements of Section 326 of U.P. Municipalities Act by the plaintiff could have at all been ignored?

(b) Whether entry in revenue records qua the land in dispute as "Pajava" was not a conclusive proof of automatic vesting of the land in the defendant-appellant/ State and hence the findings recorded by the courts below on the issue of title and ownership of the disputed land against the defendant-appellant are legally sustainable?"

36. Second Appeal No.26 of 2020 (Second Appeal Defective No.33 of 2017)

was admitted to hearing on 06.01.2020 framing the following substantial questions of law:

"(i) Whether the court of first appeal was justified in granting such relief in favour of Nagar Kshetriya Samiti Sadabad i.e. defendants to recover the amount of cost to the encroachment/existing construction when admittedly no counter claim was filed nor any relief was sought to this effect.

(ii) Since appeal No. 108 of 2008 has already been admitted, list this appeal for analogous hearing."

37. Heard Mr. Kshitij Shailendra, learned Counsel appearing on behalf of defendant No.1 and Mr. Preet Pal Rathore, learned Counsel appearing on behalf of the plaintiffs. No one appears on behalf of defendant Nos.2 to 7. Mr. Preet Pal Singh, learned Counsel has been heard on behalf of the plaintiffs in support of Second Appeal No.26 of 2020 and Mr. Kshitij Shailendra, learned Counsel on behalf of defendant No.1. No one appears on behalf of defendant Nos.2 to 7 in this appeal also.

38. It would be apposite to consider the parties' case in each of the two appeals separately with reference to the Substantial Question(s) of Law framed in the relative appeal.

A. Second Appeal No.108 of 2008 **Substantial Question (a)**

39. It is submitted on behalf of defendant No.1 that the plaintiffs have not complied with the requirements of Section 326 of the Uttar Pradesh Municipalities Act, 1916 (for short, 'the Act of 1916'). The learned Counsel for defendant No.1

submits that before the institution of a suit against a Municipality under the Act of 1916, it is imperative that a notice is served in writing upon the Municipality, indicating particulars mentioned in sub-Section (1) of Section 326. After service of notice contemplated in Section 326(1), a period of two months must elapse before the suit is instituted. Attention of the Court has been drawn to the provisions of Section 326 of the Act of 1916, which read:

"326. Suits against Municipality or its officers. - (1) No suit shall be instituted against a Municipality, or against a member, officer or servant of a Municipality, in respect of an act done or purporting to have been done in its or his official capacity, until the expiration of two months next after notice in writing has been in the case of a Municipality, left at its office, and, in case a member, officer or servant, delivered to him or left at his office or place of abode, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and the plaint shall contain a statement that such notice has been so delivered or left.

(2) If the Municipality, member, officer or servant shall, before action is commenced, have tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered, shall also pay all costs incurred by the defendant after such tender.

(3) No action such as is described in sub-section (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six

months next after the accrual of the cause of action

(4) Provided that nothing in sub-section (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceeding."

40. It is urged by the learned Counsel for defendant No.1 that the suit here was one that was initially instituted for the relief of permanent prohibitory injunction alone, but later on converted into a suit for demolition and dispossession. And, still, no notice under Section 326 of the Act of 1916 was served upon defendant No.1, as mandated by Section 326(1) of the last mentioned Act. It is urged that it was incumbent for the plaintiffs to serve a notice under Section 326 upon defendant No.1, in order to maintain their action. Learned Counsel for defendant No.1 has invited attention of the Court further to the provisions of Section 3-A(3)(b) of the Act of 1916. In order to understand the provisions of Section 3-A(3)(b) aforesaid, it would be necessary to set forth Section 3-A of the Act of 1916, which reads:

"3A. Municipality for every transitional area and smaller urban area.

- (1) A municipality constituted under clause (1) of Article 243-Q of the Constitution in accordance with Part IX-A thereof shall, -

(a) for every transitional area, be known as the Nagar Panchayat;

(b) for every smaller urban area be known as the Municipal Council.

(2) Every Nagar Panchayat or Municipal Council constituted under subsection (1), shall be a body corporate.

(3) Notwithstanding anything in sub-section (1), -

(a) every Municipal Board existing immediately before the commencement of the Uttar Pradesh Urban Local Self Government Laws (Amendment) Act, 1994, shall [from such commencement and until the first constitution of the Municipal Council under this Act as amended by the said Act be deemed to be a Municipal Council under the Act;

(b) every notified area committee constituted under Section 338 or Town Area Committee constituted under the Uttar Pradesh Town Areas Act, 1914, as it stood immediately before the commencement of the Act referred to in clause (a), shall [from such commencement and until the first constitution of the Nagar Panchayat under this Act, as amended by the Act referred to in clause (a)] be deemed to be a Nagar Panchayat under this Act."

41. There is a further submission that the learned Counsel for defendant No.1 has made while concluding his arguments on the first of the two substantial questions of law. He says that so far as the other defendants are concerned, they are the State and its officers, against whom a suit would not lie without service of a notice under Section 80 of the Code of Civil Procedure, 1908 (for short, 'the Code'). It is urged that, even if initially, the relief claimed was one of permanent prohibitory injunction, no exemption under sub-Section (2) of Section 80 of the Code was claimed. More so, after amendment of the plaint, the cause of action having changed from a suit for permanent prohibitory injunction into a suit for demolition and possession, service of

notice under Section 80, based on the amended cause of action and the amended plaint, was mandatory. And, in the absence of service of notice under Section 80 of the Code, this suit against the other defendants, that is to say, the State and its various officers is not maintainable.

42. In answer, Mr. Preet Pal Singh Rathore, learned Counsel appearing for the plaintiffs submits that defendant No.1 has raised this plea for the first time before this Court. It is pointed out that whereas in Paragraph No.42 of this defendant's written statement, there is a traverse about the time of service of notice under Section 80 of the Code, there is no pleading either in the written statement or a ground in the memorandum of first appeal, regarding want of the mandatory notice under Section 326 of the Act of 1916. It is argued that the plea regarding a bar of the suit under Section 326 of the Act last mentioned, not being raised in the written statement or before the Lower Appellate Court, it cannot be permitted to be raised for the first time in second appeal. A perusal of the written statement filed on behalf of defendant No.1 shows that indeed there is no plea raised on behalf of the said defendant regarding non-compliance with the provisions of Section 326 of the Act of 1916. The only pleading about the want of a notice is to be found in Paragraph No.42 of the written statement dated 07.01.1987. The said plea is to the effect that defendant No.1 was served with a notice dated 02.12.1985 on incorrect facts by the plaintiffs through their Counsel. It was a notice under Section 80 of the Code and that the suit was instituted without waiting for the statutory period mentioned in the said notice.

43. Now, so far as a notice under Section 80 of the Code is concerned, that

relates to the mandatory requirement of service of a notice as envisaged under sub-Section (1) of Section 80, when a suit is instituted against the Government or a public officer in respect of any act done in his official capacity. Sub-Section (1) mandates that the statutory notice contemplated under Section 80 of the Code must be served upon the Government or a public officer, if it relates to official actions of such public officer, and a suit can be instituted after expiry of two months from date of service of notice in writing at the office of the specified officer of the Government, and in the case of a public officer, delivered to such officer or left at his office. What the notice must essentially state is also laid down by sub-Section (1) of Section 80 of the Code.

44. It must be remarked that a notice under Section 80 of the Code is not to be confounded with a notice under Section 326 of the Act of 1916. The object of both kinds of notices issued under very different statutes may be similar or even identical. But, the two are not the same. The identities of parties entitled to a notice under Section 80 of the Code and Section 326 of the Act of 1916 are also different. A notice under Section 80 of the Code, as already noticed, is mandatory, where an action is brought against the Government or one of its officials for an act done in their official capacity, whereas a notice under Section 326 of the Act of 1916 is mandatory, except to the extent contemplated under sub-Section (4) thereof, in the case of a Nagar Palika Parishad or Nagar Panchayat governed by the provisions of the Act, last mentioned.

45. There is no quarrel about the fact that a Town Area Committee constituted under the Uttar Pradesh Town Areas Act,

1914 by virtue of Section 3-A(3)(b) until the first constitution of a Municipal Council, after commencement of the Uttar Pradesh Urban Local Self-Government Laws (Amendment) Act, 1994 be deemed to be a Nagar Panchayat under the Act of 1916. This being so, the defendant No.1 here, a Town Area, would be entitled to notice under Section 326 of the Act of 1916. But, that is an entitlement under the law for defendant No.1 before action is commenced.

46. Here, what this Court finds is that no plea was ever raised on behalf of defendant No.1 that the suit was not maintainable against them due to want of a notice under Section 326 of the Act of 1916. There is a passing mention, as already noticed in Paragraph No.42 of the written statement, that a notice under Section 80 of the Code, on incorrect facts, was served upon defendant No.1 by the plaintiffs and the suit instituted before expiry of the statutory period. It has been remarked above that the bar under Section 80 of the Code to commencement of actions without service of a notice, in terms of the said provision, is applicable only in the case of a suit against the Government or one of its officials, as regards their acts done while discharging their official functions. Whether the suit was instituted without service of a notice under Section 80 of the Code or instituted prematurely without waiting for expiry of the statutory time, is none of defendant No.1's concern. This is a plea, which could be raised and proved on behalf of the Government and its officials. It is not a plea that is open to defendant No.1.

47. There is no quarrel on facts that a notice under Section 326 of the Code has not at all been served upon defendant No.1

before the suit was instituted. As already noticed, there is no plea regarding want of a notice under Section 326 raised in the written statement at all. No issue was framed at the instance of defendant No.1 before the Trial Court regarding the maintainability of the suit for want of notice under Section 326 aforesaid. No issue was framed to the above effect even after the plaint was amended by the plaintiff and an additional written statement filed on behalf of defendant No.1.

48. In the opinion of this Court, the failure to raise a plea regarding want of notice under Section 326 in the written statement, then in failing to get an issue framed on the point before the Trial Court, and also failing to raise a ground before the Lower Appellate Court in the first appeal, constitutes a waiver of the right to statutory notice under Section 326, otherwise mandatory.

49. The principle of waiver of a mandatory notice before commencement of action has been recognized over time by judicial authority in the context of the analogous provisions of Section 80 of the Code. Analogous, this Court says, because the purpose of notice under Section 326 of the Act of 1916 and that under Section 80 of the Code is the same. The requirement of both these statutory notices is to extend protection from action in one case to the Government and its officers for their official acts, and in the other to municipal bodies constituted under the Act of 1916. Protection is given to these sovereign or statutory entities, because it is presumed that if the plaintiff has a case, upon service of the statutory notice and passage of the statutory time, the Government or the municipal body, as the case may be, may get an opportunity to accept the claim or so

much of it as acceptable, eschewing unnecessary litigation for these Government bodies. The bar of the mandatory notice, therefore, either under Section 80 of the Code or Section 326 of the Act of 1916, is in the nature of a protection, available to the Government or the municipal body against abrupt commencement of action. The bar being in the nature of a protection, can always be waived, if not pleaded and proved. Once the bar under Section 326 of the Act of 1916 is not pleaded in the written statement, as already remarked, and during the subsequent course of proceedings also, in the opinion of this Court, it must be deemed to have been waived. It cannot be permitted to be raised for the first time in second appeal. In this connection, reference may be made to a decision of the Orissa High Court in **State of Orissa and another v. Bamadeb Panigrahi and another**, AIR 1971 Ori 227, where in the context of a notice under Section 80 of the Code, it was observed by R.N. Mishra, J. (as the learned Chief Justice of India then was):

"9. That a notice under Section 80 of the CPC is mandatory and the question is no more open to doubt in view of the decision of their Lordships of the Supreme Court in AIR 1966 SC 1068, *Sawai Singhai v. Union of India*. Position was always well settled and as early as 1927 their Lordships of the Judicial Committee had also stated so. The decision of their Lordships of the Judicial Committee in AIR 1927 PC 176, *Bhagchand Dagdusa v. Secretary of State* was approved in the aforesaid Supreme Court decision. But there is also another current of judicial thought which cannot be ignored. Courts have taken the view that the protection available under Section 80 of the CPC either to the State Government or a public officer can be waived and raising

of a plea in the written statement and not joining an issue in the trial Court have been held to be waiver. In this Court there are two decisions directly on the point. In ILR (1959) Cut 258, *Basudeb v. Padmanav*, G.C. Das, J., held,

"When an objection that a suit is not maintainable in the absence of a notice under Section 80 is not raised in the trial Court and no issue is joined on this point and the suit is decreed the plea as to want of notice must be deemed to have been waived and when the plea is taken for the first time in appeal, the appellate Court is not entitled to dismiss the suit on the ground of absence of notice under Section 80."

10. The same view has been reiterated by Barman, J., as he then was, in (1962) 4 O.J.D. 13, *Anadi Charan Parida v. Banamali Muduli*, considering a similar question which arose with reference to Section 49 of the Madras Court of Wards Act (I of 1902) which has the same language as Section 80 of the CPC, Viswanath Sastri, J., in AIR 1949 Mad 747, *Venkataswami v. Mahalakshmi*, held:--

"Waiver is an abandonment of a right and may be express or implied from conduct and to be effectual must be by a person who has full knowledge of the facts. A person who has taken a plea based on the want of notice to which he is entitled, may waive it and allow the action to proceed as though the required notice had been given to him and this can be done so long as the action is pending and has not been finally determined."

11. A Full Bench of the Rajasthan High Court in AIR 1959 Raj 126 (FB), *Rajasthan State v. Girdharilal* adopted the self-same view. They quoted with approval the observations of their Lordships of the Judicial Committee in AIR 1947 PC 197,

Vellayan Chettiar v. Government of the Province of Madras, where it was stated.

"There appears to their Lordships to be no reason why the notice required to be given under Section 80 should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required; if in the particular case he does not require that protection and says so, he can lawfully waive his right."

12. In AIR 1958 SC 274, *Dhian Singh v. Union of India*, their Lordships stated,

"It is relevant to note that neither was this point taken by the respondent in the written statement which it filed in answer to the appellant's claim nor was any issue framed in that behalf by the trial Court and this may justify the inference that the objection under Section 80 had been waived."

13. Mr. Justice Mitra of the Calcutta High Court in AIR 1960 Cal 270, *Lalchand v. Union of India* stated,

"If the provisions of law were waived in the course of a trial, they cannot afterwards be set up by way of objection to any step taken or about to be taken upon the footing of waiver. When the litigant had, without mistake induced by the opposite party, taken a particular position in the course of litigation, he must act consistently with it, especially, if to allow him to do otherwise would prejudice the opponent. If Mr. Ghosh therefore wanted to rely on the invalidity or insufficiency of the notice under Section 80 of the CPC it was for him to raise a specific issue on this question."

14. Reliance was placed by Mitra, J., on an earlier decision of their Court in (1907) ILR 84 Cal 257, *Manindra Chandra Nandi v. Secretary of State*. To the self-same effect there is an authority in (1913) 17 Cal WN 64, *Bhola Nath Ray v. The*

Secretary of State for India in Council. In the present case a plea was taken in the written statement, but a suitable issue on this aspect was not raised nor has this point been canvassed in the trial Court. Though in the lower appellate court a ground was in the memorandum of appeal on this question it does not seem to have been canvassed, nor is it alleged in this Court that such a point was raised in the lower appellate court and the learned Appellate Judge has omitted to refer to it. In such circumstances and in view of this state of the legal position I think the contention that the suit is bad for notice cannot be permitted to be mooted. The telegram notice is Ext. 6. It is certainly not in conformity with the requirement of Section 80 of the CPC. Besides, the provision in the Code that "the plaint shall contain a statement that such notice has been so delivered or left" does not appear to have been satisfied. If this provision was deemed to be mandatory so that its compliance could not be waived by that category of defendant to whom Section 80 of the CPC applies, the position must have been different. But in view of the series of decisions referred to above, I do not propose to take a different view. The plea of want of notice cannot be permitted to be raised for the first time in second appeal to the prejudice of the plaintiff who is bound to lose if the plea is now raised and he is nonsuited on that technical score."

50. The principle of waiver with regard to a notice under Section 80 of the Code has also been approved by the Supreme Court in **Dhian Singh Sobha Singh and another v. Union of India, AIR 1958 SC 274**, when the plea was not taken in the Trial Court and no issue was framed. The decision in **Dhian Singh Sobha Singh (supra)** was followed by the Madras High Court in **Munuswami Chetty and others**

v. Commissioner, H.R.&C.E. (Admn.) Madras-34 and others, AIR 1993 Mad 144.

51. The issue again fell for consideration of the Supreme Court in the context of a case of waiver of notice under Section 80 of the Code in **State of A.P. and others v. Pioneer Builders, A.P., (2006) 12 SCC 119**. In **State of A.P. v. Pioneer Builders, A.P. (supra)**, it was held:

"19. The High Court has held that having participated in the original proceedings, it was not now open to the State to raise a fresh issue as to the maintainability of the suit, in view of waiving the defect at the earliest point of time. The High Court has also observed that knowing fully well about non-issue of notice under Section 80 CPC the State had not raised such a plea in the written statement or additional written statement filed in the suit and, therefore, deemed to have waived the objection. It goes without saying that the question whether in fact, there is waiver or not necessarily depends on the facts of each case and is liable to be tried by the court, if raised, which, as noted above, is not the case here."

52. The principles that apply to a waiver of notice under Section 80 of the Code, in the opinion of this Court, apply to Section 326 of the Act 1916 as well. This Court, on the facts here, including the pleadings, has already remarked that it is a case where the plea regarding service of a notice under Section 326 of the Act of 1916 has not been raised at all in the written statement, or an issue framed about it. The plea has not been raised before the Lower Appellate Court. In the opinion of this Court, therefore, the plea regarding want of a notice under Section 326 of the Act of

1916, cannot be accepted, as the notice would stand waived.

53. Substantial Question of Law (a) is, therefore, answered in the manner that whereas the provisions of the Act of 1916 would apply to a Town Area Committee, including the provisions of Section 326 of the Act of 1916, that ought to be complied with, but in the absence of a plea regarding a bar to the suit for non-compliance of Section 326 aforesaid being raised in the written statement or at an early stage before the Trial Court, the bar would stand waived.

Substantial Question of Law (b)

54. It is argued by the learned Counsel for defendant No.1 that the suit property was recorded as *Pajawa* and, therefore, under Section 116 of the Act of 1916 would be deemed to have vested in defendant No.1. Learned Counsel for defendant No.1 has drawn the Court's attention to Section 116 of the Act of 1916, which reads:

"116. Property vested in Municipality. - Subject to any special reservation made by the State Government, all property of the nature hereinafter in this section specified and situated within the municipal area shall vest in and belong to the Municipality, and shall, with all other property which may become vested in the Municipality, be under its direction, management and control, that is to say, -

(a) all public town walls, gates, markets, slaughter-houses, manure and nightsoil depots and public buildings of every description which have been constructed or are maintained out of the municipal fund;

(b) all public streams, lakes, springs, tanks, wells and works for the

supply, storages and distribution of water for public purposes and all bridges, buildings, engines, materials and things connected therewith or appertaining thereto, and also any adjacent land not being private property appertaining to any public tank or well;

(c) all public sewers, drains, culverts and water-courses, and all works, materials and things appertaining thereto;

(d) all dust, dung, nightsoil, ashes, refuse, animal matter or filth or rubbish of any kind, or dead bodies of animals collected by the Municipality from the streets, houses, privies, sewers, cesspools or elsewhere or deposited in places appointed by the Municipality under Section 273;

(e) all public lamps, lamp posts and apparatus connected therewith or appertaining thereto;

(f) all land or other property transferred to the Municipality by the Government or by gift, purchase or otherwise for local public purposes; and

(g) all public streets and the pavements, stones and other materials thereof, and also all trees, erections, materials, implements and things existing on or appertaining to such streets."

(emphasis by Court)

55. It is next submitted that the orders made in the mutation proceedings, that were finalized in the years 1974-75 against the plaintiffs, was sufficient to dislodge the plaintiffs' claim in this suit instituted in the year 1986. This is so because mutation entries are conclusive proof of possession over land and, therefore, on the date of institution of the suit in the year 1986, defendant No.1 must be held in possession. The subsequent conversion of the suit from one of permanent prohibitory injunction into a suit for demolition and possession,

shows that the plaintiffs were not in actual physical possession of the suit property on the date the suit was instituted. Therefore, the suit must fail. It is also urged on behalf of defendant No.1 that the Lower Appellate Court has in manifest error passed a decree for preparation of a *Kura*, whereas the suit was not one for partition, but demolition and possession.

56. The learned Counsel for the plaintiffs submits that the suit property never vested in the *Gaon Sabha*, because all along it has been recorded a *Pajawa* and the *Khatauni* shows it to be a non-agricultural land. It always remained recorded in the name of the plaintiffs' predecessor-in-title and their ancestors. The suit property never having vested in the *Gaon Sabha*, upon extension of boundaries of defendant No.1, the suit property would not automatically vest in the said defendant. Learned Counsel for the plaintiffs has taken this Court through the findings of the Courts below regarding the mutation case and the relative record to say that Mutation Case No.8 of 1975-76 did not at all relate to *Khasra* No.216. He has invited the Court's attention to the findings recorded by the Trial Court while answering Issue No.1 and also the record. It is pointed out that the findings recorded in the mutation case related to other *Khasra* numbers. It is also argued that so far as the suit property is concerned, neither in law nor in point of fact, it ever vested in the State and through them in the *Gaon Sabha*; and, finally in defendant No.1.

57. The substantial question of law that has been raised is that the suit property by its nature being a *Pajawa* would automatically vest in the State and thence in the *Gaon Sabha*, from whom defendant No.1 acquires title. The submission, therefore, is that the

suit property has to be treated as vested in the State on the date of vesting under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 (for short, 'the Act of 1951') by operation of law, once it is held that the suit property is recorded as *Pajawa*. The alternate submission appears to be, though not very relevant to the substantial question of law under consideration, that even if the suit property is not vested in the *Gaon Sabha*, upon the publication of a notification under Section 4 of the Act of 1951, the said property would vest in defendant No.1 by virtue of Section 116 of the Act of 1916.

58. This Court must remark here that defendant No.1 has not been consistent about the manner in which title to the suit property came to be vested in them. It hardly brooks doubt that the suit property prior to the abolition of zamindari was vested in the ancestors of the plaintiffs/ predecessors-in-title, and, thereafter, remained recorded in the name of the plaintiffs' vendors. There seems to be a gasping struggle by defendant No.1 to prove that somehow or the other, the suit property has come to be vested in them. The Trial Court has noticed this in its findings on Issue Nos.1 and 2 both, which show that impermissible inconsistent pleas on non-existing evidence have been urged to establish defendant No.1's title and possession to the suit property. One is the case that the suit property being recorded a *Pajawa*, it vested in the State, free from all encumbrances upon the notification under Section 4 being issued under the Act of 1951. And, from the *Gaon Sabha*, it stood automatically vested in the successor local body, to wit, defendant No.1 upon the extension of its boundaries. It is this case, which is the subject matter of consideration in terms of Substantial Question of Law (b).

59. The other case is that the suit property was acquired by the State for defendant No.1 and that is how they have acquired title. This case of defendant No.1 has been rejected by the Trial Court and affirmed in appeal by the Lower Appellate Court with the remark that there is no evidence on record to show that proceedings for acquisition were ever taken relating to the suit property and compensation paid to the person entitled. In this regard, the testimony of DW-1 has been considered and the absence of any documentary evidence about acquisition noticed to record a failure of defendant No.1 to discharge their evidential burden on the point.

60. A corollary to the defendants' alternate pleas is that whichever way title and possession to the suit property came to the defendants, the name of defendant No.1 was mutated in the revenue records vide order dated 20.11.1975 passed in Mutation Case No.8 of 1975-76, whereagainst a revision carried by the predecessor-in-interest of the plaintiffs' vendors was dismissed by the Commissioner, Agra Division, Agra vide order dated 25.08.1976. This part of the case again is not squarely the subject matter of the substantial question built on the edifice of undisputed title claimed by defendant No.1, which has been acknowledged by the revenue authorities, as also their possession, by granting them mutation in the revenue records after mutating out the name of the plaintiffs' predecessor-in-interest, said to have been got fraudulently mutated. The evidence on this point too has been meticulously examined by both Courts below, with the Trial Court, in particular, returning a finding of fact that Mutation Case No.8 of 1975-76 relates to *Khasra* Nos.240, 241 and 242 that were

acquired by defendant No.1 through the State, but there was neither acquisition of *Khasra* No.216 nor 218, nor was the mutation order passed in Mutation Case No.8 of 1975-76, one in relation to *Khasra* No.216. Since all these inconsistent pleas set up by defendant No.1, somehow to wrench title to the suit property from the plaintiffs, have been discarded by both Courts below consistently, this Court has remarked earlier that there has been a desperate effort to establish their title and possession by defendant No.1 - indeed a gasping one.

61. The other limb of the submission that the suit property even if not vested in the *Gaon Sabha*, upon publication of the notification under Section 4 of the Act of 1951, would vest in defendant No.1 by virtue of Section 116 of the Act of 1916, cannot be accepted. The reason is that Section 116(d), which has been pressed in aid by defendant No.1 to claim a deemed vesting of the suit property in them, relates to ashes, besides other things of a similar genre, like dust, dung, nightsoil- all that is found in streets, houses, privies, sewers, cesspools or elsewhere. This provision at the most may entitle defendant No.1 to claim rights over ash that was produced in the *Pajawa* when it was functional and dumped on the suit property or a part of it. Section 116(d) of the Act of 1916 does not lead to a vesting of any right or title relating to immovable property in a Nagar Palika or the Local Body, governed by the Act aforesaid. It relates to conferment of title upon the Local Body over certain kinds of waste products mentioned there. The contention of defendant No.1, therefore, that dumped ash on the suit property would lead to vesting of the suit property itself in the said defendant under Section 116(d) of the Act of 1916 cannot be countenanced.

62. Accordingly, the substantial question is answered in the manner that the entry in the revenue records for the suit property as *Pajawa* is not at all conclusive proof of automatic vesting thereof, either in defendant No.1, or the State, and further that for the said reason, the findings recorded by the Courts below on the issue of title and ownership to the suit property are unexceptionable in law.

B. Second Appeal No.26 of 2020

Substantial Question of Law (i)

63. It is argued by Mr. Preet Pal Singh Rathore, learned Counsel for the plaintiffs that the direction made by the Lower Appellate Court for the payment of costs of constructions raised by defendant Nos.4 to 7 on the part of the suit property, of which the plaintiffs have been directed to be given possession, is manifestly illegal in the absence of a cross-objection to the Trial Court's decree in that behalf by defendant No.4.

64. Learned Counsel appearing for defendant No.1, through whom defendant Nos.4 to 7 have claimed title and possession to the suit property and raised constructions thereon, argues that the power of the Appellate Court under Order XLI Rule 33 of the Code is wide enough to clothe it with the power to pass any decree or order, which ought to have been made. He submits, in short, that in order to do justice between parties, the power, even if no cross-objection is filed for the purpose by a respondent to the appeal under Order XLI Rule 22 of the Code, is decidedly available with the Court.

65. No doubt, the power of the Appellate Court is very wide under Order

XLI Rule 33 of the code and the jurisdiction of the Appellate Court to interfere with a decree, vary or modify it, as to a part of it, in the absence of a cross-objection under Order XLI Rule 22 of the Code, has been the subject matter of considerable judicial debate. Nevertheless, the power of the Appellate Court in the absence of a cross-objection by the respondent under Order XLI Rule 22 of the Code has been acknowledged of course subject to well settled restrictions. In this connection, reference may be made to the observations of the Supreme Court in **K. Muthuswami Gounder v. N. Palaniappa Gounder, (1998) 7 SCC 327**, where it has been held:

"12. Order 41 Rule 33 enables the appellate court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed an appeal. The necessary condition for exercising the power under the Rule is that the parties to the proceeding are before the court and the question raised properly arises (sic out of) one of the judgments of the lower court and in that event, the appellate court could consider any objection to any part of the order or decree of the court and set it right. We are fortified in this view by the decision of this Court in *Mahant Dhangir v. Madan Mohan* [1987 Supp SCC 528 : AIR 1988 SC 54] . No hard and fast rule can be laid down as to the circumstances under which the power can be exercised under Order 41 Rule 33 CPC and each case must depend upon its own facts. The Rule enables the appellate court to pass any order/decreed which ought to have been passed. The general principle is that a decree is binding

on the parties to it until it is set aside in appropriate proceedings. Ordinarily the appellate court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal and this Rule holds good notwithstanding Order 41 Rule 33 CPC. However, in exceptional cases, the Rule enables the appellate court to pass such decree or order as ought to have been passed even if such decree would be in favour of parties who have not filed any appeal....."

(emphasis by Court)

66. An authoritative statement of the law on the issue is to be found in **Banarsi and others v. Ram Phal, (2003) 9 SCC 606**, where their Lordships of the Supreme Court held:

"15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of the widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject-matter of the appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the appellate court. While allowing the appeal or otherwise interfering

with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41."

(emphasis by Court)

67. Here, this Court finds that the reason assigned by the Lower Appellate Court to vary the decree of demolition, and, instead, granting a decree for valuing those constructions as fall on the part of the land for which possession has been decreed, to be valued on the date these were raised and the price of constructions paid by the plaintiffs to defendant Nos.4 to 7, rests on the edifice that defendant Nos.4 to 7 raised these constructions under the belief that this part of the suit property was owned by defendant No.1. This belief, in turn, came about in consequence of the letter of the Collector, Mathura purporting to give this land to the Police.

68. The constructions were raised by defendant No.4 pending suit, which necessitated the amendment of the plaint seeking a decree for possession after demolition of those constructions. There was a temporary injunction in operation, and, obviously, on the other findings, which the Lower Appellate Court has not disturbed, the constructions in question were raised in violation of a temporary injunction passed by the Court. In any case, the constructions were raised *pendente lite* on the part of the suit property, of which both the Courts have found the plaintiffs to be holders of title, entitled to a decree of possession. The plaintiffs have also been found to be in possession of the suit property on the date the suit was instituted.

69. In view of the said findings, the Lower Appellate Court has not at all exercised powers within the settled parameters of Order XLI Rule 33 of the Code to vary the decree of demolition, substituting it by a direction to the plaintiffs to pay for the constructions raised. The constructions were, on the concurrent findings of the Courts below, raised without

title by defendant No.4, disturbing the plaintiffs' possession. What inequity could arise by directing the demolition to be carried out is hardly discernible. A misplaced faith on the Collector's letter, transferring the property to the Police Department, is no reason to tax the plaintiffs with paying for an infraction committed by defendant No.4, employing or rather misusing the police power of the State available at his command and raising forcible constructions on property that did not belong to defendant No.1; and a fortiori, to defendant Nos.4 to 7. The decree passed by the Trial Court is not in any way inconsistent; rather, the decree of possession is pre-eminently compatible with a decree for demolition to remove all that encroachment that defendant No.4 has made pending suit.

70. There is an added reason not to vary the decree in any manner in favour of defendant Nos.4 to 7. Defendant No.4, out of these defendants, who contested the suit, did not appeal the Trial Court's decree. It was defendant No.1 alone that appealed the decree. Therefore, to direct some benefit to be given to defendant Nos.4 to 7 by the Lower Appellate Court is absolutely without basis. It would have been different if defendant No.4 had also appealed, may not by seeking relief of the kind that the Lower Appellate Court has granted them.

71. Before recording our conclusions on this question, this Court thinks that the record ought to be set straight by clarifying that the words 'counter claim', employed in the present substantial question of law, appear to be the product of a clerical error. In the considered opinion of this Court, the words 'counter claim' occurring in this question have to be read and understood as "cross-objection". In conclusions, this

substantial question of law is answered in the **negative** and it is held that given the parameters, on which power under Order XLI Rule 33 of the Code is to be exercised, in the absence of a 'cross-objection' under Order XLI Rule 22 of the Code, the Lower Appellate Court was not at all justified in granting relief to the defendants (defendant Nos.4 to 7) to recover costs of the constructions from the plaintiffs, the former raised in encroachment.

72. Before curtains are drawn on this appeal, it must be mentioned in the passing that Substantial Question of Law (ii) recorded in the Court's order dated 06.01.2020 is not at all a question. That appears to be a direction to list the appeal for hearing. It has been shown as a question and assigned a number, again due to some kind of a clerical or typographical error.

73. In the result, Second Appeal No.108 of 2008 **fails** and is **dismissed with costs**. Second Appeal No.26 of 2020 is **allowed with costs**. The decree passed by the Lower Appellate Court to the extent it directs the plaintiffs to pay defendant Nos.4 to 7 costs of the constructions raised by them on the suit property is **set aside** and the Trial Court's decree is restored.

74. Let separate decrees be drawn up in both appeals in the aforesaid terms.

(2023) 5 ILRA 246
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.10.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 3393 of 1978

Jagdeo Singh & Ors. ...Appellants
Versus
Hazarilal & Ors. ...Respondents

Counsel for the Appellants:

Sri V.D. Ojha, Sri Pranav Ojha, Sri R.K. Singh, Sri Utpal Chaterjee, Sri Utpal Chaterjee

Counsel for the Respondents:

Sri V.K. Chaudhary, Sri Kunal Ravi Singh,
Manjari Singh, Sri V.K.S. Chaudhary, Sri
Wajahat Husain

**A. Civil Law - Code of Civil Procedure,1908-
Order 41 Rule 33-Appellate Court found the
sale deed dated 9.01.1968 was a valid one
and the amount was not returned to the
plaintiff then the plaintiff should get
possession over the 1/3rd portion of the
house which was sold by the defendants no.
7 and 8-Since the First Appellate Court by
using power under Order 41 Rule 33
exceeded its jurisdiction by interfering with
the decree which had attained finality vis-à-
vis defendants no. 9 to 10-property sold by
the defendants no. 9 to 10 would not be
given to the plaintiffs-the decree has been
modified to the extent that possession
would be given to the plaintiffs only vis-à-
vis the property which was sold to them by
the sale deed dated 09.01.1968.(Para 1 to
15)**

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Kashi Nath (dead) thru Lrs Vs Jaganath(2003)
8 SCC 740
2. Exe. Officer Arulmigu Chokkanatha Swamy
Koil, Trust, Virudhunagar Vs. Chandran & ors.
(2017) 3 SCC 702
3. Akhil Bhartvarshiya Marwari Agarwal jatiya
Kosh & ors.. Vs Brijlal Tibrewal & ors. (2019) 2
SCC 684
4. Lakshmanan & ors. Vs G. Ayyasamy (2016)
13 SCC 165

5. Banarsi & ors. Vs Ram Phal (2003) 9 SCC 606
6. Tummalla Atchaiah Vs Venka Narasingarao (1978) AIR SC 725
7. Kuttan Sudhakaran Vs Padmavathi Amma Laila Bai & ors. (1987) AIR Kerala 94
8. S. Md. Ismail & ors. Vs M.S. Md. Essa & ors. (1974) AIR Madras 301
9. Budhan Vs Lala Harbans Lal (1973) AIR All 63

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

1. A Suit being Original Suit No. 126 of 1969 was filed by the plaintiffs Chandrapal, Sabhajeet and Tarbabu for the relief that the defendants no. 1 to 5 be dispossessed and the plaintiffs be given the possession of the property in question. A further prayer has been made that for the period the defendants no. 1 to 5 had remained in possession, they be directed to pay Rs. 25 per month as damages to the plaintiffs. Still further a prayer was made that since the house in which the defendants Jagdev, Chandradeep Singh, Saheb Lal Singh, Ram Swaroop Singh and Ramraj Singh were staying was sold to the plaintiffs by the defendants no. 7 to 10, the plaintiffs were to be declared the owners of the property in question from which they were wrongly out of possession due to proceedings under Section 145 of C.P.C.

2. The defendants no. 1 to 5 came up with a case in their written statement that in fact the defendant no. 6 Lalta Prasad on 15.1.1968 had sold the house in question to them and, therefore, they were the rightful owners and were in possession over the house in question.

3. The Suit was dismissed with regard to possession over the house in question

and with regard to the relief that possession be handed over to the plaintiffs but was decreed to the extent that the defendants no. 7 and 8 were ordered to pay back Rs. 700/- to the plaintiffs and the defendants no. 9 and 10 were ordered to pay to the plaintiffs Rs. 2,000/-. The defendants no. 7 and 8, who were aggrieved by the fact that their sale deeds had been declared bad in law and that they were required to return Rs. 700/-, filed a First Appeal being First Appeal No. 47 of 1977. This appeal was filed against the plaintiffs. The First Appellate Court, despite the fact that the plaintiffs had not filed any appeal, decreed the Suit. It held that since the sale deed by which Hazari Lal and Shantu Lal had sold their 1/3rd portion of the property to the plaintiffs and also the sale deed dated 16.1.1968 by which Ram Deen and Ram Ashrey had sold their 2/3rd portion of the house in question to the plaintiffs were found to be valid sale deeds, the suit was to be decreed in toto. Further the plaintiffs were also directed to take possession of the house in question over which the defendants no. 1 to 5 were alleged to be in possession. The defendants no. 1 to 4 Jagdev, Chandrapal Singh, Saheb Lal Singh and Ram Swaroop have filed the instant Second Appeal.

4. The Second Appeal was admitted on the substantial question of law as to whether when the sale deeds dated 11.6.1873 and of 25.6.1868 related to another house as per their boundaries then could the First Appellate Court decree the appeal?

5. Before proceeding with the Appeal further, it shall be pertinent to see whether the grounds on which the First Appellate Court had allowed the appeal and had decreed the Suit were available to it. The

First Appeal was filed only by the defendants no. 7 and 8 who had, in fact, alleged that they had sold their 1/3rd portion of the property on 9.1.1968 for a sum of Rs. 700/- and, therefore, they were not liable to return Rs. 700/-. The Appellate Court while hearing the Appeal found that the grand father of the defendants no. 7 and 8 had purchased the property from one Syyed Azhan Hussain on 11.6.1873 and, therefore, this property belonged to them and they alone could have sold the property. The First Appellate Court had also taken note of the fact that the defendant no.6 Lalta Prasad in paragraph no. 12 of his cross-examination had mentioned that his ancestors had only one house and that too was situate in village - Khurhand and to the best of his knowledge his ancestors had only owned one house in the village. On the basis of this fact it was held that when ancestors of Lalta Prasad had only one property and that too was in village Khurhand, then the property which was sold on 15.1.1968 by the defendant no. 6 was a meaningless sale, specially when the ancestors had already sold off the property.

6. The Appellate Court while allowing the Appeal had used its powers under Order 41 Rule 33 of the C.P.C. and had decreed the Suit of the plaintiffs to the extent that not only was the sale deed by Hazari Lal and Shantu Lal considered to be a proper sale deed but it had also declared the sale deed executed by the defendants no. 9 and 10, namely, Ramdeen and Ramashrey dated 16.1.1968 a valid one.

7. Aggrieved by the judgement and decree of the First Appellate Court, the defendants Jagdev Singh, Chandrapal Singh, Saheb Lal Singh and Ram Swaroop Singh have filed the instant Second Appeal.

8. Learned counsel for the appellants while arguing the Appeal vehemently submitted that when the boundaries of the sale deed dated 11.6.1873 and that of 25.6.1886 and of the house which was sold did not match then the First Appellate Court definitely erred in law. Learned counsel for the appellant also argued that when the First Appeal was filed by the defendants no. 7 and 8 then the relief which was claimed by them alone ought to have been looked into and granted to them, if at all the first appeal was being allowed. The relief of possession which had been granted to the plaintiff over the entire property, including the property sold by the defendants no. 9 to 10, could not have been granted by the First Appellate Court.

9. Learned counsel for the appellant stated that the First Appellate Court set up a new case for the plaintiff which was never pleaded and proved by them.

10. The Appellate Court by invoking the provisions of Order 41 Rule 33 of the C.P.C. carved out a new case for the plaintiffs and wrongly held that the disputed house did not exist on the north of the house of Lalta Prasad, the defendant no.6. Learned counsel for the appellant, therefore, submitted that the pleadings and proof were at variance with each other. He submitted that under Order 6 Rule 2 C.P.C. there cannot be any variance between pleadings and proof. Learned counsel relied upon **2003 (8) SCC 740 (Kashi Nath (dead) through Lrs vs. Jaganath) and 2017 (3) SCC 702 (Executive Officer, Arulmigu Chokkanatha Swamy Koil, Trust, Virudhunagar vs. Chandran and others)**

11. Still further learned counsel for the appellant submitted that the First Appellate

Court committed a blunder by invoking the provision of Order 41 Rule 33 of the C.P.C. and relied upon **2019 (2) SCC 684 : Akhil Bhartvarshiya Marwari Agarwal Jatiya Kosh and others vs. Brijlal Tibrewal and others; 2016 (13) SCC 165 : Lakshmanan and others vs. G. Ayyasamy; 2003 (9) SCC 606 : Banarsi and others vs. Ram Phal; AIR 1978 SC 725 : Tummalla Atchaiah vs. Venka Narasingarao; AIR 1965 SC 1874 : (1. Nirmala Bala Ghose and another in Civil Appeals Nos. 966 and 968 of 1964, 2. Nirmala Bala Ghose in Civil Appeal No. 967 of 1964 vs. Balai Chand Ghose in Civil Appeals Nos. 996 and 968 of 1964, 2. Bala Chand Ghose and others in Civil Appeals Nos. 967 of 1964); AIR 1987 Kerala 94 : Kuttan Sudhakaran vs. Padmavathi Amma Laila Bai and others; AIR 1974 Madras 301 : S. Mohamed Ismail and others vs. M.S. Mohamed Essa and others and AIR 1973 Allahabad 63 : Budhan v. Lala Harbans Lal.**

12. He, therefore, submitted that the First Appellate Court erred in passing the impugned judgements.

13. Having heard the learned counsel for the appellant, this Court is of the view that so far as the matching of the boundaries of the sale deed dated 11.6.1873 and the sale deed of the year 1886 (exhibit-5) with that of the sale deed dated 15.1.1968, 9.1.1968 and 16.1.1968 is concerned, the First Appellate Court has definitely in paragraphs no. 9 of its judgement taken all precaution to match the boundaries and it has found that the boundaries of the house which was purchased by the grand father of the defendants no. 7 and 8 was matching with the boundaries of the house which was in dispute. The Court, therefore, finds that the

finding with regard to the matching of boundaries is concerned is concluded by findings of fact. However, this Court definitely is of the view that the finding with regard to the sale deed dated 16.1.1968 executed by the defendants no. 9 to 10 could not have been given. Also the relief with regard to return of Rs. 2000/- had attained finality and could not have been lightly disturbed. So far as the decree which has been passed by the First Appellate with regard to dispossession of the defendants no. 1 to 5 is concerned it cannot be interfered with as the First Appellate Court has very sensibly found that the simple allowing the first appeal vis-a-vis the defendants no. 7 and 8 would be of no avail and the decree would be a futile decree and therefore by using its powers under Order 41 Rule 33 of the C.P.C. it had also decreed the Suit to the extent that the defendants no. 1 to 5 would be dispossessed from the property which was sold to the plaintiffs. However, the decree of possession is being modified to the extent that possession would be given to the plaintiffs only vis-a-vis the property which was sold to them by the sale deed dated 9.1.1968. The property which was sold by the defendants no. 9 to 10 by their sale deed, however, would not be given to the plaintiffs. The Second Appeal is, therefore, accordingly, partly allowed.

14. Under the Order 41 Rule 33 of the C.P.C. the Appellate Court has the power to pass any decree and to make any order which ought to have been passed and thus power can be exercised by the Appellate Court notwithstanding that the Appeal is with regard to only a part of the decree. In the instant case, when the First Appellate Court was finding that the sale deed dated 9.1.1968 was a valid one and when the amount of Rs. 700/- was not being returned

to the plaintiff then it was in the fitness of things that the plaintiffs should also get possession over the 1/3rd portion of the house which was sold by the defendants no. 7 and 8 to the plaintiffs. However, since the First Appellate Court had exceeded its jurisdiction by interfering with the decree which had attained finality vis-a-vis defendants no. 9 to 10, the decree has been modified.

15. With the above observations, the Second Appeal is partly allowed.

(2023) 5 ILRA 250
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.05.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Matters Under Article 227 No. 1524 of 2023

India Oil Corporation Ltd. Lucknow
...Petitioner
Versus
Commercial Court-I, Lko. & Anr.
...Respondents

Counsel for the Petitioner:
 Ashok Kumar Singh

Counsel for the Respondents:
 Siddharth Nandwani

A. Commercial Law – Urgent interim relief - Commercial Courts Act, 2015- Section 12(A)(1) - Contemplation of urgent interim relief for the purpose of Section 12 A of the Commercial Courts Act 2015 is to be considered by the court concerned only as per averments made in plaint or temporary injunction application. (Para 18)

B. It is not solely the plaintiff who is the only arbiter of urgent interim relief, but it is also the Court concerned which has to

look into the factor of urgent interim relief in terms of relief sought in plaint or in the application for temporary injunction. (Para 17)

A suit which does not 'contemplate' any urgent interim relief under the Act cannot be instituted unless the plaintiff exhausts remedy of pre institution mediation in terms of Section 12 A of the Act. For a suit to be maintainable without the pre institution mediation and settlement as such, would require that it contemplates any urgent interim relief. The word 'contemplate' would be quite relevant for the purposes of examining the provisions and applicability of Section 12 A of the Act. (Para 16)

C. The aspect as to whether a suit has been filed after a considerable delay, would not be a criteria required to determine urgent interim relief. There may be instances when an order of termination has been passed but is not enforced for a certain length of time and it is only its enforcement that would require filing of a suit, which would thus contemplate urgent interim relief being sought for in the plaint. (Para 16)

D. Words & Phrases – ‘Contemplate’ - The word 'contemplate' would necessarily mean examination of relief prayed for in the suit as well as urgency shown in the plaint w.r.t. such relief being sought. The contemplation of urgent interim relief as such, would be dependant on the ground of said interim relief. For the purposes of waiver of mandatory provision of Section 12A as such, it is for the Court to determine contemplation of urgent interim relief. (Para 16)

In the present facts and circumstances although the suit has been filed after almost one and a half months of the termination of contract but since it indicates urgent interim relief against the clause of termination of contract, being invoked against plaintiff, therefore when the plaint as such contemplates urgent interim relief and therefore mandatory provisions pertaining to pre institution mediation have been rightly waived by the Commercial Court. As such, no exception can be taken to the order impugned. (Para 19)

Writ petition dismissed. (E-4)**Precedent followed:**

1. M/s Patil Automation Pvt. Ltd. & ors. Vs Rakheja Engineers Pvt. Ltd, 2022 (10) SCC (1) (Para 5)

2. Chandra Kishore Chaurasiya Vs R.A. Perfumery Works Pvt. Ltd, (2022/DHC/004454 decided on 27.10.2022)

Precedent distinguished:

M/s Microlabs Ltd. Vs Mr. A. Santosh, C.S., (Comm. Div No. 185 of 2022) (Para 5)

Present petition challenges the order dated 13.03.2023, passed by Commercial Court rejecting preliminary objections raised by petitioner/defendant regarding maintainability of suit on the ground that pre-institution remedy of mediation as contemplated u/s 12(A)(1) of the Commercial Courts Act 2015 having not been undertaken, without which suit in terms of the aforesaid provisions is barred.

(Delivered by Hon'ble Manish Mathur, J.)

1. Supplementary affidavit filed on behalf of opposite party no. 2 is taken on record.

2. Heard Mr. Ashok Kumar Singh, learned counsel for petitioner and Mr. Siddharth Nandwani, learned counsel for opposite party no. 2.

3. Notice to opposite party no. 1 stands dispensed with as it is proforma party.

4. Petition under Article 227 of the Constitution of India has been filed raising challenge to order dated 13.03.2023 passed by the Commercial Court in Civil Suit No. 275 of 2022 rejecting preliminary

objections raised by petitioner/defendant regarding maintainability of suit on the ground that pre-institution remedy of mediation as contemplated under Section 12 (A) (1) of the Commercial Courts Act 2015 having not been undertaken, without which suit in terms of the aforesaid provisions is barred.

5. Learned counsel for petitioner has placed reliance on judgment rendered by Hon'ble Supreme Court in the case of **M/s. Patil Automation Private Limited and others versus Rakheja Engineers Private Limited reported in 2022 (10) SCC (1)** to submit that the provisions of Section 12 A(1) of the aforesaid act have been held to be mandatory in nature and therefore, any suit filed before the Commercial Court in terms of the Act of 2015 without availing the remedy of Section 12 A of pre institution mediation is liable to be rejected. It is further submitted that in the present case, a contract was entered into between the parties on 01.12.2021 with regard to supply, transportation, installation and commissioning of new unipols at the retail outlets/KSK's of the petitioner. It is submitted that due to unfulfilment of terms and conditions of contract, show cause notice was issued to the opposite party no. 2 and after considering its reply, the contract was terminated on 25.10.2022. It is submitted that suit challenging the termination order has been filed only on 08.12.2022 and as such, there is no question of any urgency in the case due to which waiver of provisions of Section 12 A(1) of the Act of 2015 would not be required. It is submitted that it was in these circumstances that preliminary objections were filed before the Court concerned and have been rejected by means of impugned order on the ground that since the plaintiff has sought urgent interim relief, therefore,

the suit would not be barred in terms of Section 12 A of the Act. Learned counsel has placed reliance on judgment rendered by High Court of Madras in the case of **M/s Microlabs Limited versus Mr. A.Santosh , C.S (Comm. Div) No. 185 of 2022** to buttress his submissions.

6. Learned counsel appearing for opposite party no. 2 has refuted submissions advanced by learned counsel for petitioner with the submission that although the contract was terminated on 08.12.2022 but the same has also invoked provisions of clause 6.13 (b) of the contract pertaining to price adjustments for delays with the submissions that in pursuance of termination of contract, further action has been contemplated against the answering opposite party including forfeiting of security deposits, holiday listing or initiating any other penal action as deemed fit by Indian Oil Corporation/petitioner. It is thus submitted that it was only when the petitioner started initiating action against the opposite party no. 2 that the suit was filed along with an application for temporary injunction for restraining the petitioner/defendant from invoking the termination letter. Learned counsel has adverted to judgment rendered in the case of **M/s. Patil Automation Private Limited and others versus Rakheja Engineers Private Limited reported in 2022 (10) SCC (1)** as well as judgment of Division Bench of the Delhi High Court in the case of **Chandra Kishor Chaurasiya versus R A Perfumery Works Private Limited (2022/DHC/004454 decided on 27.10.2022)** to buttress his submissions.

7. In view of submissions advanced, the following question would require to be adjudicated:

Whether contemplation of urgent interim relief as envisaged under Section 12 A of the Commercial Courts Act 2015 requires consideration by the Court only as per averments made in the plaint/Temporary Injunction application or other incidental aspects as well?

8. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is evident and undisputed that termination order was issued to the answering opposite party on 25.10.2022 whereafter suit was filed on 08.12.2022 along with an application for grant of temporary injunction. The petitioner had filed preliminary objection regarding maintainability of suit since pre institution mediation as contemplated under Section 12 A of the Act of 2015 was not availed of. The said application has been rejected by means of impugned order holding that since plaintiff has sought urgent interim relief, necessity for exhausting the remedy of pre institution mediation would not bar suit proceedings. It has also been held that the use of words 'contemplate any urgent interim relief ' are used to qualify the category of a suit which is determined solely on the frame of plaint and relief sought and since plaintiff is the sole determinant of the pleadings and relief sought, it was held that suit involves urgent interim relief due to which it would not be barred in terms of Section 12 A of the Act of 2015.

9. For the purpose of adjudication of aforesaid question, it would be necessary to refer to the termination letter dated 25.10.2022 which clearly stipulates invocation of clause 6.13 (b) of the special terms and conditions of contract of tender document which has been indicated hereinabove. The plaint filed by answering

opposite party has sought the relief of declaration of termination letter dated 25.10.2022 as null and void with a decree being sought for permanent and mandatory injunction seeking to restrain the defendant from terminating the contract dated 01.12.2021 and further a decree injunction the defendant, their assigns, representatives etc from invoking the termination letter dated 25.10.2022. An application for temporary injunction has also been filed with the prayer to restrain the defendant, their assigns etc from invoking the termination letter dated 25.10.2022.

10. Clearly, the prayer as made not only in the plaint but also in the application for temporary injunction is to the effect that the defendants should be restrained/injuncted from invoking the termination letter dated 25.10.2022. The aforesaid termination letter clearly makes reference to clause 6.13 of the general conditions of contract with clause (b) pertaining to other action to be taken against the vendor including forfeiting of security deposits, holiday listing or initiating any other penal action as deemed fit by the Indian Oil Corporation (I.O.C). From the prayer so made and especially the reference made to clause 6.13 (b) of the general terms of contract, urgency is clearly borne out.

11. However, learned counsel for petitioner has specifically adverted to the fact that the plaint has been filed after almost one and a half months of issuance of the termination letter, which in itself does not indicate any urgency in the case to waive of the mandatory condition of Section 12 A of the Act of 2015.

12. For proper appreciation of the aforesaid submissions, it is necessary to

advert to the judgment rendered in the case of Patil Automation (Supra) in which the relevant paragraphs are as follows:

88. *"In Section 12 A, the bar of institution of the suit is applicable only in case in which plaintiff does not comtenplate urgent interim relief. The situation is akin to what is contemplated in Section 80(1) CPC. In other words, the suit under the Act which does not contemplate urgent interim relief is like a suit covered by Section 80 (1) CPC which does not project the need for any urgent or interim relief. In regard to a suit covered under Section 12-A of the Commercial Courts Act, namely, in a suit where interim relif is not contemplated, there can be no substantial compliance by way of post institution reference to mediation. The argument of the plaintiff overlooks the object apart from the language used besides the design and scheme of the law. It will, if accepted, lead to courts also spending their invaluable time on such matters which follow from adjournments, objections and hearings. There is not need to adopt such a course."*

99.1 *" The Act did not originally contain Section 12-A. It is by amendment in the year 2018 that Section 12-A was inserted. The Statement of Objects and Reasons are explicit that Section 12-A was contemplated as compulsory. The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provisions has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. The legislature has taken care to expressly exclude the period undergone during mediation for reckoning limitation under the Limitation Act, 1963. The object is clear."*

13. In the case of **M/s Microlabs Limited**, High Court at Madras has held that since suit was presented nearly four months after the service of cease and desist notice and no steps (Section 12 A) was taken during this period, it was held that there was no urgency clause for waiving of provisions of Section 12 A of the act.

14. On the other hand, the issue has also been adverted to by High Court at Delhi in the case of Chandra Kishor Chaurasiya (supra) in which after examining the mandate of law of case in Patil Automation Private Limited (supra) and the provisions of Section 12 A of the Act of 2015, it has been held that the question whether plaintiff desires any urgent relief is to be decided solely by the plaintiff while instituting a suit and it is not relevant to determine whether plaintiff was required to exhaust the remedy of pre institution mediation since grant of urgent interim relief is not contingent on whether the Court accedes to the plaintiff's request for interim relief or not. It has been held that the terminology of Section 12 A is used to qualify category of a suit which is to be determined solely on the frame of plaint and relief sought.

15. With regard to question required to be determined, it would be apposite to refer to Section 12 A of the Act, which is as follows:

'A suit which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.'

16. Upon evaluation of aforesaid judgments and particularly the terminology used in Section 12 A of the Act of 2015, it is evident that a suit which does not 'contemplate' any urgent interim relief under the Act cannot be instituted unless the plaintiff exhausts remedy of pre institution mediation in terms of Section 12 A of the Act. For a suit to be maintainable without the pre institution mediation and settlement as such, would require that it contemplates any urgent interim relief. In the considered opinion of this Court, the word 'contemplate' would be quite relevant for the purposes of examining the provisions and applicability of Section 12 A of the Act. The word 'contemplate' would necessarily mean examination of relief prayed for in the suit as well as urgency shown in the plaint with regard to such relief being sought. The contemplation of urgent interim relief as such, would be dependant on the ground of said interim relief. For the purposes of waiver of mandatory provision of Section 12 A of the act of 2015 as such, it is for the Court to determine contemplation of urgent interim relief. The aspect as to whether a suit has been filed after a considerable delay, would not be a criteria required to determine urgent interim relief. There may be instances when an order of termination has been passed but is not enforced for a certain length of time and it is only its enforcement that would require filing of a suit, which would thus contemplate urgent interim relief being sought for in the plaint.

17. To that extent, this Court is in respectful agreement with the judgment rendered by the High Court at Delhi. Further, in the considered opinion of this Court, it is not solely the plaintiff who is the only arbiter of urgent interim relief, but it is also the Court concerned which has to

look into the factor of urgent interim relief in terms of relief sought in plaint or in the application for temporary injunction.

18. In view of discussion made hereinabove, the question framed is answered that contemplation of urgent interim relief for the purpose of Section 12 A of the Commercial Courts Act 2015 is to be considered by the court concerned only as per averments made in plaint or temporary injunction application.

19. Upon applicability of the aforesaid judgments and discussions, in the present facts and circumstances although the suit has been filed after almost one and a half months of the termination of contract but since it indicates urgent interim relief particularly in view of clause 6.13 being invoked against plaintiff, in the considered opinion of this Court, the plaint as such contemplates urgent interim relief and therefore mandatory provisions pertaining to pre institution mediation have been rightly waived by the Commercial Court. As such, no exception can be taken to the order impugned.

20. Resultantly, the petition being devoid of merit is **dismissed**. Parties to bear their own cost.

(2023) 5 ILRA 255
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 2658 of 2023
(CIVIL)

Ramesh Duggal @ Pappu ...Petitioner
Versus

Pt. Ram Shanker Mishra Trust Chief Office,
Kanpur Nagar ...Respondent

Counsel for the Petitioner:
Sri Shesh Kumar Srivastava

Counsel for the Respondents:
Sri Shantanu Srivastava

A. Civil Law – Amendment of pleadings – Ejectment and Recovery of damages - Provincial Small Cause Courts Act, 1887 - Sections 26 & 25 - Code of Civil Procedure, 1908 - Order VI Rule 17 - Due diligence is a very important factor while allowing amendment application u/Order VI Rule 17 of CPC and applicant has to prove that he has made all possible efforts, but even after that, he could not know about the documents or facts which are most relevant to decide the controversy. In case documents or facts are available or within the knowledge of petitioner, at any stage, if any application is filed, same cannot be allowed as it would not fulfil the parameter of due diligence as provided in Order VI Rule 17 of CPC. (Para 23)

The conduct of petitioner-defendant clearly shows that trust deed was very well present from the date of filing of written statement and as per admission of petitioner-defendant, it was in his knowledge from 07.12.2017, but he has never filed any application u/Order VI Rule 17 of CPC, which shows that there is absolute lack of due diligence. In fact contrary to that, having knowledge of each and every facts, petitioner-defendant has never raised before the court by the way of written statement or application u/Order VI Rule 17 of CPC and once the suit has been decided against him, with an ulterior motive, an application has been filed. Therefore, this Court is of the view that such amendment application doesn't fulfill the condition of Order VI Rule 17 of CPC as it is having absolute lack of due diligence rather it is a case of negligence as petitioner-defendant was sleeping over the matter for a long time without any explanation. (Para 17, 18)

B. Right accrued based on admission of facts cannot be taken back by the way of allowing amendment application withdrawing the admission earlier given.

In the present case, no doubt, the suit is allowed based upon the admission of petitioner-defendant about tenant landlord relationship with respondent-plaintiff and once such amendment application is allowed at a very belated stage without any proper reason, would certainly deprive the rights of plaintiff-respondent, which accrued in his favour vide judgment and order dated 08.07.2022. Therefore, on this issue too, such amendment application cannot be allowed. (Para 27)

C. Words and Phrases – 'Due diligence' -

The words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain- Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs. (Para 21)

Present case is the best example of negligence and not of due diligence and also withdrawal of right accrued to the petitioner in light of admission made in written statement, which cannot be permitted. Therefore, no case is made out to interfere with the impugned order dated 10.02.2023 passed by District Judge, Kanpur Nagar. (Para 28)

Writ petition dismissed. (E-4)

Precedent followed:

1. Hari Shanker & ors. Vs Bhagwati Prasad Mishra, 2014 0 Supreme (All) 3127, decided on 30.10.2014 (Para 9)

2. Hari Narayan Vs Shanti Devi, 2019 SCC OnLine All 2380, decided on 28.05.2019 (Para 9)

3. Raj Kumar Mulani Vs Ramesh Kumar Hemrajani, 2019 0 Supreme (All) 1604, decided on 19.09.2019 (Para 10)

Precedent distinguished:

1. Surendra Kumar Sharma Vs Makhan Singh, 2009 (3) ARC 427 (Para 8)

2. B.K.N. Pillai Vs P. Pillai, Civil Appeal No. 7222-23 of 1999 (arising out of S.L.P. (Civil) No. 14540-14541 of 1999) decided on December 13, 1999 (Para 8)

3. Ganpatlal Gupta & ors. Vs Additional District Judge, Deoria & ors., Civil Misc. Writ Petition No. 50175 of 1999, decided on 21.03.2003 (Para 8)

4. Kamal Regmi Sharma & ors. Vs Nepal Bank Limited & ors., Civil Revision No. 511 of 1986 decided on 14.10.1986 (Para 8)

Present petition challenges order dated 10.02.2023, passed by District Judge, Kanpur Nagar, by which, application 27-Ga filed u/Order VI Rule 17 of CPC in S.C.C. Revision No. 187 of 2022 was rejected.

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

1. Heard Sri Shesh Kumar Srivastava, learned counsel for petitioner and Sri Shantanu Srivastava, learned counsel for respondent.

2. Present petition has been filed challenging the order dated 10.02.2023 passed by District Judge, Kanpur Nagar, by which, application 27-Ga filed under Order VI Rule 17 of CPC in S.C.C. Revision No. 187 of 2022 was rejected.

3. Since, only legal question is involved in the present petition, therefore, with the consent of parties without inviting for affidavits, petition is being decided at the admission stage itself.

4. Brief facts of the case are as follows. The SCC Suit No. 149 of 2015 was filed for ejectment and recovery of damages under Section 26 of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as "Act, 1887") in which written statement was filed by the petitioner-defendant denying the allegations, but accepting the respondent-plaintiff as landlord. The said suit was ex parte decreed vide order dated 08.07.2022. Against the order dated 08.07.2022, petitioner-defendant has filed Revision under Section 25 of Act, 1887 before District Judge, Kanpur Nagar. It is undisputed that petitioner-defendant was a tenant of Pt. Ram Shanker Mishra Trust established by a duly registered trust deed. Case of petitioner-defendant is that on 07.12.2021, trust deed was filed by respondent-plaintiff, then petitioner-defendant could know that Sri Uma Shanker Mishra respondent-plaintiff is a forged trustee and fraudulently presenting himself as Sarvarakaar collecting amount of rent also. After knowing this fact, petitioner-defendant has filed application 27-Ga dated 15.12.2022 under Order VI Rule 17 of CPC for amendment in written statement.

5. Learned counsel for petitioner submitted that under the provisions of Order VI Rule 17 of Civil Procedure Code, 1908 (hereinafter referred to as "CPC"), amendment may be sought at any stage of proceeding and it is required on the part of Court concerned to decide the application on merits.

6. He further submitted that in written statement, under bonafide belief, petitioner

has accepted the respondent-plaintiff as landlord and he could know about the trust deed only on 07.12.2017, which transpires that respondent is a forged trustee presenting himself as Sarvarakaar and not a landlord. Thereafter in the year 2022, petitioner-defendant has moved application 27-Ga under Order VI Rule 17 of CPC for amendment in his written statement. It is further submitted that once petitioner-defendant has disputed the ownership/landlordship, it is required on the part of Revisional Court to allow the application and invite objection upon the same, thereafter proceed to decide the case on merits.

7. He next submitted that once respondent-plaintiff is not a landlord, the suit filed by him is not maintainable and it's a legal issue goes to the roots of the controversy, therefore, it is required on the part of Revisional Court to allow the amendment application even at the revisional stage.

8. It is further submitted that in light of settled provisions of law, Revisional Court must have been very liberal while considering amendment application under Order VI Rule 17 of CPC for the purpose of substantial justice. In support of his contention, he has placed reliance upon the judgments of Apex Court as well as this Court in the matters of **Surendra Kumar Sharma vs. Makhan Singh; 2009 (3) ARC 427**, **B.K.N. Pillai vs. P. Pillai; Civil Appeal No. 7222-23 of 1999 (arising out of S.L.P. (Civil) No. 14540-14541 of 1999) decided on December 13, 1999**, **Ganpatlal Gupta and others vs. Additional District Judge, Deoria and others; Civil Misc. Writ Petition No. 50175 of 1999 decided on 21.03.2003** and **Kamal Regmi Sharma and others vs. Nepal Bank Limited and others**

(Civil Revision No. 511 of 1986 decided on 14.10.1986.

9. Sri Shantanu Srivastava, learned counsel for respondent submitted that it is a summary proceeding and after final disposal of suit, no such amendment may be allowed. He further pointed out that Order VI Rule 17 of CPC clearly provides that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The trust deed was very well in existence since the the date of tenancy as claimed by the petitioner-defendant and it is required on his part to aver the same in his written statement, if it is in his favour. Even as per case of petitioner-defendant itself, he could know about the trust deed only on 07.12.2017, he must have file application under Order VI Rule 17 of CPC immediately thereafter and not after final disposal of the suit on 08.07.2022 and on 15.12.2022 during pendency of SCC revision under the advice of counsel. It clearly transpires that conditions of due diligence have not been fulfilled and only purpose to file application is to delay the proceeding. He further submitted that filing of amendment application at such belated stage does not meet the conditions of due diligence as provided in Order VI Rule 17 of CPC, therefore, he may not file amendment application before the Revisional Court at a very belated stage. In support of his contention, he has placed reliance upon the judgments of this Court passed in ***Hari Shanker and 5 ors. vs. Bhagwati Prasad Mishra; 2014 0 Supreme (All) 3127***, decided on 30.10.2014 and ***Hari Narayan v. Shanti Devi; 2019 SCC OnLine All 2380***, decided on 28.05.2019.

10. He next submitted that once, on the basis of admission, any right accrued in favour of plaintiff cannot be taken away by the way of filing amendment application after judgment and decree. In support of his contention, he has placed reliance upon the judgment of this Court in the matter of ***Raj Kumar Mulani vs. Ramesh Kumar Hemrajani; 2019 0 Supreme(All) 1604***, decided on 19.09.2019.

11. He also submitted that against the ex parte decree, petitioner has filed application under Order IX Rule 13 of CPC, which was dismissed by S.C.C Court, Kanpur Nagar vide order dated 10.01.2023. He has produced the certified copy of order dated 10.01.2023, which is taken on record.

12. Being confronted by the Court, learned counsel for petitioner could not explain the delay for filing of amendment application after more than five years from the date of knowledge of sale deed as per his own admission. He also could not demonstrate from the trust deed or from any record as to why respondent-plaintiff is not the Sarvarakaar and cannot maintain the suit. He only submitted that onus is upon the plaintiff-respondent to prove his ownership.

13. I have considered the submissions advanced by counsel for parties and perused the records as well as judgments cited above.

14. Above noted facts are not disputed between the parties.

15. Basic issue before this Court is about the interpretation of Order VI Rule 17 of CPC, which is quoted here:—

"[17. Amendment of pleadings.

- The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.]"

16. From the perusal of Order VI Rule 17 of CPC, it is clear that amendment application may be allowed before commencement of trial, but in case, Court is of the view that in spite of due diligence, party could not have raised the matter before the commencement of trial, application may be allowed. In the present case, it is required on the part of Court to see about the due diligence made by petitioner-defendant to file amendment application based upon date of knowledge of trust deed and also the effect of amendment upon the judgment and decree of suit, if allowed.

17. First of all, I am coming to the question of due diligence made by the petitioner. It is undisputed that trust deed was very well in existence on the date of filing of suit as well as written statement, therefore, it is required on the part of petitioner-defendant to made averment about the same, while filing written statement and also place before the Court as evidence. Here in written statement, it has been accepted by the petitioner-defendant that respondent-plaintiff is

landlord and even as per his own case, having knowledge of trust deed from 07.12.2017, he has not filed any application under Order VI Rule 17 of CPC for about five years. The suit was decided vide order dated 08.07.2022 and thereafter, revision was also filed and in revision too, no such ground has been taken, but at a very belated stage, under the advice of counsel, application 27-Ga has been filed under Order VI Rule 17 CPC.

18. The conduct of petitioner-defendant clearly shows that trust deed was very well present from the date of filing of written statement and as per admission of petitioner-defendant, it was in his knowledge from 07.12.2017, but he has never filed any application under Order VI Rule 17 of CPC, which shows that there is absolute lack of due diligence. In fact contrary to that, having knowledge of each and every facts, petitioner-defendant has never raised before the court by the way of written statement or application under Order VI Rule 17 of CPC and once the suit has been decided against him, with an ulterior motive, an application has been filed. Therefore, this Court is of the view that such amendment application does not fulfil the condition of Order VI Rule 17 of CPC as it is having absolute lack of due diligence rather it is a case of negligence as petitioner-defendant was sleeping over the matter for a long time without any explanation.

19. In the judgments so relied upon by learned counsel for petitioner-defendant, Courts have only considered as to whether at a very belated stage, amendment may be allowed or not and Courts have given findings that for the purpose of substantive justice, delay cannot be a ground for rejection.

20. This case is not a case of delay as the trust deed was well in existence from the date of filing of written statement and as per admission of petitioner-defendant also, it is in his knowledge from 07.12.2017, but amendment application has not been filed. In fact, it is a case where the conditions of due diligence provided under Order VI Rule 17 of CPC has not been fulfilled and without any justification, amendment application has been filed at revisional stage after final judgment and order dated 08.07.2022 passed in suit. Therefore, judgments so relied upon by learned counsel for petitioner-defendant shall not come in the rescue of petitioner-defendant as it is case of negligence and not of *bona fide* delay.

21. I have perused the judgment passed in ***Hari Shanker (Supra)***, in which, Court has considered about the concept of "due diligence". Relevant paragraphs are quoted below:-

"9. Supreme Court in *Modi Spinning & Weaving Mills Company Ltd. Vs. Ladha Ram*, AIR 1977 SC 680, held that the defendants cannot be allowed to change completely the case made in paras 25 and 26 of the written statement and substitute an entirely different and new case. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. Same view has been taken in *Heera Lal Vs. Kalyan Mal*, (1998) 1 SCC 278, *Gautam Swarup Vs. Leela Jetly*, (2008) 7 SCC 85,

Sumesh Singh Vs. Phoolan Devi, (2009) 12 SCC 689 and *Vishwanath Agrawal Vs. Savitri Bera*, (2009) 15 SCC 693.

10. In *B.K. Narayana Pillai v. Parameswaran Pillai*, (2000) 1 SCC 712, Supreme Court held that the principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as the question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates (sic results) in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

Thus in view of the authoritative pronouncements of Supreme Court, the

case law relied upon by the counsel for the petitioners cannot be followed.

11. Now the next question arises as to whether the proposed amendment can be allowed in view of Proviso to Order VI Rule 17 C.P.C. The defendant alleged that the fact relating to the proposed amendment was noticed at the time of preparation of the appeal for final arguments on 03.08.2014.

12. Supreme Court in Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344, held that Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

13. The phrase "due diligence" came for consideration before Supreme Court in Chander Kanta Bansal v. Rajinder Singh Anand, AIR 2008 SC 2234, in which it has been held that the words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's

Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

14. Supreme Court again in J. Samuel v. Gattu Mahesh, (2012) 2 SCC 300, held that due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit. In the given facts, there is a clear lack of "due diligence" and the mistake committed certainly does not come within the preview of a typographical error. Similar view was taken in Vidyabai Vs. Padma Latha, (2009) 2 SCC 409,

Sushil Kumar Jain Vs. Manoj Kumar, (2009) 14 SCC 38 and Abdul Rehman Vs. Mohd. Ruldu, (2012) 11 SCC 341.

15. The written statement was drafted by an advocate after reading the plaint. After legal advice, it cannot be said that in exercise of "due diligence" the fact sought to be brought in the pleading by way of amendment was not in the knowledge of the defendant. A distinction has to be drawn between 'due diligence' and 'negligence'. The case of the defendants falls in the category of 'negligence' and not 'due diligence'. Trial Court rightly rejected the amendment application, as Proviso to Order VI Rule 17 C.P.C., now casts a rider on the power of the Court in allowing amendment application. "

22. This issue was again considered by this Court in ***Hari Narayan (Supra)***. Relevant paragraphs are quoted below:-

"3. Contention of the learned counsel for the revisionist is that under Order VI Rule 17 the court may at any stage of proceedings allow the amendment of pleadings so as to determine the real question in controversy between the parties, and the trial court has rejected the amendment application without recording any finding to arrive at a conclusion that in spite of due diligence the defendant could not have sought the amendment before the commencement of the trial.

7. The proviso to Rule 17 under Order VI, as inserted by the Code of Civil Procedure (Amendment) Act, 2002, however, restricts and curtails the power of the court to allow amendment of pleadings by enacting that no application for amendment is to be allowed after the trial has commenced unless the court comes to the conclusion that in spite of due

diligence, the party could not have raised the matter before the commencement of the trial.

8. The proviso to Rule 17, as per the Amendment Act, 2002, has introduced the "due diligence" test, which requires that the court must be satisfied that in spite of "due diligence" the party could not discover the ground pleaded in the amendment. The term "due diligence" has been specifically used so as to provide a test for determining whether to exercise the discretion in situations where amendment is being sought after commencement of the trial.

9. The provisions contained under Order VI Rule 17 proviso as introduced in the year 2002 came up for consideration in the case of J. Samuel Vs. Gattu Mahesh & Ors.² wherein the principles relating to allowing amendments under Order VI Rule 17 were reiterated and the object of the proviso and the meaning and significance of "due diligence" of the parties seeking amendment has also been stated. The observations made in the judgment in this regard as follows:-

"18. The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that:

"... no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

x x x x x

23. ...The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [Vide Aniglase Yohannan v. Ramlatha [(2005) 7 SCC 534], Ajendraprasadji N. Pandey v. Swami

Keshavprakeshdasji N. [(2006) 12 SCC 1], Chander Kanta Bansal v. Rajinder Singh Anand [(2008) 5 SCC 117], Rajkumar Gurawara v. S.K. Sarwagi and Co. (P) Ltd. [(2008) 14 SCC 364], Vidyabai v. Padmalatha [(2009) 2 SCC 409 : (2009) 1 SCC (Civ) 563] and Man Kaur v. Hartar Singh Sangha [(2010) 10 SCC 512 : (2010) 4 SCC (Civ) 239]."

10. Reference may also be had to the judgment in the case of Revajeetu Builders and Developers Vs. Narayanaswami and Sons & Ors.¹ wherein some of the important factors which may be kept in mind while dealing with an application filed under Order VI Rule 17 have been enumerated in the following terms:-

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is *bona fide* or *mala fide*;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse *bona fide*, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

11. In a recent judgment in the case of M. Ravanna Vs. Anjanamma³, it has been held that after commencement of trial amendment of pleadings is not permissible except under conditions stated in the proviso and the burden is on the person seeking the amendment after commencement of trial to show "due diligence" on his part as contemplated under the proviso. The relevant observations in the judgment are as follows:-

"7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6 Rule 17 CPC virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment

could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is *bona fide* or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money."

12. In the case at hand, the court below upon due consideration of the facts of the case has come to the conclusion that the amendment which was being sought was not imperative for determining the real question in controversy between the parties, and also that the same was barred by the proviso to Order VI Rule 17 CPC which curtails the discretion to allow amendment of pleadings after the trial has commenced, and introduces the "due diligence" test in terms whereof the burden is on the person seeking the amendment after commencement of trial to show that in spite of "due diligence" such an amendment could not have been sought earlier, and as such the order passed by the trial court cannot be faulted with. "

23. The controversy involved in the present case is squarely covered with judgements of *Hari Shanker (Supra)* and *Hari Narayan (Supra)*. Therefore, considering all facts and circumstances of the case, this Court is of the view that due diligence is a very important factor while allowing amendment application under Order VI Rule 17 of CPC and applicant has to prove that he has made all possible efforts, but even after that, he could not know about the documents or facts which are most relevant to decide the controversy. In case documents or facts are available or

within the knowledge of petitioner, at any stage, if any application is filed, same cannot be allowed as it would not fulfil the para meter of due diligence as provided in Order VI Rule 17 of CPC.

24. So far as second issue is as to whether allowing of such amendment application would adversely affect the right of plaintiff-respondent or not.

25. This issue was also subject matter of **Raj Kumar Mulani (Supra)**. Relevant paragraph Nos. 9 to 12 are quoted below:-

"9. The judgment of two Judge Bench of Hon'ble Supreme Court in Sushil Kumar Jain (**supra**) is based on another judgment of Hon'ble Supreme Court in Panchdeo Narain Srivastava Vs. Jyoti Sahay, 1984 Supp SCC 594 in which an observation has been made that an admission made by parties may be withdrawn. The relevant paragraph of the judgment of the Hon'ble Supreme Court in the case of Sushil Kumar Jain (**supra**) relied by learned counsel for the defendant-tenant/petitioner, is reproduced below:-

"9. That apart, a careful reading of the application for amendment of the written statement, we are of the view that the appellant seeks to only elaborate and clarify the earlier inadvertence and confusion made in his written statement. Even assuming that there was admission made by the appellant in his original written statement, then also, such admission can be explained by amendment of his written statement even by taking inconsistent pleas or substituting or altering his defence.

10. At this stage, we may remind ourselves that law is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily

governed by exactly the same principle. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering, substituting a new cause of action (See Baldev Singh & Ors. vs. Manohar Singh & Anr. AIR 2006 SC 2832).

12. Keeping these principles in mind, let us now take up the question raised before us by the learned counsel for the parties. As stated herein earlier, the admission made by a defendant in his written statement can be explained by filing the application for amendment of the same. This principle has been settled by this Court in Panchdeo Narain Srivastava Vs. K. Jyoti Sahay AIR 1983 SC 462, while considering this issue, held that the admission made by a party may be withdrawn or may be explained. It was observed in paragraph 3 of the said decision as follows:-

"An admission made by a party may be withdrawn or may be explained away. Therefore, it cannot be said that by amendment, an admission of fact cannot be withdrawn....."

10. The judgments of the Hon'ble Supreme Court in Panchdeo Narain Srivastava (**supra**) and Sushil Kumar Jain (**supra**) have been considered by a three Judges Bench of Hon'ble Supreme Court in paragraph nos.16 &17 of the judgment in Ram Niranjana Kajaria (**supra**) and both the aforesaid judgments have been over ruled and it has been held "that a categorical admission made in the pleadings cannot be permitted to be withdrawn by way of an amendment". Paragraph nos. 19, 20, 22, & 23 of the judgment in Ram Niranjana Kajaria (**supra**) are reproduced below:-

"19. In Gautam Sarup v. Leela Jetly and others (2008) 7 SCC 85, after considering Panchdeo Narain Srivastava (**supra**) and Modi Spinning and Weaving

Mills Co. Ltd. v. Ladha Ram & Co. (*supra*) and several other decisions dealing with the amendment on withdrawal of admissions in the pleadings, it was held at Paragraph-28 as follows:

"28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

20. On amendments generally, in the decision reported in Revajeetu Builders and Developers v. Narayanaswamy and Sons and others(2009) 10 SCC 84 ,after referring to Gautam Sarup (*supra*), the principles on amendment have been summarized at Paragraph-63. It has been held as follows: (Revajeetu Builders case (2009) 10 SCC 84, SCC p. 102)

"63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is *bona fide* or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or

fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

22. Delay in itself may not be crucial on an application for amendment in a written statement, be it for introduction of a new fact or for explanation or clarification of an admission or for taking an alternate position. It is seen that the issues have been framed in the case before us, only in 2009. The nature and character of the amendment and the other circumstances as in the instant case which we have referred to above, are relevant while considering the delay and its consequence on the application for amendment. But a party cannot be permitted to wholly withdraw the admission in the pleadings, as held by this Court in Nagindas Ramdas v. Dalpatram Ichharam alias Brijram and others (1974) 1 SCC 242 .To quote Paragraph-27: (SCC pp. 251-52)

"27. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an

express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

23. We agree with the position in Nagindas Ramdas (*supra*) and as endorsed in Gautam Sarup (*supra*) that a categorical admission made in the pleadings cannot be permitted to be withdrawn by way of an amendment. To that extent, the proposition of law that even an admission can be withdrawn, as held in Panchdeo Narain Srivastava 1984 Supp SCC 594 (*supra*), does not reflect the correct legal position and it is overruled."

(Emphasis supplied by me)

11. From the legal position as extracted above it is clear that the submission of the petitioner based on the over ruled judgment of Hon'ble Supreme Court in the case of Sushil Kumar Jain (*supra*), deserves to be rejected.

12. In view of the above discussion, I hold that a categorical admission made in the pleadings can not be permitted to be withdrawn by way of an amendment. The Amendment Application filed by the defendant-petitioner was not bonafide. The Judge Small Cause Court has lawfully rejected

the Amendment Application by impugned order dated 09.05.2019 and the Revision filed by the petitioner was lawfully dismissed by order dated 11.07.2019, passed by the Officiating District Judge/Additional District Judge, Court No.01, Kanpur Nagar. "

26. Very same issue is also subject matter of this petition.

27. No doubt, the suit is allowed based upon the admission of petitioner-defendant about tenant landlord relationship with respondent-plaintiff and once such amendment application is allowed at a very belated stage without any proper reason, would certainly deprive the rights of plaintiff-respondent, which accrued in his favour vide judgment and order dated 08.07.2022. Law is very much settled on this point that right accrued based on admission of facts can not be taken back by the way of allowing amendment application withdrawing the admission earlier given. Therefore, on this issue too, such amendment application cannot be allowed.

28. In the light of facts as well as law discussed here-in-above, present case is the best example of negligence and not of due diligence and also withdrawal of right accrued to the petitioner in light of admission made in written statement, which cannot be permitted. Therefore, no case is made out to interfere with the impugned order dated 10.02.2023 passed by District Judge, Kanpur Nagar.

29. Writ petition lacks merit and is accordingly, **dismissed**.

30. No order as to costs.

(2023) 5 ILRA 268
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 2716 of 2023
 (CIVIL)

Sanjay Mishra @ Ashu **...Petitioner**
Versus
Magan Pandey & Anr. **...Respondents**

Counsel for the Petitioner:

Sri Shubham Srivastava, Sri Sunil Kumar Srivastava

Counsel for the Respondents:

Sri Ramesh Chandra Agrahari

A. Civil Law – Ex-parte decree – Compliance of Section 17 - Code of Civil Procedure, 1908 - Order IX Rule 13 r/w Section 151 - Provincial Small Cause Courts Act, 1887: Section 17 - No one can take benefit of his own fault and certainly dismissal of the petition/application in default solely due to fault on the part of the counsel for the party. For which, he cannot be extended any extra benefit contrary to the provisions of law. (Para 22)

While allowing restoration application, no liberty can be granted to petitioner-defendant for compliance of Section 17 of Act, 1887. (Para 17, 23)

Undisputed facts of the case are that plaintiffs-respondents have filed S.C.C. Suit No. 99 of 2016 for eviction and payment of rent, which was ex parte decided vide order dated 03.02.2020. Petitioner-defendant has filed an application u/Order IX Rule 13 r/w Section 151 of CPC on 29.2.2020 without compliance of Section 17 of Act, 1887, which was dismissed in default vide order dated 12.2.2021. Thereafter, petitioner-defendant has moved restoration

application, which was allowed vide order dated 10.3.2022 with observation to comply the Section 17 of Act, 1887. (Para 16)

From conjoint reading of Section 17 of Act, 1887 and Order IX Rule 13 of CPC, it is apparent that such observation is wholly unwarranted and contrary to provision of rules. S.C.C. Court itself had clarified the same in its order dated 3.2.2020. In fact, **restoration application has never filed along with prayer for seeking permission to comply the provision of Section 17 of Act, 1887, but it was only filed to recall its order dated 12.1.2022, therefore, such observation cannot be treated an order from the Court, which is in teeth of settled provisions of law. (Para 20)**

B. No application u/Order IX Rule 13 of CPC can be filed without compliance of Section 17 of Act, 1887. Section 17 of Act, 1887 is mandatory having no provision of extension of time. (Para 19)

In case application u/Order IX Rule 13 r/w Section 151 CPC dated 29.2.2020 would not have been dismissed in default, petitioner-defendant would have no occasion to obtain such order for compliance of Section 17 of Act, 1887 upon the restoration application. (Para 15, 21)

C. An application seeking to set aside an ex-parte decree passed by a Court of Small Causes or for a review of its judgment must be accompanied by a deposit in the court of the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the court in its discretion subject to a previous application by the applicant seeking direction of the court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. It may be filed at any time up to the time of presentation of application for setting aside ex-parte decree or for review and the Court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the court to make a prompt order. The delay on the

part of the court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the court. (Para 30)

In the present case, neither application of petitioner u/Order IX Rule 13 of CPC was accompanied alongwith deposit required u/s 17 of Act, 1887 nor having any application to dispense with the deposit of Section 17 of Act, 1887. Even in restoration application, there is no such prayer to grant permission to comply the Section 17 of Act, 1887. Therefore, **petitioner is not entitled for any relief to comply the provision of Section 17 of Act, 1887 after filing of application u/Order IX Rule 13 of CPC r/w 151 CPC.** (Para 32)

Writ petition dismissed. (E-4)

Precedent followed:

Keadarnath Vs Mohan Lal Kesarwari, AIR 2002 SC 582 (Para 14, 30)

Precedent distinguished:

1. Shyam Kumar Gupta & ors. Vs Shubham Jain, Civil Appeal No. 765 of 2023 arising out of SLP (C) No. 2542 of 2023 (Para 6, 8, 9, 26, 33)

2. Smt. Sushma Agarwal Vs District Judge, Agra & ors., Matters Under Article 227 No. 4089 of 2018 (Para 6, 10, 29, 33)

Present petition challenges judgment and order dated 13.2.2023, passed by the Additional District Judge, Court No. 18, Kanpur Nagar in Misc. Case No. 251 of 2020, whereby application u/Order 9 Rule 13 C.P.C. for setting aside ex-parte judgment and decree dated 03.02.2020 has been rejected.

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

1. Heard Sri Sunil Kumar Srivastava, learned counsel for the petitioner and Sri Ramesh Chandra Agrahari, learned counsel for the respondents.

2. Present petition has been filed for challenging the judgment and order dated 13.2.2023 passed by the Additional District Judge, Court No.18, Kanpur Nagar in Misc. Case No. 251 of 2020 (Sanjay Mishra @ Aashu Vs. Magan Pandey and others) arising out of SCC Suit No.99 of 2016 (Magan Pandey and another vs. Sanjay Mishra @ Aashu) whereby application under Order 9 Rule 13 C.P.C. for setting aside ex-parte judgment and decree dated 3.2.2020 has been rejected.

3. Since, only legal question is involved in the present petition, therefore, with the consent of parties without inviting for affidavits, petition is being decided at the admission stage itself.

4. Learned counsel for the petitioner submitted that plaintiffs-respondents have filed S.C.C. Suit No. 99 of 2016 for eviction and payment of rent, which was ex parte decided vide order dated 3.2.2020. Against that, petitioner-defendant has moved an application under Order IX Rule 13 read with Section 151 of CPC on 29.2.2020, which was dismissed in default vide order dated 12.2.2021. After dismissal of the said application, petitioner-defendant has moved restoration application, which was allowed vide order dated 10.3.2022 with liberty to ensure the compliance of Section 17 of Provincial Small Cause Courts Act, 1887 (hereinafter referred to as Act, 1887). Thereafter, petitioner-defendant has moved an application on 6.4.2022 for compliance of Section 17 of Act, 1887. The said application was rejected vide order dated 13.2.2023 on the ground that while filing application under Order IX Rule 13 of CPC, he has not complied the Section 17 of Act, 1887 and in case treating that he has complied the Section 17 of Act, 1887, even

though same was not the full compliance as full amount has not been deposited.

5. Learned counsel for the petitioner assailed the impugned order on two grounds; First of all, Court itself while allowing the restoration application, granted permission to ensure the compliance of Section 17 of Act, 1887, therefore, there is no occasion for the Court to reject the application for non compliance of Section 17 of Act, 1887. Secondly, in case of part compliance, petitioner-defendant may have been given liberty for remaining compliance to make the deficiency good.

6. In support of his contention, he has placed reliance upon the judgment of Apex Court as well as this Court in the cases of **Shyam Kumar Gupta & Ors. vs. Shubham Jain** passed in *Civil Appeal No.765 of 2023* arising out of *SLP (C) No.2542 of 2023* and **Smt. Sushma Agarwal vs. District Judge, Agra and 2 others** passed in *Matters Under Article 227 No. 4089 of 2018*.

7. Sri Ramesh Chandra Agrahari, learned counsel for the respondents has vehemently opposed the submission of learned counsel for the petitioner and submitted that Order IX Rule 13 read with Section 151 CPC clearly provides that at the time of filing of application, provision of Section 17 of Act, 1887 must have been complied with. In the present case, there is no dispute on the point that while filing the application under Order IX Rule 13 of CPC, he has not complied the Section 17 of Act, 1887, therefore, there is no illegality or perversity in the impugned order.

8. He next submitted that so far as judgment of Apex Court in the case of

Shyam Kumar Gupta (supra) is concerned, that is not applicable in the case of petitioner for the reason that in the said case, decretal amount was not clear whereas in the present case ex parte decree and judgment was given on 3.2.2022, decree was prepared on 12.2.2022 and application under Order IX Rule 13 of CPC was filed on 22.2.2022 meaning thereby that petitioner had full knowledge about the decretal amount even though he has not deposited the single penny, while submitting the application under Order IX Rule 13 of CPC.

9. He next submitted that facts of judgment of Apex Court in the case of **Shyam Kumar Gupta (supra)** are different. In that case, there are some certain error in quantifying the amount in decree, therefore, full compliance of Section 17 of Act, 1887 could not be made. Court considering this fact has given liberty to petitioner-defendant to deposit the amount for full compliance of Section 17 of Act, 1887.

10. He also submitted that so far as judgment of this Court in the case of **Smt. Sushma Agarwal (supra)** is concerned that is also not applicable for the very same reason in that case, petitioner-defendant has deposited Rs.85,000/- in cash, which was accepted by the landlord, therefore, Court has taken view that in such matter opportunity must have been given for compliance of Section 17 of Act, 1887.

11. He also pointed out that permission of compliance of Section 17 of Act, 1887 vide order dated 10.3.2022 while allowing the restoration application is contrary to law, therefore, considering this fact, Court in its ex parte decree and judgment, made it clear that while passing the order dated 10.3.2022, it was not

intention of Court to grant time for compliance of Section 17 of Act, 1887 after restoration of application Order IX Rule 13 of CPC.

12. He further submitted that second ground taken by the learned Court below while rejecting the application under Order IX Rule 13 of CPC is having full force. In fact, Court has only held that in case in the interest of justice, if it has been accepted that petitioner had deposited the amount, that is also not full compliance. In present case, intention of petitioner was from the very day one was not appears to be proper. He first deposited the zerox copy of bank draft in his own name, which cannot be treated compliance of Section 17 of 1887. Thereafter, he deposited the two cheques amounting to Rs. 1,14,000/-, which is not fulfilling the requirement of provision of Section 17 of Act, 1887 as the decretal amount was Rs.2,07,611/-.

13. He firmly submitted that petitioner is taking benefit of his own fault as after dismissal of his application under Order IX Rule 13 of CPC in default, he has filed restoration application dated 10.3.2022 in which he was given liberty for compliance of Section 17 of Act, 1887. He further submitted that if it would have not been dismissed in default, petitioner would has no occasion to obtain order to fulfill the deficiency of Section 17 of Act 1887. Therefore, there is no illegality or perversity in the impugned order and petition is liable to be dismissed with heavy costs.

14. In support of his contention, he has placed reliance upon the judgment of Apex Court as well as this Court in the cases of **Keadarnath Vs. Mohan Lal Kesarwari reported in 2002 0 AIR (SC) 582.**

15. Being confronted by the Court, learned counsel for the petitioner could not dispute this fact that in case in absence of dismissal of application under Order IX Rule 13 of CPC, he would have no occasion to obtain order to fulfill the requirement of Section 17 of Act, 1887.

16. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record as well as judgments relied upon. Undisputed facts of the case are that plaintiffs-respondents have filed S.C.C. Suit No. 99 of 2016 for eviction and payment of rent, which was ex parte decided vide order dated 3.2.2020. Petitioner-defendant has filed an application under Order IX Rule 13 read with Section 151 of CPC on 29.2.2020 without compliance of Section 17 of Act, 1887, which was dismissed in default vide order dated 12.2.2021. Thereafter, petitioner-defendant has moved restoration application, which was allowed vide order dated 10.3.2022 with observation to comply the Section 17 of Act, 1887.

17. Now, the issue before this Court is that as to whether while allowing the restoration application, S.C.C. Court can grant liberty to petitioner-defendant to comply the Section 17 of Act, 1887 and whether it is case of part compliance of Section 17 of Act, 1887 or not.

18. I have perused the Order IX Rule 13 of CPC as well as Section 17 of Act, 1887, which are quoted hereinbelow:-

Section 17 of Act, 1887.

"Application of the Code of Civil Procedure- (1) The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall save in so far as is otherwise

provided by that Code or by this Act,] be the procedure followed in a Court of Small Causes, in all suits cognizable by it and in all proceedings arising out of such suits:

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give 21 [such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed].

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realised in manner provided by section 22 [145] of the Code of Civil Procedure, 23 [1908] (5 of 1908)."

Order IX Rule 13 of CPC

"13. Setting aside decree ex parte against defendant.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

1[Provided further than no Court shall set aside a decree passed ex parte merely on the ground that there has been

an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]

2[Explanation.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]"

19. From perusal of the same, it is apparently clear that no application under Order IX Rule 13 of CPC can be filed without compliance of Section 17 of Act, 1887. Undisputedly, petitioner has preferred application dated 29.2.2020 without compliance of Section 17 of Act, 1887, which was ultimately dismissed in default vide order dated 12.2.2021. Against that, restoration application has been filed, which was allowed vide order dated 10.3.2022 with the observation to comply the Section 17 of Act, 1887. Section 17 of Act, 1887 is mandatory having no provision of extension of time.

20. From conjoint reading of Section 17 of Act, 1887 and Order IX Rule 13 of CPC, it is apparent that such observation is wholly unwarranted and contrary to provision of rules. Therefore, considering this fact, S.C.C. Court itself had clarified the same in its order dated 3.2.2020. In fact, restoration application has never filed along with prayer for seeking permission to comply the provision of Section 17 of Act, 1887, but it was only filed to recall its order dated 12.1.2022, therefore, such observation cannot be treated an order from the Court, which is in teeth of settled provisions of law.

21. It is also undisputed that in case application under Order IX Rule 13 read with Section 151 CPC dated 29.2.2020 would not have been dismissed in default, petitioner-defendant would have no occasion to obtain such order for compliance of Section 17 of Act, 1887 upon the restoration application.

22. It is also settled that no one can take benefit of his own fault and certainly dismissal of the petition/application in default solely due to fault on the part of the counsel for the party. For which, he cannot be extended any extra benefit contrary to the provisions of law, therefore, first argument of learned counsel for the petitioner is having no force.

23. In light of discussion made hereinabove, this Court is of the firm view that while allowing restoration application, no liberty can be granted to petitioner-defendant for compliance of Section 17 of Act, 1887

24. Second argument of petitioner is that he should have been given opportunity to fulfill the remaining compliance of Section 17 of Act, 1887, if any.

25. I have perused the judgment of this Court in the case of **Shyam Kumar Gupta (Supra)** relied by the learned counsel for the petitioner. The relevant paragraphs of the said judgment are being quoted hereinbelow:-

"15. It could be reasonably noticed that in relation to the suit to which the Act of 1887 applies, an applicant seeking an order to set aside the decree passed ex parte is required to deposit the amount due under the decree/judgment or has to furnish security for due performance

of the decree or compliance with the judgment. Even under Order IX Rule 13 CPC, while making an order for setting aside the decree passed ex parte, the Court may put the defendant to terms as to costs, payment into Court or otherwise. However, these requirements need to be visualized from a practical standpoint and cannot be applied as if to penalize the defendant for every mistake, even if the amount payable is not explicitly quantified in the decree in question.

15.1. For the purpose of the case at hand, as regards the amount payable, a sum of Rs. 8,000/- towards arrears of rent had been quantified in the decree and another sum of Rs. 3,212/- towards costs could have been taken as quantified. Of course, the plaintiff was further held entitled to receive Rs. 2,000/- per month towards rent/mesne profits during the suit and until getting the actual vacant possession of the suit shop after payment of requisite court fees but, the Trial Court did not specifically quantify the amount payable by the defendant even until the date of decree. In the given circumstances, when the defendant, predecessor of the appellants, immediately moved the Court after noticing the decree in question and deposited the amount directly quantified thereunder i.e., the sum of Rs. 8,000/- towards arrears of rent and Rs. 3,212/- towards costs, totalling to Rs. 11,212/-, while seeking the order for setting aside ex parte decree, it had not been a case where the defendant had ignored the requirements of deposit altogether. Moreover, the decree in question had not been merely a money decree but had been for eviction too. Looking to the subject-matter of the suit and the overall circumstances, a practical view was required to be taken and if all any further deposit or furnishing of security was considered necessary, appropriate

orders could have been passed in that regard. Putting it differently, in terms of Section 17 of the Act of 1887 read with Order IX Rule 13 CPC, the Court could have extended the time for making deposit if so required, or could have put the defendant to the terms of security for performance of the decree.

15.2. However, for what has been noticed and extracted hereinabove, it is apparent that Trial Court and the High Court have viewed the requirements of Section 17 of the Act of 1887 from such an exacting and rather impractical standpoint that the bonafide attempt of the defendant to seek a merit decision of the suit after due contest has been totally ignored. In our view, in the present set of facts and circumstances, prayer of the defendant to set aside *ex parte* decree could not have been denied for want of further deposit in terms of the decree in question.

15.3. The High Court, while dismissing the petition filed by the appellants and endorsing the views of the Trial Court, has proceeded to rely upon the decision of this Court in the case of *Kedarnath (supra)*, that the provisions of Section 17 of the Act of 1887 are held to be mandatory. In our view, reference to the said decision remains inapposite in the present case. Even if the requirements of Section 17 of the Act of 1887 are held to be mandatory, the present one had not been a case where the defendant had altogether ignored those requirements. In *Kedarnath (supra)*, in the very passage reproduced by the High Court, it was clearly noticed that the applicant did not make any deposit and did not move any application for dispensing with deposit or seeking leave of the Court for furnishing security. In the backdrop of such facts, showing total non-compliance of the requirements of Section 17 of the Act of 1887, this Court held the

application for setting aside the decree as incompetent. It is difficult to apply the decision in *Kedarnath (supra)* to the facts of the present case.

16. Apart from the above, where we find that the Trial Court and the High Court had taken too technical and impractical a view of the matter, there is another strong reason for which we are inclined to accept the prayer for setting aside the decree passed *ex parte* in this case. As noticed, in response to the queries of this Court, the appellants have immediately taken bonafide steps and have deposited the amount which may be relatable to rent/mesne profits until the month of April, 2023. For this bonafide and prompt step (albeit taken after approaching this Court), in our view, they do deserve an opportunity to contest the suit on merits, particularly when the matter relates to a shop where the predecessor of the appellants had been continuing as tenant and the plaintiff-respondent is seeking the decree for eviction only on the ground of default in payment of rent."

26. From perusal of the above paragraphs of the aforesaid judgment, it is apparently clear that there are some factual error in quantifying the amount in decree and trial Court has not specifically quantify the amount payable by the defendant even untill the date of decree. Due to which, petitioner-defendant has deposited certain amount to his understanding and for remaining, Court has permitted to petitioner-defendant to deposit amount for full compliance of Section 17 of Act, 1887.

27. So far as present case is concerned, there is no dispute on the point that judgment was delivered on 3.2.2022, decree was prepared on 12.2.2022 and application under IX Rule 13 of CPC was

filed on 22.2.2022 without depositing single penny for compliance of Section 17 of Act, 1887, therefore, this judgment would not come in the rescue of petitioner.

28. I have also perused the judgment of this Court in the case of **Smt. Sushma Agarwal (Supra)** relied by petitioner. The relevant paragraphs of the said judgment are being quoted hereinbelow:-

"13. The Supreme Court has observed that the proviso of Section 17 does not provide any extent of time by which such application for dispensation for prior deposit of the decretal amount may be filed. The Court has observed "We think that it may be filed at any time up to the time of presentation of application for setting aside ex parte decree or for review and the Court may treat it as a previous application. It is then for the Court to make a prompt order. The delay on the part of the Court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the Court."

17. The learned counsel for the respondents has also relied upon a Division Bench decision of this Court in Raj Kumar Makhija and others Vs. M/s. SKS and Co. and others, 2000 (3) ARC 117 that it is duty of the applicant to calculate the correct decretal amount as per the decree and Court is not required to get the decretal amount calculated for the applicant. If there is any shortfall due to calculation made for any reason its consequences will follow and wrong calculation will provide no shelter to such an applicant.

18. It has been held by the Division Bench that any application filed by the tenant-defendant to make good the shortfall either in the deposit of security after expiry of period of limitation is of no

consequence. The application for setting aside the ex-parte decree would be dismissed for non compliance of the proviso to Section 17 of the Act. It has also been held that any amount deposited after expiry of period of limitation will also be taken into consideration for judging the compliance of the proviso to Section 17 of the Act. However, it has also observed that the Court can ignore the shortfall in deposit of a negligible amount on the principle of deminimis as explained in the body of the judgment. It has held further that there is no provision conferring power on the Court to condone the delay in making deposit and provisions of Section 5 of the Limitation Act will not be applicable to the deposit contemplated under the proviso to Section 17 of the Act.

20. I have considered the arguments raised by the learned counsel for the petitioner-tenant and also by the learned counsel for the respondent. No doubt that the provisions of Section 17 of the PSCC Act are mandatory in nature. It is, however, true that the petitioner had deposited Rs.85,000/- before the application under Order 9 Rule 13 of Code of Civil Procedure came up for disposal before the learned Trial Court. This fact is admitted to either of the parties that at the time when the suit was decreed it had been held by the Judge, Small Causes Court that the tenant was in arrears of payment of rent w.e.f. 1st of April, 2015 at the rate of Rs.5,000/- per month. The rent due at the time of filing of the SCC Suit was for five months, and for fourteen months, at the time when the Restoration Application was moved by the petitioner. The petitioner deposited Rs.10,100/- at the time of filing of the application for recall and during the pendency of her application for determination of the correct decretal amount, she deposited another Rs.75,000/-,

which was received by the husband of the respondent No. 3.

22. The bonafide intent of the tenant has undoubtedly been established in making payments @ Rs.5,000/- per month and also depositing some amount extra i.e. to the tune of Rs.10,100/- from a perusal of the papers brought on record. The intention of adding the proviso to Section 17 in the Provisional Small Causes Court Act, 1887 can be gathered from the language of the proviso. It was added to avoid the possibility of a litigant taking advantage of Recall Application being moved without first establishing his bonafide to pursue the litigation further, and to avoid the decree holder from being prejudiced due to the pendency of the litigation. This Court, therefore, feels it appropriate to set aside the order passed by the two learned Courts below with the observations that the tenant cannot be non-suited on a hyper technical ground when she had already deposited Rs.85,100/- during the pendency of application under Order 9 Rule 13 C.P.C."

29. Similarly, in this matter, certain amount was accepted by the plaintiff in cash, therefore, Court has granted one more opportunity for compliance of Section 17 of Act, 1887, but in the present case, at no point of time, plaintiff-respondent has accepted any amount for compliance of Section 17 of Act, 1887, therefore, this judgment is also not helping the petitioner.

30. I have also perused the judgment of Apex Court in the case of Kedarnath (*supra*) as relied by the respondent, which is squarely covered with the present controversy. Relevant paragraph of the said judgment is quoted hereinbelow:-

"A bare reading of the provision shows that the legislature have chosen to

couch the language of the proviso in a mandatory form and we see no reason to interpret, construe and hold the nature of the proviso as directory. An application seeking to set aside an ex-parte decree passed by a Court of Small Causes or for a review of its judgment must be accompanied by a deposit in the court of the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the court in its discretion subject to a previous application by the applicant seeking direction of the court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. We think that it may be filed at any time up to the time of presentation of application for setting aside ex-parte decree or for review and the Court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the court to make a prompt order. The delay on the part of the court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the court.

In the case at hand, the application for setting aside ex parte decree was not accompanied by deposit in the court of the amount due and payable by the applicant under the decree. The applicant also did not move any application for dispensing with deposit and seeking leave of the court for furnishing such security for the performance of the decree as the court may have directed. The application for setting aside the decree was therefore incompetent. It could not have been entertained and allowed."

31. From perusal of the same, it is clear that neither application was

accompanied by any deposit nor any application has been filed for dispensing with deposit and seeking leave of the Court for furnishing such security.

32. In the present case too, neither application of petitioner under Order IX Rule 13 of CPC was accompanied alongwith deposit required under Section 17 of Act, 1887 nor having any application to dispense with the deposit of Section 17 of Act, 1887. Even in restoration application, there is no such prayer to grant permission to comply the Section 17 of Act, 1887. Therefore, in light of aforesaid judgment, petitioner is not entitled for any relief to comply the provision of Section 17 of Act, 1887 after filing of application under Order IX Rule 13 of CPC read with 151 CPC.

33. This Court is of the firm view that it is not the case of part compliance, therefore, benefit of judgments of *Shyam Kumar Gupta (Supra)* and *Smt. Sushma Agarwal (Supra)* cannot be given to petitioner.

34. Both the Courts have considered each and every aspects and rightly came to the conclusion that petitioner has never complied the provision of Section 17 of Act, 1887. Courts have also rightly taken view that in case, it is treating to be compliance, the same is not full compliance as amount so required has not been deposited.

35. In view of above facts mentioned hereinabove as well as law laid by this Court, the writ petition lacks merit and is, accordingly, **dismissed**.

36. No order as to costs.

(2023) 5 ILRA 277
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 3631 of 2023
 (CIVIL)

Rajendra & Ors.		...Petitioners
	Versus	
Mohd. Shahid		...Respondent

Counsel for the Petitioners:
 Sri Piyush Shukla

Counsel for the Respondent:
 Sri Manish Tandon, Sri Atul Dayal (Sr. Advocate)

A. Tenancy Law – Ownership – Rent - U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972 - Sections 20(2)(a) & 34 - Slum Areas (Improvement and Clearance) Act, 1962 - Section 23 - Code of Civil Procedure: Order 6 Rule 14 and 15 - After receiving legal notice, it is required on the part of petitioner-defendant to raise objection about the invalidity or infirmity of notice at the earliest otherwise, it would deemed to have been waved. (Para 20)

In the present case, the legal notice has details of ownership, house number of property in dispute alongwith boundary, which is not disputed by the petitioner- defendant in its reply dated 1.5.2014. The very same fact has been mentioned in the plaint, which was also not disputed by petitioner-defendant, in fact, there was some dispute about the number of rooms in tenancy for which amendment application u/Order 6 Rule 17 of CPC has been filed in written statement, which was rejected, but so far as ownership is concerned, no application for amendment in written statement has been filed. (Para 19)

Once the content of legal notice has not been disputed in its reply (dated 01.05.2014) and further not raised objection while filing written statement, same cannot be raised at this stage, therefore, argument of petitioner has no substance on this point. (Para 21)

B.(1) In light of provision of Sections 34 r/w Rules 22 of Rules, 1972 & 38 of U.P. Act No. 13 of 1972, provision of Order 6 Rule 14 & 15 shall not be applicable in the present case. (Para 25)

Section 34 of U.P Act No.13 of 1972 r/w Rule 22 of Rules, 1972 provides certain contingencies upon which CPC is applicable, which does not contemplate any such contingencies, which invites attention of Order 6 Rule 14 & 15 of CPC. (Para 23, 24)

From perusal of Section 38 of U.P. Act No. 13 of 1972, it is clear that provision of U.P. Act No.13 of 1972 shall prevail over the provisions of CPC & Transfer of Property Act. (Para 25)

(2) No liberty can be granted to petitioner-defendant to raise this issue at this belated stage - Petitioner has not taken this ground before the SCC Court as well as Revisional Court. (Para 26)

C. For taking benefit of Section 20(4) of U.P. Act No.13 of 1972, it is required to deposit entire dues including amount for time barred period. It is admitted case of petitioner that he has not deposited the rent from 1990 and after ex parte decree while filing application u/Order 15 Rule 5 of CPC complying of Section 17 of SCC Act, 1887, he had deposited decretal amount only. (Para 30)

D. The supervisory jurisdiction under Article 227 cannot be invoked to interfere with the findings of fact recorded by the courts below. At any rate, as long as the findings are based upon some material which are relevant for the purpose and no evidence could be pointed to demonstrate that the findings recorded by the Trial Court are perverse, no interference can be made. (Para 32)

Petitioner argues that in the sale deed rent was mentioned at the rate of Rs. 800/- whereas in the legal notice as well as plaint, it was claimed at the rate of Rs. 750/-, but respondent-plaintiff could not proof the rent at the rate of Rs. 750/-, therefore, order is bad on this ground. (Para 31)

There is concurrent finding of Courts about the rate of rent at the rate of Rs.750/- i.e., in favour of respondent-plaintiff. It is settled that in case of concurrent finding of Court, scope of judicial review is limited and narrow, therefore, no interference is required under Article 227 of the Constitution of India. (Para 33)

E. The declaration of an area as slum area u/s 3 of the Act, 1962 does not automatically result in acquisition of the properties situated in the said area. Eviction cannot be made without permission of Competent Authority, but so far as decree or order for eviction is concerned, there is no such provision in Section 23 of Act, 1962. (Para 37)

Landlord can maintain a suit for eviction against tenant even if the tenanted property has been acquired and an award has been passed in respect thereof under the provision of the Land Acquisition Act, 1894. In a suit for eviction, only the relationship of landlord and tenant is to be seen. (Para 36)

Section 23 of the Act, 1962 only provides that a decree or order can be put in execution only after obtaining the permission of the competent authority. It does not prohibit the institution of any suit. Even if it is claimed that the land in the slum area stood acquired, the building situated in the said land does not automatically vest in the acquiring authority. (Para 38)

Not only after declaration of slum area, but even after acquiring the property in dispute after notification, suit is maintainable and decree can be passed. (Para 34, 39)

Writ petition dismissed. (E-4)

Precedent followed:

1. University Book Depot through Jagannath Vs Amit Mishra, Civil Revision No. 10 of 2009 decided on 29.05.2020.

2. Parwati Bai Vs Radhika, 2003 (2) RCJ 4 (Para 10)

3. Apollo Zipper India Ltd. Vs W. Newman and Co. Ltd., 2018 (3) ARC 187 (Para 10)

4. Sanjay & anr. Vs Smt. Vimla Rani & ors., 2015 (3) ARC 741 (Para 13)

5. Ghoorey Lal Vs Sheo Murti Gupta, 1994 (5) SCC 339 (Para 14)

6. Anand Kumar Vs Dinesh Kumar, 2017 (3) ARC 178 (Para 16)

7. Smt. Shakuntala & ors. Vs Shaukat Ali & anr., Matters Under Article 227 No. 6139 of 2022, decided on 06.08.2022 (Para 17)

8. Smt. Phoola Devi & ors. Vs A.D.J. Court No. 14, Kanpur Nagar, 2020 (2) ARC 610 (Para 17)

9. Sheela Jawarai Nagori & anr. Vs Kantilal Nathmal Baldota & ors., 2014 (3) ARC (5) (Para 17)

Precedent distinguished:

Asha Rani Gupta Vs Sri Vineet Kumar, Civil Appeal No. 4682 of 2022 arising out of SLP (Civil) No. 1319 of 2019 (Para 6)

Present petition challenges order dated 15.12.2022 passed by the Court of Judge, Small Causes Court, Kanpur Nagar in S.C.C. Suit No. 188 of 2014 and impugned order dated 15.03.2023 passed by the District Judge, Kanpur in S.C.C. Revision No. 26 of 2023.

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

1. Heard Sri Piyush Shukla, learned counsel for the petitioners and Sri Atul Dayal, learned Senior Advocate assisted by Sri Manish Tandon, learned counsel for the respondents.

2. Present petition has been for setting aside the impugned order dated 15.12.2022 passed by the Court of Judge, Small Causes Court, Kanpur Nagar in S.C.C. Suit No. 188 of 2014 (Mohd. Shahid vs. Rajendra and others) and impugned order dated 15.3.2023 passed by the District Judge, Kanpur in S.C.C. Revision No. 26 of 2023 (Rajendra & others vs. Mohd Shahid)

3. Since, only legal question is involved in the present petition, therefore, with the consent of parties, petition is being decided at the admission stage itself.

4. Learned counsel for petitioners submitted that plaintiff-respondent has served legal notice dated 10.4.2014 claiming himself to be the owner of house in question on the basis of sale deed executed on 31.3.2013 by Jasmeet Singh. On the very same basis, he has set up his case and filed suit. In the plaint, it is clearly mentioned that house in question has been purchased by Jasmeet Singh. He next submitted that under Section 20(2)(a) of the U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972 (*hereinafter referred to as U.P. Act No. 13 of 1972*), notice is required within 30 days. In the present case, as the notice was sent on the basis of ownership of sale deed executed by Jasmeet Singh, therefore, it is not fulfilling the requirement of Section 20(2)(a) of U.P. Act No. 13 of 1972, therefore, notice is bad.

5. He next submitted that during the course of cross examination, plaintiff-respondent has denied his signature on four pages and he was not aware about the fact written in the plaint as it was written in English. In support of his contention, he has placed reliance upon the provision of Order 6 Rule 14 and 15 of CPC, which

provides that every page required signatures of party and pleader.

6. He further submitted that petitioner has fully complied the provision of Order 15 Rule 5 of CPC as well as Section 20(4) of Act, 1972 by depositing the admitted arrears of rent at the rate of Rs. 300/- per month, but benefit of Section 20(4) of Act, 1972 has not been given to him. In support of his contention he has placed reliance upon the judgment of this Court in the case of **Asha Rani Gupta vs. Sri Vineet Kumar passed in Civil Appeal No. 4682 of 2022 arising out of SLP (Civil) No. 1319 of 2019.**

7. He next submitted that once he has deposited the rent, he has entitled for benefit of Section 20(4) of U.P. Act No. 13 of 1972. In support of his contention, he has placed reliance upon the judgment of this Court in the case of **University Book Depot through Jagannath vs. Amit Mishra passed in Civil Revision No. 10 of 2009** decided on 29.5.2020.

8. He further submitted that he had deposited the rent on month to month basis at the admitted rate of Rs.300/- through out the proceedings and same has neither been considered nor any finding has been recorded by the Court below. He further submitted that in the notice, rent has been claimed at the rate of Rs. 750/- whereas in the sale deed, it is mentioned as Rs.800/- and as per defendant-petitioner, rate is 300/-. Respondent-plaintiff could not proof the rent at the rate of Rs. 750/-, therefore, order is also bad on this ground.

9. He lastly submitted that vide notification dated 21.2.2021 area in question has been declared as slum area under the provisions of Section 23 of U.P.

Slum Areas (Improvement and Clearance) Act, 1962, therefore, as per Section 23 of Act, 1962, no decree can be passed. He also submitted that once the KDA is acquired the land, plaintiff-respondent has losts its ownership from house in question.

10. Mr. Atul Dayal, learned Senior Advocate submitted that first of all legal notice dated 10.4.2014 was given for entire premises based upon the sale deed executed by Jasmeet Singh, which has never been disputed by the petitioner-defendant in its reply dated 1.5.2014, therefore, there is no illegality in the notice dated 10.4.2014. He next submitted that facts so mentioned in the legal notice dated 10.4.2014 about the house number, ownership, property in dispute alongwith boundary has not been disputed in its reply dated 1.5.2014. He further submitted that the same averment was also made in the plaint about the description of property, which was not disputed by the defendant-petitioner in written statement and application under Order 6 Rule 17 of CPC has been filed for amendment in written statement with regard to number of rooms in tenancy, which was also rejected and affirmed by the Revisional Court. He also submitted that no other application under Order 6 Rule 17 of CPC has been filed disputing the ownership based upon the sale deed dated 31.3.2013, therefore, same cannot be raised at this stage. He next submitted that in light of law laid down by the Apex Court in the cases of **Parwati Bai vs. Radhika reported in 2003 (2) RCJ 4 & Apollo Zipper India Ltd. vs. W. Newman and Co. Ltd. Reported in 2018 (3) ARC 187** and if the validity of notice has not been challenged in written statement, the same cannot be challenged at belated stage.

11. So far as applicability of Order 6 Rules 14 & 15 of CPC is concerned, he

firmly submitted that as per Section 34 of U.P. Act No. 13 of 1972 read with Rule 22 of Rules 1972, same shall not be applicable. In fact Sections 34 of U.P. Act No. 13 of 1972 provides certain contingencies where the CPC is applicable. He also submitted that Section 38 of U.P. Act No. 13 of 1972 provides that provision of U.P. Act No. 13 of 1972 shall prevail over the provisions of CPC & Transfer of Property Act. He further submitted that provision of Order 6 Rule 14 & 15 of CPC shall only be applicable in the civil suit filed under the provision of CPC and would not be applicable in summary proceedings initiated under the U.P. Act No.13 of 1972. Further, petitioner has also not taken this ground in SCC Court as well as Revisional Court, therefore, he cannot raise this issue before this Court under Article 227 of Constitution of India.

12. Learned counsel for the respondents submitted that so far as benefit of Section 20(4) of Act No. 13 of 1972 is concerned, it is required on the part of petitioner-defendant to deposit the entire amount including the amount for time barred period. In the present case, as per admission of petitioner-defendant, he has not deposited rent from 1990 and further once the ex parte decree has been passed against him while filing the application under Order 15 Rule 5 of CPC in compliance of Section 17 of Small Causes Court Act, 1887, he has deposited the decretal amount only.

13. So far as deposit of rent on month to month basis is concerned, he submitted that he has not deposited the same regularly. This is also the finding of first court that amount was not deposited in accordance with Order 15 Rule 5 of CPC. This was also affirmed in revision. In

support of his contention about the rent of time barred period, he has placed reliance upon the judgment of this Court in the case of ***Sanjay and another vs. Smt. Vimla Rani and 6 others reported in 2015 (3) ARC 741.***

14. He next submitted that in case of denial of title, petitioner-defendant cannot take benefit of Section 20 (4) of U.P. Act No.13 of 1972 in light of judgment of Apex Court in the case of ***Ghoorey Lal vs. Sheo Murti Gupta reported in 1994 (5) SCC 339 (Paragraph 1)***

15. He next submitted that so far as rate of rent at the rate of Rs. 750/- is concerned, no doubt in the sale deed, it is mentioned only Rs. 800/-, but in the legal notice as well as plaint, he has claimed the rent at the rate of Rs. 750/-. Against which, petitioner-defendant could not produce any evidence about the rate of rent at the rate of Rs. 300/-.

16. He further submitted that there is concurrent finding of Courts, therefore, there is no scope of interference under Article 227 of the Constitution of India. In support of his contention, he has placed reliance upon the judgment of this Court in the case of ***Anand Kumar Vs. Dinesh Kumar reported in 2017 (3) ARC 178 (Paragraph 18, 21, 22, 23 & 33)***

17. He next submitted that even after declaration of slum area vide notification 21.2.2021 under Section 23 of Act, 1962, Court can pass the decree for eviction. Not only this even in case of acquirement of land after notification, suit is maintainable. In support of his contention, he has placed reliance upon the judgment of this Court as well as Apex Court in the case of ***Smt. Shakuntala and 3 others vs. Shaukat Ali***

and another passed in Matters Under Article 227 No. 6139 of 2022 decided on 6.8.2022, Smt. Phoola Devi and 4 others vs. Additional District Judge Court No. 14, Kanpur Nagar reported in 2020 (2) ARC 610 and Sheela Jawarai Nagori and Another v. Kantilal Nathmal Baldota and others reported in 2014 (3) ARC (5).

18. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record as well as judgments relied upon by the learned counsel for the parties.

19. First issue raised by learned counsel for the petitioner about the service of legal notice dated 10.4.2014 based upon the sale deed dated 31.3.2013 executed by Jasmeet Singh. His argument is that it is based upon the sale deed executed by Jasmeet Singh, therefore, it is not fulfilling the requirement of Section 20(2) (a) of U.P. Act No. 13 of 1972. The same was rebutted by Mr. Atul Dayal, learned Senior Counsel and he rightly submitted that there is no illegality in the notice dated 10.4.2014. The said legal notice is having detail of ownership, house number of property in dispute alongwith boundary, which is not disputed by the petitioner-defendant in its reply dated 1.5.2014. He has written the very same fact in the plaint, which was also not disputed by petitioner-defendant, in fact, he is having some dispute about the number of rooms in tenancy for which he has filed amendment application under Order 6 Rule 17 of CPC in written statement, which was also rejected, but so far as ownership is concerned, no application for amendment in written statement has been filed.

20. Law is very well settled by the Apex Court in the case of ***Parwati Bai***

(supra) on the point that after receiving legal notice, it is required on the part of petitioner-defendant to raise objection about the invalidity or infirmity of notice at the earliest otherwise, it would deemed to have been waived. Relevant paragraph of the said judgement is quoted hereinbeolw:-

"6. The singular question to be examined in the present case is whether the tenancy was terminated in accordance with the provisions of Section 106 of the Transfer of Property Act. The receipt of notice by the defendant is admitted in the written statement. The defendant has not raised any specific objection as to the validity of the notice. An objection as to invalidity or infirmity of notice under Section 106 T.P. Act should be raised specifically and at the earliest; else it will be deemed to have been waived even if there exists one. It cannot, therefore, be said that the notice in the present case suffered from any infirmity. A copy of the notice was exhibited and proved by the plaintiff as Exh. P-4."

21. From perusal of above paragraph, it is apparently clear that once the content of legal notice has not been disputed in its reply dated 1.5.2014 and further not raised objection while filing written statement, same cannot be raised at this stage, therefore, argument of petitioner is having no substance on this point.

22. Secondly, learned counsel for the petitioner raised issue about the applicability of Order 6 Rule 14 & 15 of CPC in light of fact that four pages of plaint was not signed by the plaintiff-respondent and he could not understood the same as it was written in English. It was also rebutted by learned Senior Counsel with the submission that Order 6 Rule 14 &

15 of CPC shall not be applicable in the present case in light of Section 34 of U.P Act No.13 of 1972 read with Rule 22 of Rules, 1972. He also argued that provision of Section 38 of U.P. Act No. 13 of 1972 shall prevail over provisions of CPC & Transfer of Property Act. Therefore, Sections 34 & 38 of U.P. Act No. 13 of 1972 is mandatory provisions and same are quoted herebelow:-

Section 34 of U.P. Act No. 13 of 1972.

34. Powers of various authorities and procedure to be followed by them (1) The DistrictMagistrate, the prescribed authority or any 1 [appellate or revising authority] shall for thepurposes of holding any inquiry or hearing 2[any appeal or revision] under this Act have thesame powers as are vested in the Civil Court under the Code of Civil Procedure, 1908 (Act No.V of 1908), when trying a suit, in respect of the following matters namely-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) receiving evidence on affidavits;

(c) inspecting a building or its locality, or issuing commission for the examination of witnesses or documents or local investigation;

(d) requiring the discovery and production of documents;

(e) awarding, subject to any rules made in that behalf, costs or special costs to any parts or requiring security for costs from any party;

(f) recording a lawful agreement, compromise or satisfaction and making an order in accordance therewith;

(g) any other matter which may be prescribed.

(2) The District Magistrate, the prescribed authority or 3[appellate or

revising authority], while holding an inquiry or hearing 4[any appeal or revision] under this Act, shall be deemed to be a Civil Court within the meaning of 5[Sections 345 and 346 of Code of Criminal Procedure, 1973]and any proceeding before him or it to be a judicial proceeding within the meaning of Sections193 and 228 of the Indian Penal Code (Act No. XLV of 1860).

(3) Where any costs or other sum of money awarded under this Act by the District Magistrate or the prescribed authority or 1[the appellate or revisional authority] remains unpaid, he or it may issue a certificate of recovery in respect thereof in the prescribed form, and any person in whose favour such certificate is issued may apply to the Court of Small Causes having jurisdiction under the Provincial Small Cause Courts Act, 1887 (Act No. IX of 1887) for recovery of the amount specified in the certificate. Such court shall thereupon execute the certificate or cause the same to be executed in the same manner and by the same procedure as if it were a decree for payment of money made by itself in a suit.

(4) Where any party to any proceeding for the determination of standard rent of or for eviction from a building dies during the pendency of the proceeding, such proceeding may be continued after bringing on the record:

(a) in the case of the landlord or tenant, his heirs or legal representatives;

(b) in the case of unauthorised occupant, any person claiming under him found in occupation of the building.

(5) Where any person has been evicted from a building in pursuance of any order of the District Magistrate or the prescribed authority or made on appeal under this Act, the District Magistrate or the prescribed authority, as the case may

be, may after service or publication of a notice in that behalf on such persons and in such manner as may be prescribed, remove or cause to be removed or dispose of, in such manner as may be prescribed, any specific property remaining on such building.

(6) Affidavits to be filed in any proceeding under this Act shall be made in the same manner and conform to the same requirements as affidavits filed under the Code of Civil Procedure, 1908 (Act No. V of 1908), and may be verified by any officer or other person appointed by the High Court under clause (b) or by an officer appointed by any other court under clause (c) of Section 139 of the said Code.

(7) The District Magistrate, the prescribed authority or 2[the appellate or revisional authority] shall record reasons for every order made under this Act.

(8) For the purposes of any proceedings under this Act and for purposes connected therewith the said authorities shall have such other powers and 3[shall follow such procedure, principles of proof, rules of limitation and guiding principles as may be prescribed."

Rule 22 of Rules, 1972.

22. Powers under the Code of Civil Procedure, 1908 (Section 34(1) (g).- [The District Magistrate, the Prescribed Authority or the Appellate or Revising Authority shall, for the purposes of holding any inquiry or hearing any appeal or revision under the Act, shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908 (Act No. V of 1908), when trying a suit, in respect of the following matters, namely-

(a) the power to dismiss an application, appeal or revision for default and to restore it for sufficient cause;

(b) the power to proceed ex-parte and to set aside, for sufficient cause, an order passed ex parte;

(c) the power to award costs and special costs to any successful party against an unsuccessful party;

(d) the power to allow amendment of an application, memorandum of appeal or revision;

(e) the power to consolidate two or more cases of eviction by the same landlord against different tenants;

(f) the power referred to in Sections 151 and 152 of the Code of Civil Procedure, 1908 (Act No. V of 1908) to make any order of the ends of justice or to prevent the abuse of the process of the authority concerned.]

Section 38 of U.P. Act No. 13 of 1972

"Act to override Transfer of Property Act and Civil Procedure Code:- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Transfer of Property Act (ACT No.IV of 1882), or in the Code of Civil Procedure, 1908 (Act No.V of 1908)."

23. Section 34 of U.P Act No.13 of 1972 read with Rule 22 of Rules, 1972 provides certain contingencies upon which CPC is applicable, which does not contemplate any such contingencies, which invites attention of Order 6 Rule 14 & 15 of CPC.

24. From perusal of the Sections 34 of U.P. Act No. 13 of 1972, it is apparently clear that provisions of CPC shall be applicable in those circumstances, which are referred in Section 34 read with rules 22 of Rules, 1972.

25. Further, from perusal of Section 38 of U.P. Act No. 13 of 1972, it is clear that provision of U.P. Act No.13 of 1972 shall prevail over the provisions of CPC & Transfer of Property Act. Therefore, in light of provision of Sections 34 read with Rules 22 of Rules, 1972 & 38 of U.P. Act No. 13 of 1972, provision of Order 6 Rule 14 & 15 shall not be applicable in the present case.

26. Not only this, petitioner has not taken this ground before the SCC Court as well as Revisional Court, therefore, no liberty can be granted to petitioner-defendant to raise this issue at this belated stage.

27. The third issue raised by the learned counsel for the petitioner about the compliance of Order 15 Rule 5 of CPC read with Section 20(4) of U.P. Act No. 13 of 1972. It is argued that he has deposited the rent on month to month basis at the admitted rate of Rs.300/-, therefore, in light of judgment of Apex Court in the case of **Asha Rani Gupta (supra) & University Book Depot (supra)**, he is entitled for benefit of Order 15 Rule 5 read with Section 20(4) of U.P. Act, 1972. Relevant paragraph of the said judgment is quoted hereinbelow:-

"9.1 A few basic factors related with the provisions of Order XV Rule 5 CPC could be noticed at once. As per these provisions, in a suit by a lessor for eviction of a lessee after the determination of lease and for recovery of rent or compensation for use and occupation, the defendant is under the obligation: (1) to deposit the entire amount admitted by him to be due together with interest at the rate of 9% per annum on or before the first hearing of the suit; and (2) to regularly deposit the monthly amount due within a week of its

accrual throughout the pendency of the suit. The consequence of default in making either of these deposits is that the Court may strike off his defence. The expression 'first hearing' means the date for filing written statement or the date for hearing mentioned in the summons; and in case of multiple dates, the last of them. The expression 'monthly amount due' means the amount due every month, whether as rent or damages for use and occupation at the admitted rate of rent after making no other deduction except taxes, if paid to the local authority on lessor's account. It is, however, expected that before making an order striking off defence, the Court would consider the representation of the defendant, if made within 10 days of the first hearing or within 10 days of the expiry of one week from the date of accrual of monthly amount."

Relevant paragraph of the judgment of **University Book Depot (supra)** is quoted hereinbelow:-

"In view of the aforesaid, this Court is of the view that the Court below erred in relying upon the decision in Bhragu Dutt Singh(Supra) to reject the plea of the revisionist for treating the amount deposited by him under the proviso to Section 17 of the Act, 1887 as a deposit referred in Section 20(4) of the Act, 1972. The legal position is settled that it was permissible to treat such deposit as one under Section 20 (4). After treating it to be so, how far the requirements of Section 20 (4) of the Act, 1972 were satisfied was another aspect which was required to be considered by the Court below but it has not done so. As regards the contention of learned Counsel Mohd. Sayeed that no application had been filed by the revisionist for treating the aforesaid amount as one under Section 20 (4), in view of the decision in Lacchhi Ram, such request

could be oral or written. The essence of the matter is as to whether there was a deposit with the Court (*custodia legis*) on or prior to the date of hearing or not. If it was, then intimation of such deposit with a request to treat it as a deposit under Section 20 (4) and adjust it accordingly is sufficient. This intimation and request could be made in writing or orally. In fact, it would be better if it is made in writing as it would avoid unnecessary disputes on this issue, but even if an oral request is made as was done in this case at the time of arguments as has been mentioned in the judgment itself, then, in such an event, once cognizance of such request has been taken by the Court below, as has been done in this case, then, there was no way this plea could be rejected as impermissible.

28. From perusal of the same, it is apparent that petitioner-defendant is required to deposit the rent at the admitted rate.

29. Learned Senior Counsel disputed the same and argued that petitioner-defendant is required to pay entire amount including the amount for time barred period. Petitioner-defendant has not deposited the rent from 1990 and after passing the ex parte decree, he has deposited decretal amount only in compliance of Section 17 of SCC Act, 1887. He placed reliance upon the judgment of this Court in the case of **Sanjay and another vs. Smt. Vimla Rani (supra)** relying upon the judgment of Apex Court and this Court. Relevant paragraph of the said judgement is quoted hereinbelow:-

"12. In the plaint, though municipal taxes was claimed since 1.10.1970, but for purposes of valuation and court fees, the arrears of last 3 years

alone was taken into consideration, as rest of the amount had since become barred by limitation. It is now no more res integra that for taking benefit of provision of Section 20(4) of the Act, the tenant has to deposit even time barred rent. The phrase "entire amount of rent and damages for use and occupation of the building due from the tenant" employed in Section 20(4) of the Act includes even the claim in respect of time barred rent as held by the Supreme Court in Subhash Chandra vs. Additional District & Sessions Judge, Saharanpur³ and in the Division Bench judgment of this Court in Mahesh Chandra vs. II Addl. District Judge, Meerut and others⁴. Concededly, Rs.1080/- deposited on 11.2.1997 represented the taxes of last three years preceding the date of institution of the suit in the year 1997. The house tax @ 10% on the annual value was levied since 1970. However, the liability to pay water tax @ 10% of the annual value accrued since 15.7.1972, the date on which 'Act' came into force. The arrears of municipal taxes for the period between 15.7.1972 until before three years of the institution of the suit, represents a huge sum, much more than several months rent. The said amount was admittedly not deposited at or before the first date of hearing. Consequently, this Court does not find any illegality in concurrent findings entered by the courts below that the petitioners have not deposited the entire arrears of municipal taxes and were thus not entitled to benefit of Section 20(4) of the Act."

30. From perusal of the above paragraph of the aforesaid judgment, it is apparently clear that for taking benefit of Section 20(4) of U.P. Act No.13 of 1972, it is required on the part of petitioner-defendant to deposit entire dues including amount for time barred period. It is

admitted case of petitioner that he has not deposited the rent from 1990 and after ex parte decree while filing application under Order 15 Rule 5 of CPC complying of Section 17 of SCC Act, 1887, he had deposited decretal amount only, therefore, in light of aforesaid judgment, benefit of Section 20(4) of U.P. Act No. 13 of 1972 cannot be extended in favour of petitioner-defendant. Therefore, judgment of **Asha Rani Gupta & Universal Book (Supra)** is of no use in present controversy as well as in such facts of the case.

31. Another argument of learned counsel for the petitioner that in the sale deed rent was mentioned at the rate of Rs. 800/- whereas in the legal notice as well as plaint, it was claimed at the rate of Rs. 750/-, but respondent-plaintiff could not proof the rent at the rate of Rs. 750/-, therefore, order is bad on this ground. This was also rightly rebutted by learned Senior Counsel for respondent-plaintiff and submitted that though in sale deed, rent was mentioned at the rate of Rs. 800/-, but in the legal notice as well as in plaint, it was claimed at the rate of Rs. 750/-. Against which, petitioner-defendant could not produce any evidence about the rate of rent at the rate of Rs.300/- as per his case.

32. He further submitted that there is concurrent finding of Courts about the rate of rent at the rate of Rs.750/- and in light of law laid down by this Court in the case of **Anand Kumar (Supra)**, Court may not interfere under Article 227 of the Constitution of India. Relevant paragraph of the said judgment is quoted hereinbelow:-

"18. Article 227 of the Constitution confers a supervisory jurisdiction on the High Courts over sub-

ordinate courts. The scope of judicial review is limited and narrow. It is not to correct the errors in the orders of the courts below but to remove manifest and patent errors of law and jurisdiction without acting as an appellate authority. Under this constitutional provision, a duty has been cast upon the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and they do it in a legal manner. Unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Articles 226 and 227 of the Constitution to interfere. In *Waryam Singh and another Vs. Amarnath and another* AIR 1954 SC 215, (at Page-571), Hon'ble Supreme Court held as under:-

"This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee* AIR 1951 Cal. 193, to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors".

22. This power is not in the nature of power of appellate power enabling the Court for re-appreciation of evidence. The Court cannot alter the conclusion reached by the Competent Statutory Authority merely on the ground of insufficiency of evidence vide: *Union of India & ors. Vs. Himmat Singh Chahar*, (1999) 4 SCC 521.

33. In the present set of facts, concurrent findings of fact has been recorded by both the courts below based on consideration of oral and documentary evidences that the disputed shop was constructed in the year 1987/1988 and first assessment was made effective from the

year 1992 and that the petitioner defendant defaulted in payment of rent. These findings are findings of fact based on consideration of material on record. The findings so recorded in the impugned judgment, do not suffer from any manifest error to warrant interference under Article 227 of the Constitution of India inasmuch as the petitioner defendant has completely failed to demonstrate that the findings are so perverse or so unreasonable that no Court could ever have reached them. The power under Article 227 is not in the nature of appellate power enabling High Court to re-appreciate evidence and to alter the conclusion reached by the court below merely on the ground of insufficiency of evidence. No evidence could be pointed by the petitioner defendant to demonstrate that the findings recorded by the Trial Court are perverse. Therefore, the supervisory jurisdiction under Article 227 cannot be invoked to interfere with the findings of fact recorded by the courts below. At any rate, as long as the findings are based upon some material which are relevant for the purpose, no interference can be made. Reference to various judgments of Hon'ble Supreme Court as made above would clearly indicate that no interference can be made on the facts of the present case."

33. It is undisputed that there is concurrent finding of Courts on this issue in favour of respondent-plaintiff. From perusal of above paragraphs of the aforesaid judgment, it is clear that there is concurrent finding of Court that scope of judicial review is limited and narrow, therefore, no interference is required under Article 227 of the Constitution of India.

34. The last argument of learned counsel for the petitioner about the declaration of property in question is

notified as slum area under the provisions of Section 23 of Act, 1962, therefore, no decree can be passed. This was validly opposed by learned Senior Counsel and submitted that not only after declaration of slum area, but even after acquiring the property in dispute after notification, suit is maintainable and decree can be passed. He supported his argument of the judgment of this Court in the case of **Smt. Phoola Devi (supra) & Smt. Shakuntala (supra)**.

35. To appreciate the controversy Section 23 of Act is quoted hereinbelow:-

Section 23 of Act, 1962

23- Tenant in slum areas not to be evicted without permission of the Competent Authority.- (1) No decree or order for the eviction of a tenant from any building or land in a slum area shall, except as hereinafter provided and till such time the declaration under section 3 is in force, be capable of being executed ; anything contained in any other law for the time being in force to the contrary notwithstanding.

(2) A decree or order referred to in sub-section (1) may be put into execution after obtaining the permission of the Competent Authority in accordance with the provisions of sub-section (3).

(3) An application for obtaining the permission of the Competent Authority under sub-section (2) shall be made in such form and contain such particulars as may be prescribed.

(4) On receipt of such application the permission of the Competent Authority, after affording reasonable opportunity to the applicant and the tenant of being heard and after making such inquiry into the circumstances of the case as it thinks fit, may, where it is of the opinion that the execution of the decree or order shall

defeat or be detrimental to the enforcement of the provisions of the Act, reject the application but in all other cases grant it.

(5) Where the Competent Authority refuses to grant the permission, it shall record in brief its reasons for such refusal and make available a copy thereof to the applicant.

36. This was interpreted in the judgment of this Court in the case of **Phoola Devi (supra)**. Relevant Paragraph of the said judgment is quoted hereinbelow:-

"22. It would also be pertinent to refer to the judgment of the Apex Court in the case of Sheela Jawarlal Nagori & Another Vs. Kantilal Nathmal Baldota & Others 2014 (3) ARC (5) wherein Apex Court has held that landlord can maintain a suit for eviction against tenant even if the tenanted property has been acquired and an award has been passed in respect thereof under the provision of the Land Acquisition Act, 1894. Further, this court in the case of Raju Savita (supra) has held that in a suit for eviction, only the relationship of landlord and tenant is to be seen.

23. It is evident from the aforesaid discussion that the relationship of landlord and tenant is established between the respondent and the petitioner, therefore, the suit of the respondent was maintainable. Consequently, this court does not find any merit in the submission of the counsel for the petitioner that the suit was not maintainable as on the acquisition of the suit property by KDA, the tile of respondent over suit property had vanished and the relationship of landlord and tenant had ceased to exist between the parties."

37. Ratio of law is also followed in the judgment of this Court in the case of **Smt.**

Shakuntala (Supra). Relevant paragraph of the said judgment is quoted hereinbelow:-

"The contention of the petitioners is not acceptable. The declaration of an area as slum area under Section 3 of the Act, 1962 does not automatically result in acquisition of the properties situated in the said area.

Section 23 of the Act, 1962 only provides that a decree or order can be put in execution only after obtaining the permission of the competent authority. Section 23 of the Act, 1962 does not prohibit the institution of any suit. Apart from the aforesaid even if the claim of the petitioners that the land in the slum area stood acquired, the building situated in the said land does not automatically vest in the acquiring authority.

In my aforesaid views, I am supported by the judgment dated 21.5.2014 passed by the Court in Writ-A No. 28288 of 2014 and judgment of this Court reported in Smt. Bano Vs. Ashad Ulla Khan and 4 others, 2017(3) ARC 807 as well as the judgment of this Court reported in Smt. Phoola Devi and 4 others Vs. Additional District Judge Court No.14, Kanpur Nagar and 2 others, 2020(2) ARC 610.

For the aforesaid reasons, the petition lacks merits and is **dismissed**."

38. From perusal of the Section 23 of Act, 1962, it is apparently clear that eviction cannot be made without permission of Competent Authority, but so far as decree or order for eviction is concerned, there is no such provision in Section 23 of Act, 1962.

39. From conjoint perusal of the Section 23 of Act, 1962 and judgments of this Court in the case of **Smt. Shakuntala Devi & Phoola Devi (supra)**, it is very

much clear that suit is maintainable and judgment and decree can be passed. Therefore, this argument of learned counsel for the petitioner is also having no force.

40. In light of facts and circumstances of the case as well as law discussed hereinabove, no case is made out for interference in the impugned orders. The petition lacks merit and is, accordingly, **dismissed**. No order as to costs.

(2023) 5 ILRA 290
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2019

BEFORE

**THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.**

Matters Under Article 227 No. 4405 of 2019
(CIVIL)

Smt. Surendra Kaur & Ors. ...Petitioners
Vivek Gupta & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vijay Mani Tiwari

Counsel for the Respondent:
Sri Pankaj Agarwal

A. Civil Law – Admission of Additional Evidence – Code of Civil Procedure 1908 - Order 41 Rule 27, Section 107(1)(d) - The basic principle of admission of additional evidence is that the person seeking admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance.
(Para 7)

As a general rule, in terms of sub-rule (1) of Rule 27, the appellate court is to decide an appeal on the evidence led by the parties before

the trial court and is not to admit additional evidence for the purpose of disposal of an appeal. Section 107(1)(d), however carves out an exception to the general rule, and empowers the appellate court to take additional evidence or requires such evidence to be taken subject to the conditions laid down in Rule 27 of Order 41. (Para 6)

There are conditions precedent before allowing a party to adduce additional evidence at the stage of appeal, which specifically incorporates conditions to the effect that the party in spite of due diligence could not produce the evidence and the same cannot be allowed to be done at his leisure or sweet will. (Para 11)

B. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction. (Para 12)

C. Power of superintendence conferred u/Article 227, is to be exercised most sparingly and within the parameters laid down by the Supreme Court. (Para 14)

Petitioners have not been able to dispute the aforementioned legal position. They have not been able to point out as to how the conditions precedent mentioned u/Order 41 Rule 27 (1) were satisfied in their case so as to enable the additional evidence to be admitted by the appellate court, nor has been able to point out any material error or irregularity in the order passed by the court below so as to warrant interference in exercise of power under Article 227 of the Constitution of India. (Para 13, 15)

Writ petition dismissed. (E-4)

Precedent followed:

1. Shivajirao Nilangekar Patil & ors. Vs Mahesh Madhav Gosavi & ors., (1987) 1 SCC 227 (Para 7)

2. K.R. Mohan Reddy Vs Net Work Inc., (2007) 14 SCC 257 (Para 10)

3. State of Gujarat Vs Mahendra Kumar Parshottambhai Desai (dead) by L.Rs., AIR 2006 SC 1864 (Para 10)

4. Municipal Corporation of Greater Bombay Vs Lal Pancham & ors. , AIR 1965 SC 1008 (Para 10)

5. State of Karnataka & anr. Vs K.C. Subramanya & ors. , (2014) 13 SCC 468 (Para 11)

6. North Eastern Railway Amn. Vs Bhagwan Das, (2008) 8 SCC 511 (Para 12)

7. N. Kamalam Vs Ayyasamy, (2001) 7 SCC 503 (Para 12)

8. Union of India Vs Ibrahim Uddin, (2012) 8 SCC 148 (Para 12)

9. A. Andisamy Chettiar Vs A. Subhuraj Chettiar, (2015) 17 SCC 713 (Para 12)

10. Shalini Shyam Shetty & anr. Vs Rajendra Shankar Patil, (2010) 8 SCC 329 (Para 14)

11. Radhey Shyam & anr. Vs Chhabi Nath & ors. , (2015) 5 SCC 423 (Para 14)

Present petition challenges order dated 16.04.2019 passed by District Judge, Aligarh, whereby the application filed by the petitioners-tenant seeking to adduce additional evidence under Order 41 Rule 27 C.P.C. has been rejected.

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

1. Heard Sri Vijay Mani Tiwari, learned counsel for the petitioners and Sri Pankaj Agarwal, learned counsel for the respondents.

2. The present petition seeks to challenge the order dated 16.04.2019, passed by the District Judge, Aligarh in

U.P.U.B. Appeal No.15 of 2017 (*Smt. Surendra Kaur and others Vs. Vivek Gupta and others*), whereby, the application filed by the petitioners-tenant (Application No.11 Ga) seeking to adduce additional evidence under Order 41 Rule 27 C.P.C. has been rejected.

3. Learned counsel for the petitioners has placed reliance upon the *Application No. 11 Ga*, which had been filed in Appeal and submits that the petitioners' evidence was required to be adduced for the reason that the earlier counsel did not effectively pursue the case and did not tender proper advice and as such it was necessary that the evidence be permitted to be adduced at the stage of appeal.

4. The court below has rejected the aforementioned contention by stating that additional evidence could only be taken as per the provisions under Order 41 Rule 27 of the Code of Civil Procedure, and lack of proper legal advice or inadvertence could not be a ground for adducing additional evidence.

5. Rule 27 under Order 41 of the Code of Civil Procedure enumerates the circumstances in which the appellate court may admit additional evidence, whether oral or documentary in appeal, and they are as under :-

(i) Where the lower court has improperly refused to admit evidence which ought to have been admitted, or

(ii) Where such additional evidence was not within the knowledge of the party or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(iii) Where the appellate court requires such evidence either to enable it to pronounce judgment, or for any other substantial cause.

6. As a general rule, in terms of sub-rule (1) of Rule 27, the appellate court is to decide an appeal on the evidence led by the parties before the trial court and is not to admit additional evidence for the purpose of disposal of an appeal. Section 107 (1) (d), however carves out an exception to the general rule, and empowers the appellate court to take additional evidence or requires such evidence to be taken subject to the conditions laid down in Rule 27 of Order 41.

7. In **Shivajirao Nilangekar Patil and Ors. Vs. Mahesh Madhav Gosavi and Ors.**¹, it was held that the basic principle of admission of additional evidence is that the person seeking admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. The relevant observations in the aforementioned judgment are as follows :-

"27.....The basic principle of admission of additional evidence is that the person seeking the admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. Secondly the party affected by the admission of additional evidence should have an opportunity to rebut such additional evidence. Thirdly, that additional evidence was relevant for the determination of the issue....."

8. In the case at hand, the application of the petitioners for adducing additional

evidence in the appellate court would be referable to sub-rule (aa) under Order 41 Rule 27 (1).

9. The aforementioned sub-rule (aa) was introduced in terms of C.P.C. (Amendment) Act 104 of 1976 as another ground on which additional evidence may be produced in the appellate court. The intention of Rule 27 (1) (aa) is that the party who, for reasons mentioned therein, was unable to produce the evidence in the trial court, should be enabled to produce the same in the appellate court. In the event sub-rule (aa) under Order 41 Rule 27 (1) is to be applied, the onus is on the applicant to show that the ingredients or conditions precedent therein are satisfied.

10. The conditions required for application of sub-rule (aa) under Order 41 Rule 27(1) came up for consideration in the case of **K.R.Mohan Reddy Vs. Net Work Inc.**² The Supreme Court after referring to the earlier judgments in the case of **State of Gujarat Vs. Mahendra Kumar Parshottambhai Desai (dead) by L.Rs.**³ and **Municipal Corporation of Greater Bombay Vs. Lal Pancham and others**,⁴ in the context of adduction of additional evidence at the appellate stage in terms of provisions under Order 41 Rule 27 (1), held that in the event sub-rule (aa) is to be applied, the onus would be on the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied, and a good reason must also be shown as to why the evidence was not produced before the trial court. The observations made in the aforementioned judgment are as follows :-

"15. The High Court, unfortunately did not enter into the said questions at all. As indicated hereinbefore,

the High Court proceeded on the basis as if Clause(b) of Sub-rule (1) of Rule 27 of Order XLI of CPC was applicable.

16. It is now a trite law that the conditions precedent for application of Clause (aa) of Sub-rule (1) of Rule 27 of Order XLI is different from that of Clause (b). In the event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied. On the other hand Clause(b) to Sub-rule (1) of Rule 27 of Order XLI of CPC is to be taken recourse to, the appellate Court was bound to consider the entire evidences on record and come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary.

17. The fact that the High Court failed to do so, in our opinion, amounts to misdirection in law. Furthermore, if the High Court is correct in its view that the plaintiff-respondent had proceeded on the basis that the suit in its entirety based on a cheque, wherefor, it was not necessary for it to file the books of accounts before the trial Court, finding contrary thereto could not have been arrived at that the same was in fact required to be proved so as to enable the appellate Court to arrive at a just conclusion.

18. The Supreme Court in *State of Gujarat v. Mahendra Kumar Parshottambhai Desai(dead) by L.Rs.* AIR 2006 SC 1864 relying upon *Municipal Corporation of Greater Bombay v. Lal Pancham and Ors.*, held as under:

Though the appellate Court has the power to allow a document to be produced and a witness to be examined under Order XLI Rule 27 CPC, the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for

enabling it to pronounce judgment. This provision did not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in the case. It does not entitle the appellate court to let in fresh evidence only for purposes of pronouncement of judgment in a particular way.

19. Appellate Court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial Court, but it will be different if the Court itself require the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the Court. But mere difficulty is not sufficient to issue such direction. While saying so, however, we do not mean that the Court at an appropriate stage would be precluded from considering the applicability of Clause (b)."

11. The conditions precedent for grant of permission for production of additional evidence at appellate stage under Order 41 Rule 27 (1) (aa), were restated in the case of ***State of Karnataka and another Vs. K.C.Subramanya and others***.⁵ The relevant observations made in the judgment are as follows :-

"4. However, we do not feel impressed with this argument and deem it fit to reject it in view of Order 41 Rule 27(1)(aa) which clearly states as follows:

"27. (1)(a)***

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the

time when the decree appealed against was passed, or

(b) ***"

On perusal of this provision, it is unambiguously clear that the party can seek liberty to produce additional evidence at the appellate stage, but the same can be permitted only if the evidence sought to be produced could not be produced at the stage of trial in spite of exercise of due diligence and that the evidence could not be produced as it was not within his knowledge and hence was fit to be produced by the appellant before the appellate forum.

5. It is thus clear that there are conditions precedent before allowing a party to adduce additional evidence at the stage of appeal, which specifically incorporates conditions to the effect that the party in spite of due diligence could not produce the evidence and the same cannot be allowed to be done at his leisure or sweet will."

12. Placing reliance upon the judgments in the case of **K.R.Mohan Reddy Vs. Net Work Inc.**², **North Eastern Railway Admn. Vs. Bhagwan Das**⁶, **N. Kamalam Vs. Ayyasamy**⁷ and **Union of India Vs. Ibrahim Uddin**⁸, the principles with regard to adduction of additional evidence at appellate stage were summarized in the case of **A.Andisamy Chettiar Vs. A.Subburaj Chettiar**,⁹ and it was stated that unless conditions mentioned under Order 41 Rule 27 are fulfilled, additional evidence cannot be adduced at appellate stage. The relevant extract from the judgment is as follows :-

"11. Under the scheme of the Code of Civil Procedure, 1908 (for short "the Code") whether oral or documentary, it is the trial court before whom parties are

required to adduce their evidence. But in three exceptional circumstances additional evidence can be adduced before the appellate court, as provided under Section 107(1)(d) read with Rule 27 of Order 41 of the Code. Rule 27 of Order 41 reads as under:

"27.Production of additional evidence in appellate court.--(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if--

(a) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) The appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the appellate court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission."

12. From the opening words of sub-rule (1) of Rule 27, quoted above, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the appellate court, but for the three situations mentioned above. The parties are not allowed to fill the lacunae at the appellate stage. It is against

the spirit of the Code to allow a party to adduce additional evidence without fulfilment of either of the three conditions mentioned in Rule 27. In the case at hand, no application was moved before the trial court seeking scientific examination of the document (Ext.A-4), nor can it be said that the plaintiff with due diligence could not have moved such an application to get proved the documents relied upon by him. Now it is to be seen whether the third condition i.e. one contained in clause (b) of sub-rule (1) of Rule 27 is fulfilled or not.

13. In *K.R. Mohan Reddy v. Net Work Inc.* [*K.R. Mohan Reddy v. Net Work Inc.*, (2007) 14 SCC 257] this Court has held as under: (SCC p. 261, para 19)

"19. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction."

14. In *North Eastern Railway Admn. v. Bhagwan Das* [*North Eastern Railway Admn. v. Bhagwan Das*, (2008) 8 SCC 511] this Court observed thus: (SCC pp. 515-16, para 13)

"13. Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 CPC, which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be

prescribed. These conditions are prescribed under Order 41 Rule 27 CPC. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said Rule are found to exist."

15. In *N.Kamalam v. Ayyasamy* [*N.Kamalam v. Ayyasamy*, (2001) 7 SCC 503] this Court, interpreting Rule 27 of Order 41 of the Code, has observed in para 19 as under: (SCC p. 514)

"19. ... the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal-- it does not authorise any lacunae or gaps in the evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way."

16. In *Union of India v. Ibrahim Uddin* [*Union of India v. Ibrahim Uddin*, (2012) 8 SCC 148 : (2012) 4 SCC (Civ) 362] this Court has held as under: (SCC p. 171, para 49)

"49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without

taking into consideration the additional evidence sought to be adduced."

13. Counsel for the petitioners has not been able to dispute the aforementioned legal position.

14. This Court may also take notice of the fact that the power of superintendence conferred under Article 227, is to be exercised most sparingly and within the parameters which have been summarized in the case of *Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil*¹⁰, and also in the case of *Radhey Shyam and another Vs. Chhabi Nath and others*¹¹.

15. Learned counsel for the petitioners have not been able to point out as to how the conditions precedent mentioned under Order 41 Rule 27 (1) were satisfied in their case so as to enable the additional evidence to be admitted by the appellate court, nor has been able to point out any material error or irregularity in the order passed by the court below so as to warrant interference in exercise of power under Article 227 of the Constitution of India.

16. The petition lacks merit and it is, accordingly, dismissed.

(2023) 5 ILRA 296

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 01.05.2023

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Matters Under Article 227 No. 5967 of 2022

Matters Under Article 227 No. 5348 of 2022

U.P. Sunni Central Waqf Board, Lucknow

...Petitioner

Versus

Bhagwan Sri Krishna Virajman & Ors.

...Respondents

Counsel for the Petitioner:

Sri Punit Kumar Gupta, Ms. Poorva Agarwal, Sri Nasiruzzaman, Sri W.H. Khan (Sr. Advocate), Sri S.F.A. Naqvi (Sr. Advocate)

Counsel for the Respondents:

Sri Prabhash Pandey, Sri Birendra Prasad Maurya, Sri Kamlesh Narayan Pandey, Ms. Pooja Agarwal, Sri Prabhash Pandey, Ms. Priyanka Swami, Ms. Ritu Bhardwaj, Sri Pradeep Sharma, Mrs. Garima Prasad, Sr. Advocate/Add. A.G.

A. Civil Law – Jurisdiction u/Art. 226, 227 - A plaint duly instituted u/s 26 of the CPC has to be registered and in light of provisions contained in Section 27 of CPC, if the suit is duly instituted, summons have to be issued to the Defendants. The Trial Court treated the Plaint as a Misc. Case and decided a question of maintainability of the suit which is not permissible in law. The Civil Judge (S.D.), has not even exercised its powers u/Order 7 Rule 11 of the CPC and has rejected the plaint duly presented by treating it as a Miscellaneous Case. **There is no provision in CPC to register any regular suit as a Miscellaneous Case. The Plaintiffs had not filed any application which could be treated as a Misc. Case. The Plaintiffs had filed Suit.** The Trial Court therefore clearly committed manifest error of law in registering the suit as a Miscellaneous case and hearing it on the question of maintainability. (Para 12, 17)

B. It is well settled that if an appeal has been filed against an order or decree against which no appeal is maintainable, the Court can treat the appeal as revision. The Plaintiffs had filed an Appeal against the order dated 30.09.2020 treating the order to be passed u/Order 7 Rule 11 CPC. The District Judge held by order dated 18.01.2021 that the order dated 30.09.2020 could not be treated as an order u/Order 7 Rule 11 CPC and therefore held that Appeal was not maintainable, Revision

was maintainable. Order dated 18.01.2021 has been challenged and instead the parties participated in revision proceedings before the District Judge over several hearings and raised all their contentions. (Para 18)

C. No objection was raised as to the lack of pecuniary jurisdiction before the District judge in revision proceedings and this issue cannot be permitted to be raised by the Petitioners for the first time before this Court in jurisdiction u/Article 227. It is noteworthy to mention that at Para 83 of the plaint, the valuation of the suit is stated as Rs. 20,00,000/- and as per the provisions of Section 115 of CPC r/w Chapter II of Civil Laws Uttar Pradesh (Amendment) Act 2019 the Revision u/s 115 of CPC upto Rs. 25,00,000/- would lie before the District Judge. (Para 18)

D. The Defendant comes into picture the moment summons are issued to him. At the time of dismissing the suit, the Civil Judge (Senior Division) had not issued summons to the Defendants (Petitioners herein) and therefore, the question of registration of the suit was between the court and the plaintiffs.

The District Judge framed many points on the basis of the arguments raised on behalf of the Defendants, as recorded in the impugned judgment. These questions were not needed to be decided as the Defendant had right to file its Written Statement, deny the facts and law therein, and the Court u/Order 14 Rule 1 CPC was then to frame issues and after issues were framed, parties are entitled to lead evidence. In absence of framing of issues and permitting parties to lead evidence, matter could not have been decided. It was however, open to decide the question of preliminary issues, but as to what will be the preliminary issues will also have to be decided under Order XIV Rule 2(ii) CPC being jurisdiction of the court and bar created by any law. **Entire procedure laid down in law has been by-passed and findings on the merits of the case have been given which is not permissible in law.** (Para 19, 20)

E. Scope of interference - The questions regarding the maintainability of a regular

civil suit and its merits, which could not have been decided by the Trial Court without following the due procedure as per the Code, and further the contentious questions were not required to be decided by the District Judge in a Revision Petition. In any case, these questions cannot be now decided by this Court in a petition under Article 227. Any observations by this Court will prejudice the rights and contentions of both the parties. The suit has now been registered as suit No. 353 of 2022. Summons have already been issued by the trial court on 26.05.2022 for filing the respective Written Statements and framing of issues. (Para 21)

When the suit itself was not registered, how could the valuation of the Miscellaneous case be a subject matter of objection in a revision petition. Various findings by the District Judge given on the merits of case, were made in view of the arguments raised before the Revision Court by the Petitioners herein. These questions also cannot be decided by this Hon'ble Court in jurisdiction u/Article 227. (Para 14, 15)

Both the petitions are disposed of by remanding the matter back to the Trial Court with directions to adjudicate the Civil Suit No. 353 of 2022 after following due procedure as per law without being influenced by any observation or findings of the District Judge vide impugned order dated 19.05.2022. All the parties are free to raise all their contentions before the trial Court. (Para 22)

Both petitions are disposed of by remanding the matter back to the Trial Court. (E-4)

Present petition challenges the judgment and order dated 19.05.2022, passed by District Judge Mathura, by which the judgement and order dated 30.09.2020 passed by the Civil Judge (Senior Division), Mathura has been set aside.

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Shri W.H. Khan, learned Senior Counsel along-with Shri S.F.A.,

Naqvi, learned Senior Counsel assisted by Shri Punit Kumar Gupta, Ms. Poorva Agarwal and Shri Nasiruzzaman, learned counsel for the petitioner in both the petitions and Mrs. Garima Prasad, learned Senior Counsel/Additional Advocate General of State of U.P. along-with Ms. Priyanka Swami, Ms. Ritu Bhardawaj, Ms. Pooja Agarwal, Mr. Prabhash Pandey and Mr. Pradeep Sharma, learned counsel on behalf of contesting respondents namely respondent nos. 1 to 8, Shri Kamlesh Narayan Pandey, learned counsel appearing on behalf of respondent no.10 namely Sri Krishna Janam Bhumi Trust, Mathura, Through the Managing Director and Shri Birendra Prasad Maurya, learned counsel appearing on behalf of respondent no.11 namely Sri Krishna Janam Asthan Sewa Sansthan, Through its Secretary.

2. The above petitions have been filed under Article 227 of the Constitution of India challenging the judgment and order dated 19.05.2022 passed by District Judge Mathura in Civil Revision No. 02/2021 (Bhagwan Sri Krishna Virajman us. UP Sunni Central Waqf Board and others) by which the judgement and order dated 30.09.2020 passed by the Civil Judge (Senior Division), Mathura in Misc. Case No. 176 of 2020 has been set aside. Common questions are raised and thus, both the matters are taken up together and are being disposed of by a common order with the consent of the parties.

3. The brief facts of the case are that a regular Civil Suit was filed on 25.09.2020 by the Respondent nos. 1 to 9 herein/Plaintiffs before the Court of Civil Judge (Senior Division), Mathura claiming right over the property in dispute situated at Katra Keshav Dev measuring 13.37 acres which according to the Plaintiffs is

birthplace of Lord Krishna and for removal of the structure standing thereat and prayed for issuing decree in the nature of declaration, mandatory and prohibitory injunction and also for cancelling the alleged fraudulent compromise decree dated 20.07.1973 and 07.11.1974. The following reliefs were sought:

(a) decree the suit in favour of Plaintiffs and against the Defendants, cancelling the judgment and decree dated 20.07.1972 and Judgment and decree dated 07.11.1974 passed in Civil Suit no. 43 of 1967 by Ld. Civil Judge Mathura;

(b) declare that the judgment and decree dated 20.07.1973 and the judgment and decree dated 07.11.1974 and passed in Civil Suit No. 43 of 1967 by Ld. Civil Judge, Mathura is not binding on the Plaintiffs;

(c) Decree the suit for declaration declaring that land measuring 13.37 acres of Katra Keshav Dev shown by letters A,B,C,D and the site plan vest in the deity Lord Shree Krishna Virajman:

(d) Decree the suit for mandatory injunction in favour of the Plaintiffs and against the Defendants no. 1 and 2 directing them to remove the construction raised by them encroaching upon the land shown by Letters No.E,B,G,F in the site plan within the area of Katra Keshav Dev City Mathura and to handover vacant possession to Shree Krishna Janmabhoomi Trust within the time provided by the Hon'ble Court;

(e) Decree the suit for prohibitory injunction restraining defendant No.1 and 2, their workers, supporters, men, attorneys and eerie person acting under them from entering into premises of 13.37 acres land at Katra Keshav Dev, City and District Mathura;

(f) The Hon'ble Court may pass any other decree for which Plaintiffs are found entitled to or which may be necessary to be passed in the interest of justice;

(g) Award the costs of the suit."

4. When the suit was presented before the Civil Judge (Senior Division) on 25.09.2020, the Civil Judge (S.D.), did not register the suit as a civil suit and in turn registered the case as a Miscellaneous case on the ground that the Plaintiff Nos. 3 to 8 are not residents of Mathura whereas the property in question is situated in District Mathura. The Civil Judge (S.D.), instead of registering the suit passed order treating it as Misc. Case No. 176 of 2020 and fixed the next date of hearing on the question of maintainability of suit on 30.09.2020.

5. The Civil Judge (S.D.) dismissed the Misc Case No. 176 of 2020 at the threshold on the ground that the Respondents are devotees /worshippers and if the suit is allowed to be filed, the social and judicial system will collapse and they do not have a Right to Sue. The operative part of the order dated 30.05.2020 holds as under:

"..8. It is well known that Lord Krishna is the revered deity of Hindu religion and is known as an incarnation of Lord Shri Vishnu. There are innumerable devotees and worshipers of Lord Shri Krishna all over the world, if in this way every devotee and worshipper is allowed to file a case, then the Judicial and social system will collapse. Admittedly, the applicants are not parties to the decree in question, nor are they as trustees. Granting permission to the applicants to file a case on the basis of being merely a devotee does not appear to be just and reasonable and

filing a case by a devotee is also not permissible in the eyes of the law.

9. After all the above deliberations, it is concluded that the applicants do not have the Right to Sue for presenting the present case. There is thus, no sufficient ground to register the present case as a regular Suit. Therefore, the Misc. Case deserves to be dismissed.

Miscellaneous case is dismissed. File be consigned Record Room."

6. The Respondent nos. 1 to 9/Plaintiffs then filed Appeal no. 02 of 2021 before the District Judge Mathura. At this stage, on 16.10.2020, the District Judge issued notice to the Petitioners herein (Defendants in the Suit). The Petitioners herein filed Application No. 66-Ga raising Objection to the maintainability of the Appeal. Meanwhile, the Civil Judge (S.D.) also rejected the application of the Plaintiffs seeking a copy of decree on the ground that the order dated 30.09.2020 had not been passed under Order 7 Rule 11 CPC. Accordingly, vide order dated 18.01.2021, the District Judge held that the order dated 30.09.2020 could not be treated as an order under Order 7 Rule 11 CPC, and therefore Appeal was not maintainable. The Appeal was thus directed to be registered as a Revision Petition consequent to which the same was registered as Civil Revision No. 02 of 2021.

7. While disposing the Revision Petition, the District Judge framed many points on the basis of the arguments raised on behalf of the Petitioners herein (Defendants to the suit) namely:

(i) whether the Revision is maintainable or not against the impugned order dated 30.09.2020?

(ii) Whether a worshipper as the next friend of deity can file suit for the restoration and re-establishment of religious rights of the deity?

(iii) Whether the plaintiffs are entitled to maintain the suit challenging the compromise judgment and decree dated 20.07.1973 and 07.11.1973 passed in Civil Suit No.43 of 1967 by Ld. Civil Judge, Mathura, on the ground of fraud, misrepresentation and collusion?

(iv) Whether the provisions of the Places of Worships (Special Provisions) Act 1991 will be applicable or not?

(v) Whether the impugned order suffers from manifest error of law and the court below has failed to exercise the jurisdiction vested in it by law?

8. The District Judge gave detailed findings on each of the above points and finally set aside the order dated 30.09.2020 by the impugned judgment dated 19.05.2022 holding that the Trial Court had committed illegality and manifest error, thereby directed the Trial Court to hear both the parties and pass appropriate order in light of the observations made by it in the Revision Petition.

9. Learned Senior Counsel for the Respondent nos. 1 to 9 informs that subsequent to the impugned order, the case came to be listed before the Trial Court on 26.05.2022 when the Civil suit was registered as Original Suit No. 353 of 2022 and summons were issued by the trial court fixing 01.07.2022 for filing the Written Statements and framing of issues. Thereafter, this Court by an interim order dated 03.08.2022 in Petition No. 5967 of 2022 stayed further proceedings before the trial court.

10. Pleadings are complete. I have perused the records and heard the parties at

length. With the consent of counsel for the parties, the present petition is disposed of finally.

11. Shri W.H. Khan, learned Senior Counsel for the Petitioner in Petition No. 5967 of 2022 has raised the issue of pecuniary jurisdiction of the Revisional Court and has contended that since the valuation of the Plaint is Rs.42,26,230.40/- which is more than Rs.25 lakhs, the revision petition would lie before the High Court. Also, that the District Judge committed a manifest error of law by converting the civil appeal into a civil revision. The learned Senior Counsel further submits that the District Judge has exceeded his jurisdiction in giving findings on merits on the disputed questions of the suit and entered into a realm which is totally beyond his powers.

12. Mrs. Garima Prashad, learned Senior Counsel appearing for the Respondent nos. 1 to 9 contends that the only question before the Revisional Court was whether a regular Civil Suit upon its due presentation before a competent Civil Court can be refused to be registered as a Civil Suit, and instead whether it can be registered and dismissed as a Miscellaneous Case. As per the learned Senior Counsel, there is no provision in Code of Civil Procedure, 1908 (CPC) to consider the Plaint as a Miscellaneous case. The learned Senior Counsel refers to Order IV of the CPC which mandates registration of suit upon due presentation, and Order XIV which provides for framing issues as well as the preliminary issues. It is submitted that the trial court erred in dismissing the suit at the threshold by wrongly framing the question of maintainability of the suit and deciding the same, without even registering the suit

itself, and thus, the District Judge was justified in setting it aside.

13. At this stage, regarding the aforesaid submission on behalf of the Respondents, this Court put a specific query to Shri W. H Khan learned Senior Counsel for the Petitioners, to which the Learned Senior Counsel fairly accepted the legal position that no findings on any issue could be given by any Court of law on any civil suit without first registering it as a civil suit and following the procedure as per law.

14. In response to the issue of lack of pecuniary jurisdiction, it is submitted by Mrs. Garima Prashad, learned Senior Counsel for the Respondents, that no such objection was raised before the District Judge and that the same cannot be raised for the first time before this Hon'ble Court in the jurisdiction under Article 227. Further, Para 83 of the Suit states that the valuation of the suit for the purposes of jurisdiction is only Rs.20 lakhs whereas the figure of Rs.42,26,230.40/- being relied upon by the Petitioners does not find mention anywhere in the Complaint and is sum total of reliefs sought for purposes of Court fee. It is further submitted that when the suit itself was not registered, how could the valuation of the Miscellaneous case be a subject matter of objection in a revision petition. Lastly, it is submitted that in any event, in such a case the Hon'ble High Court would not interfere in its discretionary powers under Article 226 and 227, because even if the Revision for some reason was incompetent, the Revision court had record before it and gave effect to the correct legal position.

15. In response to the various findings by the District Judge given on the merits of

case, Mrs. Garima Prashad, learned Senior counsel submits that the same were made in view of the arguments raised before the Revision Court by the Petitioners herein. She submits that these questions also cannot be decided by this Hon'ble Court in jurisdiction under Article 227 and urges that the stay order dated 03.08.2022 be vacated and the Trial Court be directed to proceed with the civil suit in accordance with law.

16. Learned Counsel for the Respondent nos. 10 and 11 adopt the submissions of the learned Senior Counsel for the Respondent nos. 1 to 9.

17. At the outset, a perusal of the record shows that the Civil Suit which was duly instituted by the plaintiffs was wrongly registered as a Miscellaneous Case by the Civil Judge (S.D.). Order IV of the Code provides for the institution of suits. Rule 1 of Order IV says suit to commence by presentation of plaint. Rule 1(2) of Order IV says every plaint shall comply with the rules in Order VI and VII, so far as they are applicable. Order VI relates to pleadings and Order VII relates to the contents of the plaint. Upon presentation of the Complaint, under Rule 2 of Order IV, the Court "shall" cause particulars of every suit to be registered. There is no provision in CPC to register any regular suit as a Miscellaneous Case. The Plaintiffs had not filed any application which could be treated as a Misc. Case. The Plaintiffs had filed Suit. The Trial Court treated the Complaint as a Misc. Case and decided a question of maintainability of the suit which is not permissible in law. A plaint duly instituted u/s 26 of the CPC has to be registered and in light of provisions contained in Section 27 of CPC, if the suit is duly instituted, summons have to be issued to the

Defendants. It is noteworthy to mention here that the Civil Judge (S.D.), has not even exercised its powers under order 7 Rule 11 of the CPC and has rejected the plaint duly presented by treating it as a Miscellaneous Case. The Trial Court therefore clearly committed manifest error of law in registering the suit as a Miscellaneous case and hearing it on the question of maintainability.

18. The Plaintiffs had filed an Appeal against the order dated 30.09.2020 treating the order to be passed under Order 7 Rule 11 CPC. The District Judge held by order dated 18.01.2021 that the order dated 30.09.2020 could not be treated as an order under Order 7 Rule 11 CPC and therefore held that Appeal was not maintainable, Revision was maintainable and directed the Revision to be numbered accordingly. It is well settled that if an appeal has been filed against an order or decree against which no appeal is maintainable, the Court can treat the appeal as revision. I also find that this order dated 18.01.2021 has been challenged and instead the parties participated in revision proceedings before the District Judge over several hearings and raised all their contentions. No objection was raised as to the lack of pecuniary jurisdiction before the District judge in revision proceedings and this issue cannot be permitted to be raised by the Petitioners for the first time before this Court in jurisdiction under Article 227. It is noteworthy to mention that at Para 83 of the plaint, the valuation of the suit is stated as Rs.20,00,000/- and as per the provisions of Section 115 of CPC r/w Chapter II of Civil Laws Uttar Pradesh (Amendment) Act 2019 the Revision u/s 115 of CPC upto Rs 25,00,000/- would lie before the District Judge.

19. The District Judge framed many points on the basis of the arguments raised

on behalf of the Defendants, as recorded in the impugned judgment. These questions were not needed to be decided as the Defendant had right to file its Written Statement, deny the facts and law therein, and the Court under Order 14 Rule 1 CPC was then to frame issues and after issues were framed, parties are entitled to lead evidence. In absence of framing of issues and permitting parties to lead evidence, matter could not have been decided. It was however, open to decide the question of preliminary issues, but as to what will be the preliminary issues will also have to be decided under Order XIV Rule 2(ii) CPC being jurisdiction of the court and bar created by any law. Entire procedure laid down in law has been by-passed and findings on the merits of the case have been given which is not permissible in law.

20. At the time of dismissing the suit, the Civil Judge (Senior Division) had not issued summons to the Defendants (Petitioners herein) and therefore, the question of registration of the suit was between the court and the plaintiffs. The Defendant comes into picture the moment summons are issued to him.

21. This Court is conscious that the questions regarding the maintainability of a regular civil suit and its merits, which could not have been decided by the Trial Court without following the due procedure as per the Code, and further the contentious questions were not required to be decided by the District Judge in a Revision Petition. In any case, these questions cannot be now decided by this Court in a petition under Article 227. Any observations by this Court will prejudice the rights and contentions of both the parties. The suit has now been registered as suit no. 353 of 2022. Summons have already been issued by the

trial court on 26.05.2022 for filing the respective Written Statements and framing of issues.

22. In light of the above, both the petitions are disposed of by remanding the matter back to the Trial Court with directions to adjudicate the Civil Suit no. 353 of 2022 after following due procedure as per law without being influenced by any observation or findings of the District Judge vide impugned order dated 19.05.2022. All the parties are free to raise all their contentions before the trial Court.

(2023) 5 ILRA 303
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.05.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ B No. 229 of 2023
connected with
Writ B No. 245 of 2023
And
Writ B No. 232 of 2023

**Dinesh Chandra @ Dinesh Chandra Tiwari
& Ors. ...Petitioners**

Versus

**Deputy Director of Consolidation,
Sultanpur & Ors. ...Respondents**

Counsel for the Petitioners:

Vivek Tripathi

Counsel for the Respondents:

C.S.C., Prabhat Kumar

A. Practice and Procedure – Constitution of India, 1950 – Article 226 & 227 – Writ – Maintainability – Order was passed by the Revenue Court in the title matter – Quashing sought – Whether remedy is the petition under Article 227 or under Article

226 – Held, Judicial orders of civil court are not amenable to writ jurisdiction under Article 226 of the Constitution and jurisdiction under Article 227 is distinct from jurisdiction under Article 226 – The Revenue Court is not the Judicial/ Civil Court – The orders passed by the revenue authority or consolidation authority are not the orders being passed by judicial authority/Civil Courts – High Court rejected the preliminary objections regarding maintainability of the writ petitions under Article 226 of the Constitution of India. (Para 16, 22 and 27)

B. UP Consolidation of Holding Act, 1953 – Civil Procedure Code, 1908 – Section 5(2) – Consolidation Court – Nature – Whether it is Civil Court or Revenue Court – Held, the Consolidation Officers may not be treated as Officers of the Civil Court, however, they may more or less be treated as Revenue Officers – The revenue authorities/consolidation authorities when discharge their judicial/quasi judicial functions used to follow the specific mandate and mechanism so prescribed under the Statute and quite often, those officers are not trained judicial officers but being prescribed authorities under the particular Statute, they discharge their functions as revenue/consolidation officer. In that way, they may not be treated at par with the judicial officers of the Civil Court and therefore, they are not judicial/Civil Court. At the best, it may be said that they discharge their duties and functions as Tribunal. (Para 14 and 26)

Preliminary objection regarding the maintainability of Writ petition rejected. (E-1)

List of Cases cited:

1. Shalini Shyam Shetty & anr. Vs Rajendra Shankar Patil; (2010) 8 SCC329

2. Suraj Singh Vs Deputy Director of Consolidation, Jhansi & ors.; 2016 (34) LCD 1860

3. Radhey Shyam & anr. Vs Chhabi Nath & ors.; (2015) 5 SCC 423

4. Kiran Devi Vs The Bihar St. Sunni Wakf Board & ors.; (2021) AIR (SC)1775

5. Consolidation No. 9855 of 2018; Paras Nath Vs Deputy Director of Consolidation, Ambedkar Nagar & ors. decided on 05.07.2018

6. Matters Under Article 227 No. 3626 of 2018; M/S Shiv Baba Industry Lalpur, Shahjahanpur Vs St. of U.P. & ors. decided on 28.05.2018

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. In the present matter, the question of maintainability has been raised, therefore, the Members of the Bar have been permitted to address the Court. Pursuant thereto, Shri M.E. Khan has argued on behalf of the petitioners assisted by other counsels of the writ petitioners, Shri Shailendra Kumar Singh, Chief Standing Counsel-II assisted by Shri Rohit Nandan Shukla, Shri R.C. Tiwari, learned Additional Chief Standing Counsel, Shri Upendra Singh, Shri Yogesh Kumar Awasthi, learned Standing Counsel have argued the case on behalf of the State and Shri Prabhat Kumar has argued the case on behalf of the private opposite parties in Writ B No. 229 of 2023 and Shri Mohan Singh, learned counsel for the Gaon Sabha.

2. Since the similar question is to be decided i.e. maintainability of the writ petition in the writ petitions bearing Writ-B No.245 of 2023 & Writ-B No.232 of 2023, therefore, these writ petitions are connected and the aforesaid question is decided by a common judgment.

3. Sri Prabhat Kumar, learned counsel for the private opposite parties has raised objection regarding maintainability of the

writ petition under Article 226 of the Constitution of India against the orders being passed by the "Revenue Courts" placing reliance upon the judgment Apex Court in re; **Shalini Shyam Shetty and another vs. Rajendra Shankar Patil, (2010) 8 SCC 329** and judgment of this Court in re; **Suraj Singh** (since deceased and substituted by legal heirs) **vs. Deputy Director of Consolidation, Jhansi and others, 2016 (34) LCD 1860.**

4. The sole premise of the objection regarding maintainability of the writ petition is that, to decide the title dispute, be it civil matter or revenue matter, appropriate remedy would not be to file petition under Article 226 of the Constitution of India, rather a petition should be filed under Article 227 of the Constitution of India, therefore, as per Sri Prabhat Kumar, this petition may be dismissed.

5. In response to the aforesaid objection, learned counsel for the petitioners has stated that it is true that the issue in question is relating to the title dispute, but the orders being passed by the consolidation authorities, which are not the revenue authorities, therefore, the objection so raised by learned counsel for the private opposite parties, placing reliance upon the aforesaid judgments in re: **Shalini Shyam Shetty** (supra) and **Suraj Singh** (supra), would not be applicable in the present case.

6. On the next date, learned counsel for the petitioners has addressed on the point of maintainability of the writ petition placing reliance upon the judgment of Apex Court rendered in re: **Radhey Shyam and another vs. Chhabi Nath and others, (2015) 5 SCC 423** wherein the judgment of

Apex Court rendered in re: **Shalini Shyam Shetty** (supra) has been considered.

7. Learned counsel for the petitioners has also placed reliance upon the judgment of the Apex Court rendered in re; **Suraj Singh** (supra), which is based on the judgment of the Apex Court rendered in re: **Radhey Shyam** (supra) as well as the Full Bench judgment of Apex Court rendered in re: **Kiran Devi vs. The Bihar State Sunni Wakf Board and others, (2021) AIR (SC) 1775**, by submitting that if the order is passed by the Revenue Authority, a writ under Article 226 of the Constitution of India may lie.

8. Referring various paragraphs of the judgment rendered in re: **Radhay Shyam** (supra), specific reliance has been placed towards para-25 wherein the Apex Court has clearly observed that the orders of the civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/ civil courts and learned counsel for the petitioners has submitted that if order of any judicial officer/ civil court is assailed, the petition should have been filed under Article 227 of the Constitution but in other cases the writ petition under Article 226 of the Constitution of India may lie. However, learned Chief Standing Counsel and learned counsel for private opposite parties referred para 18 of the judgment of the Apex Court in re; **Radhay Shyam** (supra).

9. Learned counsel for the petitioners has also referred Section 3 of C.P.C. which provides the subordination of courts and as per Section 3 of C.P.C., the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court

and District Court. He has also referred Section 5 of C.P.C., which provides application of the Code to Revenue Courts. Sub-Section 2 of Section 5 C.P.C. provides that the "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

10. In view of the above, learned counsel for the petitioners has stated that the Revenue Court is different from the District/ Civil Court and the bar carved out in **Radhey Shyam** (supra) is only meant for District/ Civil Court not for Revenue Court, therefore, no other inference of dictum of the Apex Court in re; **Radhey Shyam** (supra) may be drawn since the findings and observations of the Apex Court are very clear.

11. So as to understand the difference between the Civil Court and Revenue Court, Sections 3 and 5 of Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") would have to be considered, which read as under:-

"3. Subordination of Courts-
For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

5. Application of the Code of Revenue Courts- (1) *Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure*

upon which any special enactment applicable to them is silent, the State Government may, by notification in the Official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the State Government may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

12. Notably, Section 5 (2) CPC provides that proceedings relating to the rent, revenue or profits of land used for agricultural purposes are conducted by the Revenue Courts not by the Civil Court having original jurisdiction under the CPC to try such suits or proceedings as being suits or proceedings of a civil nature. Therefore, it is clear from the CPC itself that Civil Courts are different from the Revenue Courts.

13. U.P. Consolidation of Holding Act, 1953 (hereinafter referred to as "the Act") is a complete Code, which provides redress of all the grievances of a *Chak Holder* in respect of improper allotment either it may be in respect of wrong valuation, wrong placement or other objection of similar nature. "Consolidation" means re-arrangement of holdings in a unit amongst several tenure-holders in such a way as to make their respective holdings more compact vide Section 3 (2) of the Act. "Consolidation Scheme" means the scheme

of consolidation in a unit as provided in Section (3-B) of Section 3 of the Act. Section 4 of the Act provides declaration and notification regarding consolidation. Consolidation operation starts after declaration and notification being issued under Section 4 of the Act.

14. Therefore, considering the aforesaid aspect, the Consolidation Officers may not be treated as Officers of the Civil Court, however, they may more or less be treated as Revenue Officers.

15. The Apex Court in re; **Radhey Shyam** (supra) has decided the issue as to what orders can be assailed under Article 226 of the Constitution of India and what orders can be assailed under Article 227 of the Constitution of India. The relevant observations of the judgment in re; **Radhey Shyam** (supra) have been given in paras-18 and 25 to 29, which read as under:-

"18. While the above judgments dealt with the question whether judicial order could violate a fundamental right, it was clearly laid down that challenge to judicial orders could lie by way of appeal or revision or under Article 227 and not by way of a writ under Articles 226 and 32.

25. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all the other courts having limited jurisdiction subject to the supervision of the King's Court. Courts are set up under the Constitution or the laws. All the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all the High

Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts. Control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of the civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to the judicial courts, as rightly observed in the referring order [**Radhey Shyam** v. Chhabi Nath, (2009) 5 SCC 616] in paras 26 and 27 quoted above.

26. The Bench in *Surya Dev Rai* [*Surya Dev Rai v. Ram Chander Rai*, (2003) 6 SCC 675] also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Articles 226 and 227 was obliterated was not correct as rightly observed [**Radhey Shyam** v. Chhabi Nath, (2009) 5 SCC 616] by the referring Bench in para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227

has been explained in several decisions including *Waryam Singh v. Amarnath* [AIR 1954 SC 215 : 1954 SCR 565], *Ouseph Mathai v. M. Abdul Khadir* [(2002) 1 SCC 319], **Shalini Shyam Shetty** v. *Rajendra Shankar Patil* [(2010) 8 SCC 329 : (2010) 3 SCC (Civ) 338] and *Sameer Suresh Gupta v. Rahul Kumar Agarwal* [(2013) 9 SCC 374 : (2013) 4 SCC (Civ) 345]. In **Shalini Shyam Shetty** [(2010) 8 SCC 329 : (2010) 3 SCC (Civ) 338] this Court observed: (SCC p. 352, paras 64-67).

"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in *Surya Dev* [*Surya Dev Rai v. Ram Chander Rai*, (2003) 6 SCC 675] and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil

Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the Hon'ble High Court will follow the time-honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."

(emphasis supplied)

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view [**Radhey Shyam** v. Chhabi Nath, (2009) 5 SCC 616] of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

28. We may also deal with the submission made on behalf of the respondent that the view in *Surya Dev Rai* [*Surya Dev Rai* v. *Ram Chander Rai*, (2003) 6 SCC 675] stands approved by larger Benches in *Shail* [*Shail* v. *Manoj Kumar*, (2004) 4 SCC 785 : 2004 SCC (Cri)

1401], *Mahendra Saree Emporium* (2) [*Mahendra Saree Emporium* (2) v. *G.V. Srinivasa Murthy*, (2005) 1 SCC 481] and *Salem Advocate Bar Assn.* (2) [*Salem Advocate Bar Assn.* (2) v. *Union of India*, (2005) 6 SCC 344] and on that ground correctness of the said view cannot be gone into by this Bench. In *Shail* [*Shail* v. *Manoj Kumar*, (2004) 4 SCC 785 : 2004 SCC (Cri) 1401], though reference has been made to *Surya Dev Rai* [*Surya Dev Rai* v. *Ram Chander Rai*, (2003) 6 SCC 675], the same is only for the purpose of scope of power under Article 227 as is clear from para 3 of the said judgment. There is no discussion on the issue of maintainability of a petition under Article 226. In *Mahendra Saree Emporium* (2) [*Mahendra Saree Emporium* (2) v. *G.V. Srinivasa Murthy*, (2005) 1 SCC 481], reference to *Surya Dev Rai* [*Surya Dev Rai* v. *Ram Chander Rai*, (2003) 6 SCC 675] is made in para 9 of the judgment only for the proposition that no subordinate legislation can whittle down the jurisdiction conferred by the Constitution. Similarly, in *Salem Advocate Bar Assn.* (2) [*Salem Advocate Bar Assn.* (2) v. *Union of India*, (2005) 6 SCC 344] in para 40, reference to *Surya Dev Rai* [*Surya Dev Rai* v. *Ram Chander Rai*, (2003) 6 SCC 675] is for the same purpose. We are, thus, unable to accept the submission of the learned counsel for the respondent.

29. Accordingly, we answer the question referred as follows:

29.1. Judicial orders of the civil court are not amenable to writ jurisdiction under Article 226 of the Constitution.

29.2. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226.

29.3. Contrary view in *Surya Dev Rai* v. *Ram Chander Rai*, (2003) 6 SCC 675, is overruled."

(emphasis supplied)

16. The Apex Court in re; **Radhey Shyam** (supra) in para-25 has categorically held that writ jurisdiction under Article 226 is conferred on all the High Courts whereby the writ of certiorari can be issued against patently erroneous or without jurisdiction orders of Tribunal or authorities or courts *"other than judicial courts"*. For challenging the judicial orders, writ under Article 227 may lie as the High Court got power of superintendence under Article 227 of the Constitution of India. The Apex Court further provides that orders of the Civil Court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/Civil Courts. While answering the question referred before the Apex Court in re; **Radhey Shyam** (supra), the Apex Court has clearly held in para-29.1 and 29.2 that judicial orders of civil court are not amenable to writ jurisdiction under Article 226 of the Constitution and jurisdiction under Article 227 is distinct from jurisdiction under Article 226.

17. Sri Prabhat Kumar has drawn attention of this Court towards the decision of this Court in re; **Suraj Singh** (supra) wherein the Hon'ble Single Judge of this Court has, however, observed that against the judicial order of Civil Court, writ under Article 226 would not lie but the reasons assigned in that judgment would equally apply to the Revenue Courts also.

18. Sri Prabhat Kumar, learned counsel for the private opposite parties has referred the decision of this Court dated 05.07.2018 in re; **Paras Nath Vs. Deputy Director of Consolidation, Ambedkar Nagar & Ors., Consolidation No.9855 of 2018**, whereby the writ petition of a similar nature has been entertained under Article 227 of the Constitution of India. Notably,

the judgment of the Apex Court in re; **Radhey Shyam** (supra) and the judgment of **Suraj Singh** (supra) have been considered and it has been held that the judgment in re; **Suraj Singh** (supra) would be applicable treating as if that writ petition has been filed under Article 227 of the Constitution of India. Sri Prabhat Kumar has also cited the judgment of this Court dated 28.05.2018 in re; **M/S Shiv Baba Industry Lalpur, Shahjahanpur Vs. State of U.P. and 3 Ors, Matters Under Article 227 No.3626 of 2018**, referring para-27 thereof to submit that instead of Article 226 of the Constitution of India, the writ petition challenging the orders of Revenue Court/ Consolidation Authorities should have been filed under Article 227 of the Constitution of India. Para-27 in re; **M/S Shiv Baba Industry Lalpur, Shahjahanpur** (supra) reads as under:-

*"27. Thus after the consistent expression of unanimous opinion by their Lordships of the Supreme Court in **Shalini Shyam Shetty** (supra) and the decision of Three Judge Bench of their Lordships in **Radhey Shyam** (supra), there remains no cavil notwithstanding any kind of interpretation that might have been earlier placed on the amended Rules of Chapter XXII of the High Court Rules that a petition under Article 227 of the Constitution can never be styled as a writ petition and styling it as a writ petition is certainly a defect that goes to the root of the matter rendering such a petition ill-framed beyond maintainability. A petition under Article 227 of the Constitution in order to be in tune with the jurisdiction it invokes may be styled as a Civil Misc. Applications or Criminal Misc. Applications or may be labelled by any appropriate nomenclature which eschews the use of the word writ. In addition, the relief clause should not ask*

for issue of any of the writs or orders in the nature of writs as are enumerated in Article 226 of the Constitution, that includes mandamus, certiorari, prohibition or quowarranto. The relief in a matter under Article 227 of the Constitution may not only seek setting aside of the order under challenge, but reversal of the same and further orders on the applications made to the subordinate court or tribunal in the same manner as a court of appeal or revision, subject of course to limitations on the exercise of the power under Article 227, could have passed including injunctions and directions of an appropriate kind to private parties or in the context of criminal proceedings like one involving reversal of an interlocutory order, refusing discharge by the Trial Court and the Sessions Judge in revision concurrently."

19. Notably, the aforesaid writ petition was filed under Article 227 of the Constitution of India and it was entertained under that Article only.

20. The Full Bench of the Apex Court in re; **Kiran Devi** (supra) has considered the dictum of the Apex Court in re; **Radhey Shyam** (supra). Paragraph nos.19 to 23 in re; **Kiran Devi** (supra) read as under:-

"19. A three Judge Bench in a judgment reported as **Radhey Shyam v. Chhabhi Nath & Ors.**, (2015) 5 SCC 423 held that the observations in para 25 of the judgment in *Surya Dev Rai v. Ram Chander Rai & Ors.*, (2003) 6 SCC 675, to be not good law. In *Surya Dev Rai*, it was held that the order of Civil Court could be challenged in a petition under Article 226 and that the distinction between Articles 226 and 227 of the Constitution of India stood almost obliterated. This Court in **Radhey Shyam** held:

"27. ... we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view [**Radhey Shyam v. Chhabhi Nath**, (2009) 5 SCC 616] of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

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29. Accordingly, we answer the question referred as follows:

29.1. Judicial orders of the civil court are not amenable to writ jurisdiction under Article 226 of the Constitution.

29.2. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226.

29.3. Contrary view in *Surya Dev Rai* [*Surya Dev Rai v. Ram Chander Rai*, (2003) 6 SCC 675] is overruled."

20. Therefore, when a petition is filed against an order of the Wakf Tribunal before the High Court, the High Court exercises the jurisdiction under Article 227 of the Constitution of India. Therefore, it is wholly immaterial that the petition was titled as a writ petition. It may be noticed that in certain High Courts, petition under Article 227 is titled as writ petition, in certain other High Courts as revision petition and in certain others as a miscellaneous petition. However, keeping in view the nature of the order passed, more particularly in the light of proviso to sub-section (9) of Section 83 of the Act, the High Court exercised jurisdiction only under the Act. The jurisdiction of the High Court is restricted to only examine the correctness, legality or propriety of the findings recorded by the Wakf Tribunal. The High Court in exercise of the jurisdiction conferred under proviso to sub-section (9) of Section 83 of the Act does not act as the appellate court.

21. We find merit in the argument raised by Mr. Sanyal that the nomenclature of the title of the petition filed before the High Court is immaterial. In *Municipal Corporation of the City of Ahmedabad v. Ben Hiraben Manilal*, (1983) 2 SCC 422, this Court held that wrong reference to the power under which an action was taken by the Government would not per se vitiate the action, if the same could be justified under some other power whereby the Government could lawfully do that act. The Court held as under:

"5. It is well settled that the exercise of a power, if there is indeed a power, will be referable to a jurisdiction, when the validity of the exercise of that power is in issue, which confers validity upon it and not to a jurisdiction under which it would be nugatory, though the section was not referred, and a different or a wrong section of different provisions was mentioned. See in this connection the observations in *Pitamber Vajirshet v. Dhondu Navlapa* [ILR (1888) 12 Bom 486, 489]. See in this connection also the observations of this Court in the case of *L. Hazari Mal Kuthiala v. ITO, Special Circle, Ambala Cantt.* [AIR 1961 SC 200:(1961) 1 SCR 892:(1961) 41 ITR 12, 16 : (1961) 1 SCJ 617] This point has again been reiterated by this Court in the case of *Hukumchand Mills Ltd. v. State of M.P.* [AIR 1964 SC 1329:(1964) 6 SCR 857:(1964) 52 ITR 583: (1964) 1 SCJ 561] where it was observed that it was well settled that a wrong reference to the power under which action was taken by the Government would not per se vitiate that action if it could be justified under some other power under which Government could lawfully do that act. See also the observations of the Supreme Court in the case of *Nani Gopal Biswas v. Municipality*

of Howrah [AIR 1958 SC 141: 1958 SCR 774: 1958 SCJ 297 : 1958 Cri LJ 271]."

22. Later, in *Pepsi Foods Ltd.*, this Court held that nomenclature under which the petition is filed is not quite relevant and it does not debar the Court from exercising its jurisdiction which otherwise it possesses. If the Court finds that the appellants could not invoke its jurisdiction under Article 226, the Court can certainly treat the petition as one under Article 227 or Section 482 of the Code. This Court held as under:

"26. Nomenclature under which petition is filed is not quite relevant and that does not debar the court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory. If in a case like the present one the court finds that the appellants could not invoke its jurisdiction under Article 226, the court can certainly treat the petition as one under Article 227 or Section 482 of the Code. It may not however, be lost sight of that provisions exist in the Code of revision and appeal but some time for immediate relief Section 482 of the Code or Article 227 may have to be resorted to for correcting some grave errors that might be committed by the subordinate courts. The present petition though filed in the High Court as one under Articles 226 and 227 could well be treated under Article 227 of the Constitution."

23. Therefore, the petition styled as one under Article 226 would not bar the High Court to exercise jurisdiction under the Act and/or under Article 227 of the Constitution. The jurisdiction of the High Court to examine the correctness, legality and propriety of determination of any dispute by the Tribunal is reserved with the High Court. The nomenclature of the proceedings as a petition under Article 226

or a petition under Article 227 is wholly inconsequential and immaterial."

21. Sri Shailendra Kumar Singh, learned Chief Standing Counsel-II has also adopted the objection so raised by Sri Prabhat Kumar and has submitted that if the orders of Consolidation Authorities or Revenue Authorities have been assailed, the writ petition under Article 226 would not be maintainable. He has also cited those judgments, which have been cited by the learned counsel for the petitioners and Sri Prabhat Kumar.

22. As has been considered above vide paras-25 to 29 in re; **Radhey Shyam** (supra), the Apex Court has clarified the position. Particularly, in para-25 in re; **Radhey Shyam** (supra), the Apex Court has observed that writ of certiorari may lie against patently erroneous and without jurisdiction order of Tribunal or authorities or courts other than judicial/Civil Courts. Further, the Revenue Court is not the Judicial/ Civil Court. In the judgment of **Radhey Shyam** (supra), judgment of **Shalini Shyam Shetty** (supra) has been considered by the Apex Court in para-26 and after considering the judgment of **Shalini Shyam Shetty** (supra), the Apex Court in re; **Radhey Shyam** (supra) has carved out the distinction between the orders being passed by the Civil Court and other than Civil Court by holding that the judicial orders of the Civil Court are not amenable to writ jurisdiction under Article 226 of the Constitution of India.

23. The judgments so cited by the respective parties, there is no dispute that reliance upon the dictum of the Apex Court in re; **Radhey Shyam** (supra) has been placed. Learned counsel for the parties are in agreement that the Apex Court in re;

Radhey Shyam (supra) has clearly and explicitly has observed as to what would happen in respect of the orders being passed by the Judicial/ Civil Courts and the orders being passed by other than Judicial/Civil Courts. No writ petition shall lie against the orders of Judicial/Civil Courts under Article 226 and there is apparent distinction between Articles 226 & 227 of the Constitution of India. Since the Apex Court has not held that even if any order is passed by a judicial or quasi judicial authority while exercising its statutory powers and even if that authority is other than judicial/ Civil Court, no writ shall lie under Article 226 of the Constitution of India, therefore, no other inference may be drawn from the ratio of the judgment of the Apex Court in re; **Radhey Shyam** (supra), which has not specifically been held. If the specific and clear direction has been issued by the Apex Court in re; **Radhey Shyam** (supra), any other inference should not be drawn. If the Apex Court was of the view that the orders of all judicial authorities, be it Judicial/Civil Court or Revenue/Consolidation Court/Authority, are not amenable under Article 226 of the Constitution of India, specific direction to that effect would have been given but no specific direction to that effect has been given by the Apex Court in para-29 of the judgment in re; **Radhey Shyam** (supra). The Full Bench of the Apex Court in re; **Kiran Devi** (supra) has observed that the Apex Court has considered all relevant judgments in re; **Radhey Shyam** (supra) including the judgment in re; **Shalini Shyam Shetty** (supra) and held that the petition styled as "Under Article 226" would not bar the High Court to exercise jurisdiction under Article 227 of the Constitution of India. Basically, the jurisdiction of the High Court is to examine

the correctness, legality and propriety of the orders being passed by the subordinate authority/court, the nomenclature of the proceedings as a petition under Article 226 or a petition under Article 227 is wholly inconsequential and immaterial. The Full Bench of the Apex Court in re; **Kiran Devi** (supra) has not restricted entertaining such type of petitions under Article 226 of the Constitution of India, rather has observed that in the given facts and circumstances, the nomenclature of the proceedings would be wholly immaterial.

24. The Apex Court in para 25 in re; **Radhey Shyam** (supra) has considered its own observation of para 18. Further, the observation of para 18 may be read in the light of observation given in paras 25 & 29 in re; **Radhey Shyam** (supra).

25. In view of the above, when there is a settled law of the Apex Court in re; **Radhey Shyam** (supra) and **Kiran Devi** (supra) and there is clarity in the directions of the Apex Court in the aforesaid cases, therefore, being a High Court, I have no other option except to follow those directions of the Apex Court in its letter and spirit. Further, the judgments and orders of the Coordinate Bench are not binding if the directions thereof are not in conformity with the directions being issued by the Apex Court.

26. There is apparent difference between the court of law and the Tribunals. The court of law is vested with general jurisdiction over all the matters, whereas the Tribunals deal with the matters vested with limited jurisdiction to decide a particular issue/issues as per specific statutory prescription to that effect. Courts exercise only the judicial functions whereas the Tribunals undertake various other administrative functions.

Officers of the court, more particularly judicial courts, are trained and expert persons in the law, however, it is not mandatory in every case that the members of the Tribunal need to be trained and expert in law. In view of the above, the revenue authorities/consolidation authorities when discharge their judicial/ quasi judicial functions used to follow the specific mandate and mechanism so prescribed under the Statute and quite often, those officers are not trained judicial officers but being prescribed authorities under the particular Statute, they discharge their functions as revenue/consolidation officer. In that way, they may not be treated at par with the judicial officers of the Civil Court and therefore, they are not judicial/Civil Court. At the best, it may be said that they discharge their duties and functions as Tribunal.

27. Accordingly, considering the arguments of learned counsel for the parties and the judgments so placed, which have been considered herein above, I am of the considered opinion that the orders being passed by the revenue authority or consolidation authority are not the orders being passed by judicial authority/Civil Courts, therefore, the preliminary objections so raised by the learned counsel for the opposite parties regarding maintainability of the writ petitions under Article 226 of the Constitution of India is hereby rejected. These writ petitions under Article 226 of the Constitution of India challenging the orders of the consolidation/revenue authorities are held to be maintainable.

28. Let counter affidavit be filed within a period of four weeks. Rejoinder affidavit, if any, may be filed within a period of two weeks.

29. List the aforesaid petitions in the week commencing 3rd July, 2023.

30. Interim orders granted earlier shall continue till the next date of listing in all the writ petitions.

31. Since all the writ petitions were connected for the reason that preliminary objection regarding maintainability was raised and the aforesaid preliminary objection has been rejected, therefore, all the writ petitions would be heard and decided on their own merits.

32. Accordingly, Writ-B No.245 of 2023 & Writ-B No.232 of 2023 are de-linked from Writ-B No.229 of 2023 and list them separately.

(2023) 5 ILRA 314

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 03.05.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 534 of 2022

Havaladar Singh & Ors. ...Petitioners
Versus

District Deputy Director of Consolidation, Azamgarh & Ors. ...Respondents

Counsel for the Petitioners:

Sri Narayan Dutt Shukla, Sri Rituvendra Singh Nagvanshi, Sri Shiv Chand Yadav, Sri Shyam Lal, Sri R.C. Singh (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Rameshwar Prasad Shukla

A. Revenue Law – UP Revenue Code, 2006 – UP Consolidation of Holding Act, 1953 – Long Standing Entry since 1955 –

Expunging thereof sought in 2020 – Permissibility – Consolidation process finalized in 1962 – Effect – Held, there is not only delay of 65 years in initiating the instant proceedings rather bar of two consolidation operation are also there, as such, there is no question of expunging the petitioners' entry to nullify the order dated 30.10.1955 which is continuing since first consolidation operation rather before amendment of 1958 took place in the U.P.C.H. Act – High Court set aside the impugned order. (Para 9, 12 and 13)

Writ petition allowed. (E-1)

List of Cases cited:

1. Smt. Chandan Devi Vs IInd Additional District Judge Nainital; 1998 A.L.J. 525
2. Dnyandeo Sabaji Naik & anr. Vs Mrs. Pradnya Prakash Khadekar & ors.; 2017 (5) SCC 496
3. Smt. Raj Kumar Kapoor Vs Civil Judge Kanpur & ors.; 1987 A.L.J 137
4. Kedar Nath & ors. Vs Fulena & ors.; 2009(1) ADJ 554
5. Gulab Chandra Vs Munsiff West Allahabad & ors.; 1988 A.L.J. 852
6. Saleem Vs Deputy Director of Consolidation, G.B. Nagar; 2015 (129) RD 249
7. Bhikku & anr. Vs Deputy Director of Consolidation & ors.; 1960 RD 189
8. Mandir Shivji Maharaj through Parmal Singh Vs Commissioner (Director of Consolidation) Meerut & ors.; 1969 RD 34
9. University of Delhi Vs U.O.I.& ors.; 2020 (13) SCC 745
10. Balwant Singh (Dead) Vs Jagdish Singh & ors.; AIR 2010 SC 3043

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

1. Heard Mr. R.C. Singh, learned Senior Counsel assisted by Mr. Narayan Dutt Shukla, learned Counsel for the petitioners, learned Standing Counsel for the State-respondents and Mr. Rameshwar Prasad Shukla for respondent No.3, Gaon Sabha.

2. Brief facts of the case are that predecessors-in-interest of the petitioners namely Shri Laxmi Singh was recorded owner of disputed plot no. 362 situated in village-Kishundurpur, Tappa-Attaisi, Pergana-Nizamabad, Tahasil- Sadar, District-Azamgarh. Copy of Khewat of 1356 fasli to 1359 fasli of the Village Kishundaspur, Tappa Attaisi, Pargana Nizamabad Tehsil Sadar District Azamgarh has been annexed as Annexure No. 1 to the writ petition in order to demonstrate the ownership of petitioners' predecessors-in-interest. Copy of khatauni of 1356 fasli, 1359 fasli as well as khasra of 1359 fasli have been annexed as Annexure Nos. 2, 3 and 4 to the writ petition to demonstrate the ownership of the petitioners' predecessors-in-interest. Village was brought under consolidation operation on 30.10.1955 by way of notification issued under Section 4 of the U.P.C.H. Act. In the khatauni of 1362 fasli, plot no. 362 was recorded in the name of petitioners' predecessors-in-interest, the copy of khatauni of 1362 fasli has been annexed as Annexure No. 6 to the writ petition. During consolidation operation, petitioners filed an objection under Section 8 of U.P.C.H. Act to rectify the revenue entry. New plot nos. 213 ka and kha were carved out from old plot no. 362. The order dated 30.10.1955 passed by Consolidation Officer in a proceeding under Section 8 of the U.P.C.H. Act to record the plot as brick klin became final as nobody challenged the order in first consolidation operation. The first consolidation operation came to an end

in the year 1962. Village was again brought under consolidation operation in the year 1981. Basic year entry remained in the name of petitioners and no objections were filed against the basic year entry which remained in the name of petitioners. Final records were accordingly prepared in the name of petitioners. New plot no. 311 ka and kha carved out from old plot no. 213. According to petitioners, new plot no. 213 ka and kha have never been pond and bhita. A four lane road is being constructed by National Highway Authority of India across the aforesaid plots, as such, there is no question that pond and bhita exist in the plot. The land in dispute was never recorded as pond either before the abolition of zamindari or after abolition of zamindari. According to petitioners their predecessors had established a brick klin in the year 1940 and the business continued till 1950. The portion of the plot in question was acquired by National Highway Authority of India by way of notification published in Hindi newspaper dated 30.6.2017. No dispute was raised by any person before the competent authority appointed under the National Highway Act 1956 accordingly award dated 31.5.2018 was made by competent authority under section 3G of the National Highways Act. Copy of the award dated 31.5.2018 has been annexed as Annexure No. 12 to the writ petition. At the time of disbursement of the amount determined under the award, a complaint has been made by the Pradhan that old plot no. 213, new plot no. 311 is a pond and bhita therefore compensation in respect of the aforementioned plot should not be disbursed. Competent Authority accordingly issued order dated 22.7.2020 that payment of compensation be deferred. Pradhan filed revision under Section 48(1) of the U.P.C.H. Act on 16.7.2020 before the Deputy Director of Consolidation to set

aside the order dated 30.10.1955 in respect to plot no. 362 and record the same as pokhari and bhita. On the basis of the complaint made by Pradhan, a case no. D202015060001018 has been registered under Section 38(1) of U.P. Revenue Code, 2006 for correction of revenue entry in respect to old plot no. 362 of Village Kishundaspur. Raj Narayan and Others also filed revision under Section 48(3) of the U.P.C.H. Act, Vijay Prakash and Others also filed separate revisions challenging the order of Assistant Consolidation Officer dated 30.10.1955 in the aforementioned proceeding, the reports were submitted by the authorities. Petitioners challenged the proceeding initiated under Section 48(1) of the U.P.C.H. Act as well as the proceeding initiated under Section 38(1) of the U.P. Revenue Code, 2006 through writ-B no. 3 of 2021. This Court vide order dated 7.9.2021 disposed of the writ petition filed by petitioners with direction that petitioners can file objection in the pending proceeding which shall be decided in accordance with law within period of two weeks. Proceedings under Section 48(1) of the U.P.C.H. Act as well as the proceeding under Section 38(1) of the U.P. Revenue Code, 2006 were heard together by District Deputy Director of Consolidation/Collector and the same were decided vide separate order dated 6.12.2021 expunging the petitioners' entry and directing that plot in dispute be recorded as pokhari, bhita and banjar. Hence this writ petition.

3. This Court vide order dated 1.4.2022 directed the learned Standing Counsel as well as the Counsel for the Gaon Sabha to file counter-affidavit within three weeks. In pursuance of the order of this Court dated 1.4.2022, learned Standing Counsel has filed his counter-affidavit. Petitioners have filed rejoinder-affidavit also.

4. Counsel for the petitioners submitted that the proceeding initiated after 65 years for setting aside the order dated 30.10.1955 is abuse of process of law. He further submitted that no objection was raised during consolidation operation, as such, the initiation of proceeding by way of revision under Section 48 of the U.P.C.H. Act as well as by way of proceeding under Section 38(1) of the U.P. Revenue Code, 2006 is abuse of process of law. He further submitted that land in dispute was never recorded as pond and bhita. He further submitted that even in the map plot in question was not shown as pond and bhita. He further submitted that longstanding revenue entry cannot be expunged in the arbitrary manner. He submitted that complete procedure has been provided under U.P.C.H. Act for challenging the basic year entry, as such, the initiation of proceeding after 65 years challenging the order passed during first consolidation operation is wholly illegal and is abuse of process of law. He further submitted that first consolidation operation was finalized in the year 1962 and second consolidation operation was started in the year 1981, as such, the initiation of the impugned proceeding after such a long period to expunge the petitioners' entry cannot be permitted. He further submitted that there was no consideration by respondent No.2 while passing the impugned order for condonation of delay of 65 years. He further submitted that delay condonation matter and the merit of the case should be decided separately, but respondent No.2 has failed to consider the same and passed the impugned order in arbitrary manner. He further placed reliance upon the judgment of this Court as well as Apex Court in order to demonstrate that the right which has accrued due to expiry of period cannot be taken away in arbitrary manner. The

particulars of the case law cited by learned counsel for the petitioners are as follows :-

i) 1998 A.L.J. 525 Smt. Chandan Devi Vs. IInd Additional District Judge Nainital

ii) 2017 (5) SCC 496 Dnyandeo Sabaji Naik and another Vs. Mrs. Pradnya Prakash Khadekar and Others

(iii) 1987 A.L.J 137 Smt. Raj Kumar Kapoor Vs. Civil Judge Kanpur and Others

(iv) 2009(1) ADJ 554 Kedar Nath and others Vs. Fulena and Others

(v) 1988 A.L.J. 852 Gulab Chandra Vs. Munsiff West Allahabad and Others

(vi) 2015 (129) RD 249 Saleem Vs. Deputy Director of Consolidation G.B. Nagar

(vii) 1960 RD 189 Bhikku and another Vs. Deputy Director of Consolidation and Others

(viii) 1969 RD 34 Mandir Shivji Maharaj through Parmal Singh Vs. Commissioner (Director of Consolidation) Meerut and Others

(ix) 2020 (13) SCC 745 University of Delhi Vs. Union of India and Others

5. On the other hand, learned Standing Counsel submitted that land in dispute is pond and bhita, as such, no right will accrue to the petitioners even after expiry of 65 years. He further submitted that the impugned order has been passed in accordance with law as it has been found that the order passed on 30.10.1955 is fraudulent. He submitted that there is no limitation against the fraudulent order/proceeding, as such, the impugned order has been passed in the interest of State/Gaon Sabha land. He submitted that no interference is required

in the matter and writ petition is liable to be dismissed.

6. I have considered the arguments advanced by learned counsel for the parties and perused the records.

7. There is no dispute about the fact that first consolidation operation came in the village in the year 1955 and the same was finalized in the year 1962. There is also no dispute about the fact that second consolidation operation took place in the village in the year 1981. According to the petitioners, the Consolidation Officer has passed the order in favour of the predecessors-in-interest of the petitioners on 30.10.1955 during first consolidation operation. There is also no dispute about the fact that the instant proceedings have been initiated under Section 48 of the U.P.C.H. Act as well as under Section 38(1) of the U.P. Revenue Code, 2006 in the year 2020 and the impugned orders have been passed for expunging the petitioners' entry.

8. In order to appreciate the controversy involved in the matter the perusal of the provisions contained under Sections 8 and 48 of the U.P.C.H. Act, 1953 with amendment of 1956 and 1963 will be relevant as the order impugned was passed on 30.10.1955. Provisions before the amendment and after the amendment in respect to U.P.C.H. Act are as under:-

8. That Section 8 of the U.P.C.H. Act, 1953, as it originally existed, is being reproduced herein below:

"8. Revision and correction of records.- (1) Where, upon an examination of the land records as aforesaid, the Assistant Consolidation Officer is of the

opinion that a revision of maps or records is necessary before proceeding with the preparation of provisional Consolidation Scheme, he shall make a report accordingly, in the form and manner prescribed, to the Settlement Officer (Consolidation).

(2) Upon receipt of the report under sub-section (1) to the Settlement Officer (Consolidation) shall, after such inquiry as he may consider necessary, either -

(a) direct the Assistant Consolidation Officer to proceed with the correction of maps or records, or

(b) recommend to the State Government for revision of maps or records in accordance with the provisions of Chapter IV of the U.P. Land Revenue Act, 1901.

(3) Upon receipt of the directions under Clause (a) of Sub-section (2), the Assistant Consolidation Officer shall after such further partial as may consider necessary correct the entries in the Annual Register in accordance with the provisions contained in Chapter III of the U.P. Land Revenue Act, 1901.

(4) Any person aggrieved by the order of Assistant Consolidation Officer under sub-section (3) may, within 30 days of the order, appeal to the Consolidation Officer, whose decision shall, except as otherwise provided by or under this Act, be final"

9. That the aforesaid provision came to be substituted by UP Act No. XXXVIII of 1956 which ran as under:

"8" Revision of field-book and the current Annual Register - Upon revision of the village maps under Section 7, the District Deputy Director of Consolidation shall, subject to the provisions hereinafter contained, cause to be revised the field-book of the unit after

field to field partial and the current annual register after its test and verification. He shall also cause to be prepared in respect to the plots falling in the unit, a statement showing the mistakes and disputes discovered during the course of field to field partial and test and verification of the current Annual Register".

10. That Section 8 again came to be substituted in the present position vide U.P. Act No. VIII of 1963 which ran as under:

"[8. Revision of the field-book and the current annual register-Determination of valuations and shares in joint holdings.- (1) Upon the revision of the maps under Section 7, the District Deputy Director of Consolidation shall, subject to the provisions hereinafter contained, and in such manner as may be prescribed, cause to be-

(i) revised, the field book of the unit after field to field partial, and the current annual register after its test and verification;

(ii) determined, in consultation with the Consolidation Committee, the valuation of-

(a) each plot after taking into consideration its productivity, location and availability of irrigation facilities, if any; and

(b) all trees, wells and other improvements existing in the plots for the purpose of calculating compensation therefore;

(iii) ascertained the share of each owner, if there be more owners than one, out of the valuation determined under sub-clause (b) of clause (ii); and

(iv) determined the shares of individual tenure-holder in joint holdings for the purpose of effecting partition to ensure proper consolidation.

(2) The District Deputy Director of Consolidation shall cause to be prepared a khasra chakbandi, in the form prescribed in respect of all the plots falling in the units as also a statement showing the mistakes 49 [undisputed cases of succession] and disputes discovered during the test and verification of the annual register and in the course of the field to field partiall].

11. That by virtue of provision contained under sub-section (4) of Section 8 (as it originally existed) order of Assistant Consolidation Officer would be appealed before the Consolidation Officer and order of the Consolidation Officer was final and same was not subject to appeal or revision.

12. That original Section 48 of the U.P.C.H. Act, 1953 read as under:

"48. Revision - The Director of Consolidation may call for the record of any case if the Officer, (other than the Arbitrator) by whom the case was decided appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegality or with substantial irregularity and may pass such orders in the case as it may think fit.

13. That the original Section 48 came to be substituted by U.P. Act No. XXIV of 1956 which is being reproduced herein below:

"48. Powers of Director of Consolidation to call for records and to revise orders. - The Director of Consolidation may call for the record of any case or proceeding if the Officer (other than the Arbitrator) by whom the case was decided or proceeding taken appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to

have acted in the exercise of his jurisdiction illegality or with substantial irregularity and may pass such orders in the case as it may think fit."

14. That Section 48 again came to be amended by the Act No. XXXVIII of 1958 which ran as under:

"48. Revision. - The Director of Consolidation may call for the record of any case decided or proceeding taken, where he is of opinion that a Deputy Director, Consolidation has -

(i) exercised jurisdiction not vested in him in law, or

(ii) failed to exercise jurisdiction vested in him, or

(iii) acted in the exercise of his jurisdiction illegality or with substantial irregularity, and as a result of which substantial injustice appears to have been caused to a tenure-holder, and he may, after affording reasonable opportunity of hearing to the parties concerned, pass such order in the case or proceeding as he think fit."

9. Petitioners' predecessors were continuously recorded since 1955 and there was no proper objection in two consolidation operations took place in the village but in the year 2020, the proceeding has been initiated by the Pradhan for expunging the petitioners' entry as well as setting aside the order dated 30.10.1955 and the respondent No.2 has passed the impugned order in the proceeding under Section 48 of the U.P.C.H. Act as well as the proceedings under U.P. Revenue Code, 2006 expunging the long standing entry of the petitioners without considering the fact that 65 years have been passed and consolidation operations have over in the village but without considering the impact of the expiry of consolidation operation as well as inordinate delay of 65 years, the

impugned orders have been passed simultaneously under U.P.C.H. Act and U.P. Revenue Code, 2006.

10. Hon'ble Apex Court in the Case reported in **AIR 2010 Supreme Court 3043 Balwant Singh (Dead) Versus Jagdish Singh and Others** has held that once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay, it will be unreasonable to take away the right on the mere asking of the applicant. Paragraph No.13 of the Judgement is relevant which is as under:-

"13. As held by this Court in the case of Mithailal Dalsangar Singh (AIR 2003 SC 4244: 2003 AIR SCW 4878) (supra) the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to

take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly. The application filed by the applicants lacks in details. Even the averments made are not correct and ex facie lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflects normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party. In the case of State of Bihar v. Kameshwar Prasad Singh [(2000) 9 SCC 94 : 2000 SCC (L&S) 845] this Court had taken a liberal approach for condoning the delay in cases of the Government to do substantial justice. Facts of that case were entirely different as that was the case of fixation of seniority of 400 officers and the facts were required to be verified. But what we are impressing upon is that delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in mind by the Court while deciding such applications. In the

case of *Ramlal v. Rewa Coalfields Ltd.* [AIR 1962 SC 361] this Court took the view:

"7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna v. Chathappan* ILR (1890) 13 Mad 269.

It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay. This aspect of the matter

***naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;*"**

11. The case law cited by learned Counsel for the petitioner are also relevant in the matter as in the judgement of **Bhikku (Supra)** scope of entries of Sections 7,8 and 12 of U.P.C.H. Act as they stood prior to 1958 amendment were taken into consideration. In the case of **University of Delhi (Supra)** Hon'ble Apex Court has held that condonation of long delay should not be automatic and merely because petitioner/ applicant is a public body.

12. In the instant matter, there is not only delay of 65 years in initiating the instant proceedings rather bar of two consolidation operation are also there, as such, there is no question of expunging the petitioners' entry to nullify the order dated 30.10.1955 which is continuing since first consolidation operation rather before amendment of 1958 took place in the U.P.C.H. Act.

13. Considering the entire facts and circumstances, the impugned order dated 6.12.2021 passed by respondent No.1 in case No. 01197/ 2020 Computerized No. D202015060001197 under Section 48(1) of U.P.C.H. Act and order dated 6.12.2021 passed by respondent no.1 in Case No. 01018/2020 Computerized Case No. D202015060001018 under Section 38(1) of the U.P. Revenue Code, 2006 are liable to be set aside and the same are hereby set aside.

14. Writ petition stands **allowed** and respondent No.1 is directed to record the names of the petitioners in the revenue

records in respect to disputed plot within a period of six weeks from the date of production of a certified copy of this order.

(2023) 5 ILRA 322
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2023

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Writ B No. 1218 of 2021

Narendra Kumar & Anr. ...Petitioners
Versus
The Board of Revenue, U.P. at Allahabad &
Ors. ...Respondents

Counsel for the Petitioners:

Sri Fuzail Ahmad Ansari, Sri R.C. Singh (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Krishna Kant Singh, Sri Yogendra Singh Bohra

A. Revenue Law – UP Revenue Code, 2006 – Sections 59, 77, 101 & 161 – Exchange of land of Gram Panchayat – School was constructed long back over the petitioner's land – Application for exchange was rejected – Validity challenged – Finding required u/s 101(2)(b) has not been recorded – No resolution of LMC in favour of exchange was passed – Effect – Held, to refuse permission for exchange under sub-section (1) of Section 101 of the Code, 2006, it was required of the Sub-Divisional Officer to record a finding in terms of clause (b) of sub-section (2) of the Code, 2006. That is to say, the finding returned ought to have been that the difference between the valuation, if determined in the manner prescribed, of the lands given and received in exchange exceeds ten per cent of the lower valuation – However, High Court further held, for want of any

resolution of the Land Management Committee in favour of exchange or any suo moto resolution of the Sub-Divisional Officer approved by the Collector, any application filed for exchange of land of Gram Panchayat cannot meet the prescribed requirements of Rule 101 and therefore such an application would have an incurable defect. (Para 16 and 20)

Writ petition allowed. (E-1)

List of Cases cited:

1. C/M Vishambharnath Janta Inter College & anr. Vs St. of U.P. & ors.; 2019 (142) RD 810
2. Writ C No. 26603 of 2021; Sita Ram Vs St. of U.P. & ors. decided on April 6, 2022: 2022 SCC OnLine All 200
3. Shiv Murat Vs Board of Revenue, U.P. at Allahabad & ors.; 2017 (7) ADJ 252

(Delivered by Hon'ble Jayant Banerji, J.)

1. This writ petition has been filed seeking quashing of the order dated 23.02.2021 passed by the Board of Revenue, U.P., Allahabad in Revision no.1124 of 2017. Also the order dated 24.04.2017 passed by the Sub-Divisional Officer is sought to be quashed by which application for exchange of land has been rejected.

2. The petitioners claim to the Bhumidhar of plot No.17 ad-measuring 0.357 hectare and Plot No.19 ad-measuring 0.092 hectare. Both the aforesaid plots of land are stated to be recorded as grove land. It is stated that plot No.18 ad-measuring 0.104 hectare is recorded in the name of a school 'Purv Madhyamik Vidyalay, Mauza- Tarsara, Pargana- Hasangarh, Tehsil- Iglas, District- Aligarh'. Other than that plot, plot no.21 having an area of 0.057 hectare is also recorded in the name of the aforesaid school.

3. It is stated that the building of the school was constructed long back on plot no.19, which is the plot belonging to the petitioners, instead of plot No.18. Therefore, under the provisions of section 101 of the U.P. Revenue Code, 2006, the petitioners filed an application on 11.03.2016 before the Sub Divisional Officer for exchange of plot no.19 with plot no. 18 in terms of the prayer made in the application. A report of the Tahsildar/Lekhpal was called for, in which report it was stated that the circle rate and the nature of land of both the plot nos.18 and 19 are the same. However, by the impugned order dated 24.4.2017, the Sub-Divisional Officer rejected the application for exchange. Against the aforesaid order the petitioners filed a revision before the Board of Revenue which was dismissed by the order dated 23.2.2021.

4. The contention of the learned counsel for the petitioners is that the application filed by the petitioners under Section 101 of the Code, 2006, deserves to be allowed particularly when the revenue authorities have reported to the respondent No.2 regarding the same valuation of the plots of the land sought to be exchanged. It is contended that the Sub-Divisional Officer based her order on a defunct Government Order dated 10.11.2014 that was issued under Section 161 of the repealed U.P. Zamindari Abolition and Land Reforms Act, 1950. It is contended that the sub-section (2) of section 101 of the Code, 2006 provides for certain eventualities that may authorize the competent authority to refuse permission for exchange. In this case too, the Sub-Divisional Officer refused the exchange but the ground for refusal of exchange is not relatable to any ground appearing in sub-section (2) of Section 101 of the Code,

2006. It is urged that since the valuation of the plots of land sought to be exchanged has been reported by the revenue inspector/tehsildar to be identical therefore, the refusal of the Sub-Divisional Officer to permit exchange is arbitrary. Learned counsel for the petitioner in support of his contention has relied upon a judgement of co-ordinate Bench of this Court in the matter of **C/M Vishambharnath Janta Inter College and another vs State of U.P. & others**³.

5. The learned counsel for the respondents have drawn the attention of the Court to Section 59 of the Code, 2006 pertaining to entrustment of land, to contend that the land which stands entrusted to the Gaon Sabha cannot be claimed by the petitioners for exchange as of right.

6. Shri Y.S. Bohra, learned counsel appearing for the respondent No.5 has drawn attention to sub-section (2) of Section 9-A of the Uttar Pradesh Basic Education Act, 1972 to contend that the property of the Uttar Pradesh Board of Basic Education, comprising of plot nos. 18 and 21, stand vested in the Gram Panchayat and any transfer by sale, gift, exchange, mortgage, lease or otherwise of any building, property or assets is prohibited. He further urged that in view of Clause (d) of sub-section (2) of section 101, the land being reserved for planned use of the Gaon Sabha, bhumi-dhari rights can not accrue on them in view of the provisions of Section 77 of the Act, 2006, and therefore, no exchange is permissible. Learned counsel has further drawn the attention of the Court to the proviso to sub-Section (2) of Section 101 to contend that exchange may be permissible in respect of land mentioned in clause (d) subject to the decision of the State Government.

7. A perusal of the order dated 24.04.2017 passed by the Sub-Divisional Officer reveals that on perusing the report of the tehsildar and the site plan, she has found the exchange proceedings in question to be initiated contrary to rules of the Board of Revenue, since on one plot a building of the school is constructed while the other plot is being used as a grove / for agriculture purposes. She further observes that if the parties wanted exchange in accordance with rules, they should not have sought exchange where one plot is being used for a grove and another plot for a school building. In that regard the Sub-Divisional Officer has relied upon a Government Order dated 10.11.2014. Accordingly, the application was rejected.

8. Sections 59, 77 and 101 of the Code of 2006 read as under:

"59. Entrustment of land etc. to Gram Panchayat and other local authorities.- (1) The State Government may, by general or special order to be published in the manner prescribed, entrust all or any of the things specified in sub-section (2), which vest in the State Government, to a Gram Panchayat or other local authority for the purposes of superintendence, preservation, management and control in accordance with the provisions of this Code.

(2) The following things may be entrusted to a Gram Panchayat or other local authority under sub-section (1), namely-

(i) lands, whether cultivable or otherwise, except land for the time being comprised in any

(ii) grove standing on the Gram Panchayat land, pasture land, graveyard, cremation ground, manure pits, Khaliyans, Chakroads, link roads, sector roads, land in

river bed, road, Sadak Khanti, Sullage farm;

(iii) forests; and fisheries;

(iv) trees, other than trees in a holding or on the boundary of a holding or in a grove or abadi, or any trees on unoccupied land;

(v) hats, bazars, meals, tanks, ponds, water-channels, private ferries, pathways and abadi sites;

(vi) subject to the provision of the Treasure Trove Act, 1878, any properties specified in Section 55 and belonging to the State Government.

(3) Every land or other thing -

(a) vested in a Gram Panchayat or any other local authority under the provisions of the Uttar Pradesh Consolidation of Holdings Act, 1953 or the Uttar Pradesh Imposition of Ceiling on land Holdings Act, 1960;

(b) placed under the charge of a Gram Panchayat or any other local authority under any of the enactments repealed by this Code;

(c) otherwise coming into possession of a Gram Panchayat or other local authority, either before or after the commencement of this Code; shall be deemed to be entrusted to such Gram Panchayat or other local authority, as the case may be, with effect from the date of commencement of this Code or from the date of such coming into its possession, for the purpose of superintendence, preservation, management and control, in accordance with the provisions of this Code.

(4) The State Government may, by a subsequent order to be published in the manner prescribed, -

(a) add to, amend, vary or rescind any earlier order issued under sub-section (1);

(b) transfer to any other Gram Panchayat or other local authority, any land or other thing entrusted or deemed to be entrusted under sub-section (1) or sub-section (3) for superintendence, preservation, management and control;

(c) resume any land or other thing so entrusted, or deemed to be entrusted or transferred to any Gram Panchayat or local authority on such terms and conditions as prescribed;

(d) impose conditions and restrictions subject to which the powers of superintendence preservation, management and control under this section shall be exercised.

(5) Where any of the thing specified in sub-section (2) has been entrusted or deemed to have been entrusted to a Gram Panchayat, and the village or any part thereof in which such things are situated lies outside the circle of the Gram Panchayat, such Gram Panchayat or its Bhumi Prabandhak Samiti shall, subject to any general or special order issued by the State Government in this behalf, perform, discharge and exercise the functions, duties and powers assigned, imposed or conferred by or under this Code or the U.P. Panchayat Raj Act, 1947 on a Gram Panchayat or a Bhumi Prabandhak Samiti as if that village or part also lay within that circle.

(6) Where any of the things specified under sub-section (2) has been entrusted or deemed to be entrusted to a local authority other than the Gram Panchayat, the provisions of this Chapter shall mutatis mutandis apply to such local authority.

.....

.....

77. Bhumidhar rights not to accrue in certain lands.-(1)
Notwithstanding anything

contained in this Code or any other law for the time being in force; no person shall acquire the rights of a Bhumidhar in the following land-

(a) Khaliyan, manure pits, pasture land or land normally used as burial or cremation ground;

(b) land covered by water and used for the purpose of growing singhara or other produce;

(c) land situate in the bed of a river and used for casual or occasional cultivation;

(d) such tracts of shifting or unstable cultivation which the State Government may by notification specify;

(e) land declared by the State Government to be intended or set apart for taungya plantation and notified as such;

(f) grove land entrusted or deemed to be entrusted to a Gram Panchayat or any other local authority under Section 59;

(g) land included in sullage farm or trenching ground entrusted or deemed to be entrusted to a Gram Panchayat or any other local authority under Section 59;

(h) land acquired or held for a public purpose or a work of public utility;

(i) land covered by a pond, tank or lake, or forming part of an embankment, bandh or bhita; and

(j) any other land which the State Government may, by notification, specify in this behalf;

Explanation.- The expression 'public purpose', in clause (h) shall include :

(i) land set apart for military camping ground;

(ii) land included within railway or canal boundaries;

(iii) land acquired and held by a local authority for its own purposes;

(iv) land referred to in Section 29-C of the Uttar Pradesh Consolidation of Holdings Act, 1953; or

(v) land reserved by a [Gram Panchayat] for the purposes of public utility:

(2) Notwithstanding anything to the contrary contained in other provisions of this Code, where, any land or part thereof specified in sub-section (1) of this section is, surrounded by or, in between, the plot or plots of land purchased, acquired or resumed for public purpose, the State Government may, change the class of such public utility land, and if class of such public utility land is changed, any other land equivalent to or more than that of the aforesaid public utility land, shall be reserved for the same purpose in the same Gram Panchayat or local authority, as the case may be or State Government may permit the exchange thereof under Section 101 of this Code, in the manner prescribed:

Provided that the class of any public utility land may be changed only in exceptional cases on such terms and conditions, as may be prescribed. The reason for changing the class of public utility land shall be recorded in writing.

(3) The State Government, while changing the class of the land or permitting the exchange of the same under Section 101 of the Code, shall consider the location, public utility and suitability of the land proposed to be reserved or exchanged.

(4) If class of land is changed under sub-section (2) of this section, the Collector shall order the record of rights (Khatauni) and the map to be corrected accordingly.

Explanation.- The expression 'public purpose', in sub-section (2) of this section means, *mutatis mutandis*, 'the public purpose' as defined in clause (za) of Section 3 of Right to Fair Compensation

and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Act No. 30 of 2013).

.....

.....

101. Exchange.- (1)

Notwithstanding anything in Section 77 of this Code, any Bhumidhar may with prior permission in writing of the Sub-Divisional Officer exchange his land with the land -

(a) held by another Bhumidhar; or

(b) entrusted or deemed to be entrusted to any Gram Panchayat or a local authority under Section 59.

(2) The Sub-Divisional Officer shall refuse permission under sub-section (1) in the following cases, namely -

(a) if the exchange is not necessary for the consolidation of holdings or securing convenience in cultivation; or

(b) if the difference between the valuation, determined in the manner prescribed, of the lands given and received in exchange exceeds ten per cent of the lower valuation; or

(c) if the difference between the areas of the land given and received in exchange exceeds twenty-five per cent of the lesser area; or

(d) in the case of land referred to in clause (b) of sub-section (1), if it is reserved for planned use, or is land in which bhumidhari rights do not accrue; or

(e) if the land is not located in same or adjacent village of the same tahsil:

Provided that the State Government may permit the exchange with land mentioned in clause (d) aforesaid, on the conditions and in the manner, prescribed.

(3) Nothing in this section shall be deemed to empower any person to exchange his undivided interest in any

holding, except where such exchange is in between two or more co-sharers.

(4) Nothing in the Registration Act, 1908 (Act No. 16 of 1908), shall apply to an exchange in accordance with this section."

9. Therefore, under Section 59 of the Code, 2006, for purposes of superintendence, preservation, management and control of things which vest in the State Government and which are specified in sub-section (2) thereof, the State Government is authorized entrust them to a Gram Panchayat, or other local authority.

Sub-section (3) of Section 59 creates a legal fiction which deems entrustment of every one of the three specified categories thereunder of land or other thing to such Gram Panchayat or other local authority, as the case may be, with effect from the date of commencement of the Code, 2006 or from the date of such coming into its possession, for the purpose of superintendence, preservation, management and control. The aforesaid three specified categories of land or other thing that are specified in sub-section (3) are those:-

(a) vested in a Gram panchayat or any other local authority under the provisions of the Uttar Pradesh Consolidation of Holdings Act, 1953 or the Uttar Pradesh Imposition of Ceiling on Land Holdings act, 1960;

(b) placed under the charge of a gram panchayat or any other local authority under any of the enactments repealed by the Code, 2006; or

(c) otherwise coming into possession of a Gram panchayat or other local authority, either before or after the commencement of the Code, 2006.

10. Section 77 (1) of the Code, 2006 which begins with a non-obstante clause, provides for certain classes of land in respect of which no person shall acquire the rights of a Bhumidhar, notwithstanding anything contained in the Code, 2006 or any other law for the time being in force. Clause (f) of sub-section (1) of Section 77 brings within its ambit grove land entrusted or deemed to be entrusted to a Gram Panchayat or any other local authority under Section 59.

11. Section 101 (1) of the Code, 2006 begins with a non-obstante clause which provides that notwithstanding anything in Section 77, any Bhumidhar may with prior permission in writing of the Sub-Divisional Officer exchange his land with the land - (a) held by another Bhumidhar; or (b) entrusted or deemed to be entrusted to any Gram Panchayat or a local authority under Section 59. However, sub-section (2) of Section 101 provides certain specific conditions whereunder the Sub-Divisional Officer shall refuse permission. They are:-

(a) if the exchange is not necessary for the consolidation of holdings or securing convenience in cultivation; or

(b) if the difference between the valuation, determined in the manner prescribed, of the lands given and received in exchange exceeds ten per cent of the lower valuation; or

(c) if the difference between the areas of the land given and received in exchange exceeds twenty-five per cent of the lesser area; or

(d) in the case of land referred to in clause (b) of sub-section (1), if it is reserved for planned use, or is land in which bhumidhari rights do not accrue; or

(e) if the land is not located in same or adjacent village of the same tahsil:

The proviso after clause (e) provides that the State Government may permit the exchange with land mentioned in clause (d) aforesaid, on the conditions and in the manner, prescribed.

Though, prima facie, there appears to be a conflict between the enabling provision of clause (b) of sub-section (1) of Section 101 (which is qualified by the non-obstante clause), and, clause (d) of sub-section (2) of Section 101, however, since nothing has been pleaded nor urged in this regard, this court refrains from expressing any opinion on the issue. In any view of the matter the proviso appearing after clause (e) aforesaid does enable the State Government to permit the exchange on the conditions and in the manner prescribed.

12. The word **exchange** has also been defined in Section 118 of the Transfer of Property Act, 1882 as under:

"118. "Exchange" defined.-

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale."

So exchange of property would occur where two persons mutually transfer the ownership of one thing for the ownership of another. The essential requisite of exchange, therefore, is that it should be voluntary and conscious decision by each party and permissible by law.

13. At this stage, it is pertinent to refer to Rules 100, 101 and 102 of the Uttar

Pradesh Revenue Code Rules, 20165 which are as follows:

"100. Application for exchange between Bhumidhars [Section 101].-

(1) Every application for exchange of land between two Bhumidhars shall contain the following particulars:-

(a) Names, parentage and addresses of both the parties to the exchange.

(b) Details of the land sought to be given and received in exchange (with plot numbers, area, location and land revenue).

(c) Whether the proposed exchange is necessary for the consolidation of holdings or for the convenience of cultivation.

(d) Whether the proposed exchange involves transfer of undivided interest in the land.

(e) Whether the land or any part thereof has been let out or encumbered.

(f) Valuation of the lands to be given and received in exchange and the extent of difference in such valuation.

(g) The areas of the land to be given and received in exchange and the extent of difference in such areas.

(h) Whether the land to be given and received in exchange are located in the same or adjacent villages of the same Tahsil.

(2) Every such application shall be accompanied by the certified copies of the Khatauni relating to the plots to be given and received in exchange.

101. Application for exchange of land of Gram Panchayat (Section 101).-

(1) Every application for exchange of land by a Bhumidhar under clause (b) of section 101(1) shall contain the following particulars:-

(a) The particulars specified in rule 100(1)6.

(b) Whether the land to be received in exchange from the Gram Panchayat is reserved for planned use or is land in which Bhumidhars right does not accrue.

(c) Whether the land to be received in exchange from the Gram Panchayat consists of any tree or other improvements, if so, their details.

(2) Every such application shall be accompanied by certified copies of the Khatauni relating to the plots, given as well as received in exchange, together with a copy of the resolution of the Bhumi Prabandhak Samiti in favour of such exchange or the suo-motu resolution of the Sub-Divisional-Officer approved by the Collector.⁷

102. Grant of permission by Sub-Divisional Officer [Sections 101 and 102].- (1) On receipt of an application under rule 100 or rule 101, the Sub-Divisional Officer shall issue notice to the Bhumidhar or the Gram Panchayat concerned to show-cause why the permission for exchange should not be granted.

(2) The Sub-Divisional Officer shall also cause to be calculated the rental values of the land given or received in exchange and may also hear the lessees, mortgagees or other holders of the encumbrances, if any.

(3) If after making necessary inquiries, the Sub-Divisional Officer is satisfied that the parties are agreeable to such exchange and the required terms and conditions are fulfilled, he shall grant the requisite permission and shall direct the Record-of- Rights to be corrected accordingly.

(4) If the application is in respect of the land referred to in clause (b) of sub-

section (1) and if it is reserved for planned use or is land in which bhumidhari rights do not accrue and the Sub-Divisional Officer is satisfied that the permission for exchange is in the interest of the applicant and is also in the public interest, he may refer the matter to the State Government for appropriate order and if the permission is granted by the State Government, the Sub-Divisional Officer shall direct the Record-of-Rights (Khatauni) to be corrected accordingly."

14. As it appears from a reading of the aforesaid provisions of the Rules, 2016, Rule 100 provides the particulars required in every application for exchange of land between two Bhumidhars; Rule 101 specifies the particulars required in every application for exchange of land of Gram Panchayat by a Bhumidhar; and, Rule 102 provides the procedure for consideration of an application under Rule 100 or Rule 101 by the Sub-Divisional Officer. Perusal of sub-rule (4) of Rule 102 provides that where the application is in respect of land referred to in clause (b) of sub-section (1)⁸ and it is reserved for planned use or is land in which bhumidhari rights do not accrue and the Sub-Divisional Officer is satisfied that the permission for exchange is in the interest of the applicant and is also in the public interest, he may refer the matter to the State Government for appropriate order and if the permission is granted by the State Government, the Sub-Divisional Officer shall direct the Record-of-Rights (Khatauni) to be corrected accordingly.

15. The land which is being sought by the petitioners in exchange for their land stands entrusted with the Gram Panchayat. The school is stated to be constructed long back on the land of the petitioners and the application for exchange was filed on

11.03.2016. Section 9-A of the Basic Education Act reads as follows:-

Section 9A. Control of teachers and properties of basic school.

(1) Notwithstanding anything contained to the contrary in any other provisions of this Act, on and from the date of commencement of the Uttar Pradesh Basic Education (Amendment) Act, 2000, -

(a) every teacher of the basic school serving under, the Board immediately before such commencement shall be under the administrative control of the Gram Panchayat or the Municipality, as the case may be, within whose territorial limits the basic school, is situated;

(b) all buildings, properties and assets of the Board in respect of a basic school shall stand transferred to, and vest in, the Gram Panchayat or the Municipality, as the case may be, within whose territorial limits the basic school is situated;

(c) where any building or part thereof is occupied by a tenant by the Board for the purpose of a basic school immediately before such commencement, the tenancy in respect of such building or part thereof shall, notwithstanding anything contained in any contract, lease or other instrument, stand transferred in favour of the Gram Panchayat, or the Municipality, as the case may be;

(d) the Board shall cease to be the licensee in respect of the building or part thereof referred to in sub-section (2) of Section 18-A and the Gram Panchayat or the Municipality, as the case may be, within whose territorial limits such building is situated shall, if it is not already owner thereof, be deemed to have become licensee in respect of such building or part thereof on such terms and conditions as may be determined by the State Government.

(2) No Gram Panchayat or Municipality shall have the power to transfer by sale, gift, exchange, mortgage, lease or otherwise any building, property or assets transferred to, and vested in, such Gram Panchayat or Municipality, as the case may be, under sub-section (1).

15. Given the provision of clause (c) of sub-section (3) of Section 59 and clause (f) of sub-section (1) of Section 77 of the Code, 2006, the area of plot no.19 which is admittedly grove land, over which the school is constructed and over which the petitioners claim bhumidhari rights, would be deemed to be entrusted to the Gram Panchayat. However, it cannot be the case of the respondents that plot no.19 was transferred to or vested in the Gram Panchayat under the provisions of Section 9-A of the Basic Education Act, as the Board of Basic Education would first have to demonstrate that the land comprising plot no. 19 and the building of the school belonged to it. Thus the reference to the provisions of Section 9-A of the Basic Education Act, by the learned counsel for the respondent insofar as it concerns the Bhumidhari Plot No. 19 of the petitioners, is of no consequence. However, as regards Plot No. 18, the respondents may have an arguable case.

16. In any view of the matter, what is required to be seen in the present writ petition is whether the order dated 24.04.2017 passed by the Sub-Divisional Officer and the order dated 23.02.2021 passed by the Board of Revenue can be sustained. The sum and substance of the order passed by the Sub-Divisional Officer has already been noted above. It is evident that the reason for rejection of the application for exchange is that on one plot there is a grove, while on the other plot

there exists a school building. Therefore, to refuse permission for exchange under sub-section (1) of Section 101 of the Code, 2006, it was required of the Sub-Divisional Officer to record a finding in terms of clause (b) of sub-section (2) of the Code, 2006. That is to say, the finding returned ought to have been that the difference between the valuation, if determined in the manner prescribed, of the lands given and received in exchange exceeds ten per cent of the lower valuation. Of course, it was also open to the Sub-Divisional Officer to record finding for refusal of permission on ground of existence of any condition mentioned in sub-section (2) of Section 101, if the facts and evidence on record so reflected. The Sub-Divisional Officer was required to take into account considerations that were relevant to the purpose of the statute in question. This was not done in the present case and so the impugned order dated 24.04.2017 cannot be sustained. The order dated 23.02.2021 of the Board of Revenue also adopts the same analogy as the Sub-Divisional Officer for rejection of the revision filed by the petitioners, and therefore, that order too cannot be sustained.

17. In the case of **Sita Ram v. State of U.P. and others**⁹, a coordinate bench of this court observed as follows:

"20. In exercise of its discretionary power, if the concerned authority ignores or does not take into account considerations which are relevant to the purpose of the statute in question, then its action would be invalid. This would be more so where the statute conferring discretion on the authority has structured the discretion by expressly laying down the consideration which should be taken into account by the authority for exercise of the

discretion. In such a case, if the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account or by disregard of the relevant considerations required to be taken into account, the decision arrived at by the authority would be invalid."

18. There is an important aspect of the matter that requires attention. Under sub-rule (2) of Rule 101 of the Rules, 2016, an application for exchange of land of Gram Panchayat is required to be accompanied by certified copies of the khatauni relating to the plots given as well as received in exchange, together with a copy of the resolution of the Bhumi Prabandhak Samiti in favour of such exchange. In the alternative, the application is to be accompanied by the suo moto resolution of the Sub-Divisional Officer approved by the Collector. There is no material on record to demonstrate that any of such resolution was made and filed alongwith the application of the petitioners.

19. In the case of **Shiv Murat Vs. Board of Revenue, U.P. at Allahabad and others**¹⁰, while considering exchange under the provisions of Section 161 of the repealed U.P.Z.A. and L.R. Act, 1950, the Court posed the question whether the land vesting in the State Government can be exchanged without notice to the Land Management Committee and without there being a resolution of the Gaon Sabha approving the exchange. The Court observed as follows:

"11. On plain reading of Sub-clause (i) of Section 161 and Rule 145, it is apparent that the Assistant Collector upon being satisfied with the conditions of exchange, as a consequence of the Rule he

is required to call upon the parties to show cause why the exchange should not be made and thereafter under Rule 146 the Assistant Collector is to decide the objections, if any, and pass suitable orders. It is, therefore, clear that without notice to the Gaon Sabha and in absence of a resolution recording consent of the Land Management Committee the permission to make an exchange suo moto by the Assistant Collector on a report of the Halka Lekhpal would be void not being mandated under Section 161 of the Act.

12. In the event of the submission of learned counsel for the petitioner being accepted, then land of a bhumidhar can be exchanged behind his back merely on an application by another bhumidhar, on mere approval of the Assistant Collector. Rule requires that the owner of the land be it a bhumidhar or in the present case a Gaon Sabha would have to be put to notice before the land vesting in the Gaon Sabha is exchanged.

.....

.....

17. On the bare reading of the meaning of the word "exchange" it would transpire that it is not unilateral transaction and is mutual one and it depends on the readiness and willingness of both the parties, i.e., the party which wants to exchange and the party which accepts the exchange proposed by the other party. Therefore, I am of the considered opinion that unless both the parties agree for exchange, the Assistant Collector cannot accord permission merely at the instance of an individual seeking exchange of his land with another individual unless he is willing to exchange. The willingness of the parties to exchange their respective land is condition precedent under Section 161 of the Act. The exchange of the land is not unilateral transaction of a willing party to

exchange, there must be consent of the person with whom exchange has been sought and unless there is agreement of exchange between the parties, there is no such power vested with the Assistant Collector under the statute to compel the bhumidhar to exchange land with another bhumidhar/Gaon Sabha against its will.

18. This Court in Rambali and others Versus State of U.P. and others, decided on 9 May 2012, declined to issue writ of mandamus seeking direction to the Assistant Collector to decide the application under Section 161. The Court held as follows:

".....

As I have noticed that the exchange of land belonging to a bhumidhar to another bhumidhar is not unilateral transaction by a willing party to exchange, there must be consent of the person with whom exchange has been sought and unless there is an agreement of exchange between the parties, there is no such power, vested with the Assistant Collector, under the statute, to compel a bhumidhar for exchange of his land with another bhumidhar against his will. I am of the view that conferment of right of exchange of the land under Section 161 of the Act read with relevant rules as detailed is subject to convenience of both the parties to the exchange and in the eventuality the willingness of both the sides to exchange, the Section 161 imposes duty upon the Assistant Collector either to grant permission or to refuse the same if the same is not inconformity with the section 161 of the Act and the rules 144 to 147 of the Rules."

19. The exchange of Land is not a novelty of the Zamindari Abolition Act. Provisions for exchange existed even under U.P. Tenancy Act, 1939 and other legislation viz. M.P. Land Revenue Court,

1959. The term exchange is not defined in the Act, hence the definition given in Section 118 of the Transfer of Property Act shall be applicable. According to the said provision, exchange is a transfer. When two persons mutually transfer the ownership of one thing for the ownership of another, a transaction is called exchange. For a valid exchange, it must be voluntarily and both parties must agree thereto. No exchange is permissible unless both parties agree to the exchange.

20. In *Saheb Singh Versus Gaon Sabha*, 1981 RD 85, where Land Management Committee passed a resolution that a particular pathway should be widened and the affected tenure holders must be given land in exchange near their chaks. It was held that the order of the Sub Divisional Officer approving the exchange was bad because the consent of all the affected tenure holders was not obtained.

21. In *Smt. Badi Dulaiya Versus Gaon Sabha*, 1987 RD 246, wherein, it was held that if the procedure prescribed by Rules 144 to 146 was not followed, and the permission required under Rule 110-A(2) was not obtained, the order for exchange was not valid (Refer: *State of U.P. Versus M/s Techno Tower Limited*, 1986 RD 397).

22. In *Narain Singh Versus Gaon Sabha*, 1975 ALJ (Revenue) 73, it was held that a land belonging to the Gaon Sabha cannot be allowed to be exchanged without the consent of the Gaon Sabha. In *Gulshan Rai Versus Mitra Sen*, 1994 RD 125, where on the report submitted by Naib Tehsildar recommending that the permission for exchange may be granted to the parties and on such report, the Sub Divisional Officer passed an order approving the exchange, it was held to be no order in the eye of law.

23. Before disposing of the application for exchange, a duty is cast upon the Assistant Collector to ensure that the provisions of Rule 144 to 146 are literally followed. (Refer-*Ashok Kumar Versus Mahavir Singh*, 1994 RD 136; *State of U.P. Versus M/s Techno Tower Ltd.*, 1986 RD 397). The proceedings for exchange are judicial proceeding and therefore, the Assistant Collector should pass complete and self contained order. Where the Assistant Collector finds that parties involved in the exchange have not consented, therefor, or if any of them has withdrawn such consent, he has no option but to reject the application. (*Fakir Chand Versus Naib Johra Zaidi*, 1995 RD 405)

24. The trial court should ensure and see that show cause notice mentioned in Rule 145 is issued and the condition mentioned in the proviso to Section 161 is fulfilled (*Gaon Sabha Versus Kundan Lal*, 1986 RD 366).

25. The exchange of land belonging to the Gaon Sabha does not depend of the personal consent of the Pradhan or the Lekhpal. For exchange proper resolution as required under law should be passed by the Gaon Sabha. (*Harihar Prasad Versus Jagdish*, 2001 RD 163)."

20. For want of any resolution of the Land Management Committee in favour of exchange or any suo moto resolution of the Sub-Divisional Officer approved by the Collector, any application filed for exchange of land of Gram Panchayat cannot meet the prescribed requirements of Rule 101 and therefore such an application would have an incurable defect.

21. In view of the facts and circumstances mentioned above, the impugned orders dated 24.04.2017 passed by the Sub-

ground of limitation rather adjudication should be made on merit – High Court set aside the impugned order and remitted back the appeal for it's decision on merit after condoning the delay in filing the appeal. (Para 12, 16, 17 and 18)

Writ petition allowed. (E-1)

List of Cases cited:

1. Kedar & ors. Vs Assistant Director of Consolidation Banda & ors.; 1988 ALJ 358
2. Collector, Land Acquisition Anantnag & ors. Vs Mst. Kantiji & ors.; AIR 1987 SC 1353
3. Bhagmal & ors. Vs Kunwar Lal & ors.; (2010) 12 SCC 159

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

1. Heard Mr. R.C. Singh, learned Senior Counsel assisted by Mr. Shailendra Kumar Pandey, learned counsel for the petitioner, learned Standing Counsel for the State respondents, Mr. Prashant Kumar Tripathi, learned counsel for respondent No.5 and Mr. Narsingh Pandey, learned Counsel for respondent No.12.

2. Brief facts of the case are that family pedigree in order to appreciate the controversy, will be relevant which is an under:

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Divisional Officer and dated 23.02.2021 passed by the Board of Revenue are invalid and are hereby set aside. However, since the application filed by the petitioners under section 101 of the Code, 2006 appears to be incomplete and therefore, cannot be termed as a valid application, it shall be open to them to file a fresh application stating/enclosing all requisite details and documents. If such an application is filed, the same would be duly considered by the competent authority. This writ petition is, accordingly, **allowed** in terms of the observation herein.

(2023) 5 ILRA 334
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 2783 of 2022

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

Counsel for the Petitioner:

Sri Shailendra Kumar Pandey, Sri
Rituvendra Singh Nagvanshi, Sri R.C. Singh
(Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Narsingh Pandey, Sri Prashant
Kumar Tripathi

A. Consolidation Law – UP Consolidation of Holding Act, 1953 – Sections 9-A(2) & 11(1) – Title matter – Appeal could not be filed within limitation period – Condonation of delay sought, which was rejected – Rejection order of the appellate court was also confirmed in the revision – Justice oriented approach – Applicability – Held, matter should not be thrown on the

Ganpat Dube

Shobha

Parmeshwara

Rajpati

Chanda Devi

3. The dispute pertains to old khata No.137 consisting of 16 plots total

area 5 bigha, 1 biswa and 8 dhoor. Smt. Lakhpata was Zamidar/ proprietor of the land in dispute. Smt. Lakhpata transferred her entire right by registered sale deed dated 02.12.1918 in favour of Sri Ganpat Dube. It is also material that Smt. Lakhpata was Sir holder of the land in dispute. Smt. Lakhpata became ex-proprietary tenant by virtue of provisions contained under Section 10 of North Western Provinces Tenancy Act 1901 due to transfer made by Smt. Lakhpata to Sri Ganpat Dube, Smt. Lakhpata was not heard of from 1348 Fasli accordingly, Sri Ganpat Dube being Jamindar took entire property in his possession. By Virtue of Provisions contained under Section 18 of the U.P.Z.A. & L. R. Act, Sri Ganpat Dube became bhumidhar of the land in dispute after date of vesting. After death of Sri Ganpat Dube, his two widows namely Smt. Sharda and Smt. Parmeshwara succeeded to the property and their names were accordingly mutated in the revenue record. Smt. Parmeshwara had no issue therefore, her share was succeeded by Smt. Shobha. Smt. Rajpati Devi daughter of Smt. Shobha executed a will deed in favour of Chanda Devi, who is petitioner before this Court. Under the order of Amaldaramad dated 30.10.1970 passed by Supervisor/ Kannongo, name of Lalta, Rampadarth and Ramsukh sons of Kanahaiya were ordered to be mutated as heirs of Smt. Lakhpata. Since the succession was disputed as Supervisor/ Kannungo did not have jurisdiction to record the name of Lalta, Rampadarth and Ramsukh under Section 33-A of U.P. Land Revenue Act on the basis of P.A.-11 accordingly, Smt. Rajpati filed a suit being suit No.425 under Section 229-B of U.P.Z.A. & L. R. Act claiming declaration for her right and title in respect to the plot in dispute stating that the order of Amaldaramad dated 30.10.1970 is out

come of fraud. During the pendency of the aforesaid suit, the village was brought under consolidation operation under Section 4 of the U.P.C.H. Act as such suit stood abated on 28.05.1979 in view of the provisions contained under Section 5 of the U.P.C.H. Act. In the Basic Year of Consolidation operation Lalta, Rampadarth and Ramsukh sons of Kanahaiya were recorded over the plots of khata No.137 New khata No.105. Against basic year entry Smt. Rajpati filed objection under Section 9-A (2) of the U.P.C.H. Act claiming exclusive right in the pots of Khata No.105 stating that she herself is cultivating two plots and remaining 14 plots has been given on Batai cultivation. The Consolidation Officer heard the aforementioned title objection filed by Smt. Rajpati and vide order dated 19.02.1982 decided the objection against Smt. Rajpati for 14 plots and decided in her favour for two plots which were in her personal cultivation. Against the order of Consolidation officer dated 19.02.1982 Smt. Rajpati filed appeal under Section 11 of the U.P.C.H. Act on 16.08.1982 along with prayer for condonation of delay supported with affidavit of appellant. Sri Janaki and Sri Jagai also filed their separate appeals against the order of Consolidation Officer dated 19.02.1982. All the three appeals were consolidated and heard together. The appellate court vide order dated 18.03.1983 allowed all three appeals setting aside the order of Consolidation Officer. Against the appellate order dated 18.03.1983, Rampadarth and others filed three separate revisions being revision Nos 734, 733 and 732 under Section 48 of U.P.C.H. Act. All the three revisions were consolidated and heard together. The aforesaid revisions were allowed and matter was remanded to the appellate Court to decide the appeals afresh vide order

dated 22.10.1984. In pursuance of the remand order dated 22.10.1984 appeals filed by Janki, Jagai and Rajpathi were renumbered as Appeal Nos.4, 6 and 5 respectively. All the three appeals were heard together and appellate court vide order dated 31.05.2004 decided the appeal whereby appeal No.4 filed by Janki, appeal No.5 filed by Smt. Rajpati were allowed and appeal No.6 filed by Jagai was dismissed. The appellate court while deciding the appeal vide order dated 31.05.2004 has taken into consideration the evidence on record as well as provisions of U.P.Z.A. and L.R.Act, 1950 and accepted the claim of the petitioner on the basis of provisions contained under the Act and rules framed thereunder. Against the order dated 31.05.2004 two revisions under 48 of U.P.C.H. Act were filed by Ram Shanker and others, who were consolidated and heard together. Revisional court vide order dated 16.03.2005 dismissed the revisions, hence Ram Shankar and others challenged the order of appellate court dated 31.05.2004 and revisional court dated 16.03.2005 through Writ-B No.44157 of 2005 before this Court which was allowed vide order dated 01.10.2010 quashing the orders dated 31.05.2004 and 16.03.2005 and remanded the matter before appellate Court to examine the delay condonation matter, possession of the parties and the revenue entry. In pursuance of the order of this Court dated 01.10.2010 Settlement Officer Consolidation has restored all the three appeals and after hearing the counsel for the parties dismissed all the three appeals filed by petitioner's predecessor in interest, Janki and Jagai on the ground of limitation vide order dated 04.06.2016. Petitioner filed recall application against the appellate order dated 04.06.2016 which was dismissed vide order dated 07.10.2016 accordingly petitioner filed two Separate

revisions under Section 48 of U.P.C.H. Act against the order dated 04.06.2016 and 07.10.2016. One Jaglal has also filed his separate revision against the appellate order dated 04.06.2016. All the three revisions were consolidated and heard together. Revisional Court vide order dated 08.9.2021 dismissed all the three revisions hence this writ petition.

4. This Court vide order dated 19.11.2022 has entertained the writ petition and granted interim protection in the matter however on the recall application filed on behalf of respondent No.5 the earlier order dated 19.11.2022 was recalled vide order dated 13.02.2023 on the ground of opportunity of hearing.

5. In pursuance of the order dated 19.11.2022 notices were issued to the private respondents Nos. 5 to 15. Respondent No.5 has already put in his appearance before issuance of notice to the respondents through Mr. Prashant Kumar Tripathi Advocate. Respondent No.12 has put in appearance through Mr. Narshing Pancey Advocate after issuance of notice to the respondent.

6. As per office report dated 10.02.2023 service is sufficient upon respondent Nos.6 to 10 and 12 to 15. Officer has also reported that respondent No.11 is dead. Petitioner has filed an application for amendment to amend the array of parties by mentioning deceased against the name of respondent No.11, who died issue-less and heirs are already on record of the writ petition. accordingly this Court vide order dated 28.03.2023 allowed the amendment application.

7. Learned Senior Counsel for the petitioner submitted that serious question of

law has been raised in the title appeal under Section 11 (1) of U.P.C.H. Act, but the appeal has been dismissed on the ground of limitation. He further submitted that in appeal prayer has been made for condonation of delay along with separate affidavit of the appellant, but the appellate court has illegally dismissed the appeal on the ground of limitation. He further submitted that delay was not inordinate in filing the appeal rather the appeal was filed on 16.04.1982 against the order of Consolidation Officer dated 19.02.1982, as such dismissal of appeal on the ground of limitation is against the principle of law laid by this Court as well as Apex Court from time to time for taking liberal view in delay condonation matter. He further submitted that earlier the claim of the petitioner was allowed on merit by passing detailed order considering the provisions of law, as such the dismissal of the appeal after remand order passed by this Court on the ground of limitation only specially when the delay is not inordinate will be against the principle of law settled by Apex Court for deciding the matter on merit rather on technical ground. He further submitted that even on merit, petitioner is entitled to the right and title over the land in dispute as after date of vesting no right will accrue to Lakhpata as such Lalta, Rampadarth and Ramsukh will not get any right and petitioner will be entitled to the right and title over the land in dispute in view of the provisions contained under Section 18 of U.P.Z.A. & L. R. Act. Learned Senior Counsel for the petitioner placed reliance upon the judgment of this Court passed in Writ-B No.14670 of 1988 (Smt. Kalawati Vs. Deputy Director of Consolidation and others) in which this Court has affirmed the order condoning the delay in filing the appeal before Settlement

Officer of Consolidation after following the judgement of the Apex court.

8. On the other hand, Mr. Prashant Kumar Tripathi, Counsel for respondent No.5 submitted that in pursuance of the remand order passed by this Court dated 01.10.2010 by which petitioner's writ petition was allowed and matter was remitted back before the appellate court to decide the appeal afresh considering the delay condonation matter and other points on merit, the appellate court has considered the delay condonation matter and rejected the appeal on the ground of limitation. He further submitted that no separate application under Section 5 of Limitation Act has been filed rather in the appeal itself the prayer has been made for condonation of delay, as such, delay in filing the appeal was rightly refused by the appellate court. He further submitted that sufficiency of cause and reality of cause are two different things. He further submitted that there can be liberal view in respect to the sufficiency of cause, but there cannot be liberal view in respect to the reality of the cause. He further submitted that petitioner has not filed separate application for condonation of delay as such, delay cannot be condoned whether the delay is inordinate or not. Mr. Prashant Kumar Tripathi, counsel for respondent No.5 placed reliance upon judgment of this Court, reported in 1988 ALJ 358 Kedar and others Vs. Assistant Director of Consolidation Banda and others in order to demonstrate that there can be no liberal view in respect to the reality of the cause in filing the delay condonation application. He next submitted that no interference is required against the impugned order and writ petition is liable to be dismissed.

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

10. There is no dispute about the fact that proceeding arises out of title matter under Section 9-A (2) of U.P.C.H. Act. There is also no dispute about the fact that title appeal filed by the petitioner on 16.04.1982 against the order dated 19.02.1982 passed by Consolidation Officer has been dismissed by the appellate court on the ground of limitation only. There is also no dispute about the fact that revision filed by the petitioner against the order dismissing the petitioner's title appeal on the ground of limitation has been also dismissed.

11. In order to appreciate the controversy the perusal of the appeal under Section 11 (1) of U.P.C.H. Act filed by Smt. Rajpati taking specific grounds specially in paragraph No.10 of the memo of appeal with respect to condonation of delay supported by the affidavit of the appellant will be relevant which are as under:

न्यायालय एस० ओ० सी० महोदय हरैया

1- राजपति देवी बेवा राजेन्द्र सा० मझो० तप्पा बेलवा प० अमोढा तह० हरैया जिला बस्ती

बनाम

1-रामसुख, | सा० मझौवा दूवे

2- लालता | पुत्रगण | तप्पा- बेलवा परगना अमोढा तह० हरैया

3- पदारथ | जिला- बस्ती

4- ग्राम सभा प्रधान |

5- सरकार उ०प्र० द्वारा जिलाधिकारी बस्ती

धारा- 11 सी एव एक्ट

अपील बनराजी फैसला श्रीमान सी०ओ० महोदय विक्रम जोत बाबत वाद सं० 2486, 2487, 2488,

2489, 2490, 2491, 2492, 2493, 2494, 2495 धारा 9अ

(2) बाबत मौ० मझौवा बस्ती तप्पा बेलवा परगना अमोढा त० हरैया जिला बस्ती रामसुख बनाम लालता ता० फैसला 19-02-1982

अपीलान्त निम्नलिखित निवेदन करता है:-

1- यह कि फैसला अदालत मातहत खिलाफ कानून काबिज खारिजी है।

2- यह कि अदालत मातहत ने उक्त वझमूला मिसिल पर गौर नहीं फरमाया है। फैसला इसके खिलाफ सही नहीं है।

3- यह कि अदालत मातहत का लीगल पेपर के सही नहीं है।

4- यह कि अदालत मातहत में सही तनकी हास नहीं कायम किया है और नहीं टिडिंग ही सही है।

5- यह कि यह बात बखूबी साबित है कि आ०नि०पहले लखमन्ती देवी वीयर की थी जिसमें गनपत के हक में बैनामा किया और गनपत के कानूनी को जायज वारिस राजपती अपीलान्तिया ही है।

6- यह कि रेस्पोंडेंट कतई लखपती के नाती नहीं है और ना ही लखपती उसकी नानी है।

7- यह कि अदालत माल द्वारा यह नियत हो चुका है कि अपीलान्तिया ही आ०नि० की मालिक बतौर भूमिधर व काबिज है।

8- यह कि कब्जा भी अपीलान्तियान ही आश्रित है और वह नियमानुसार है।

9- यह कि रेस्पोंडेंट मो गलत संख्या व बिला किसी हक के आ०नि० के फर्जी ढंग से लड रहे है।

10- यह कि आदेश दिनांक 19-02-82 की जानकारी 23-02-82 को हुई और उसी दिन नकल की दरखवास्त दिया जो 05-03-82 को मिला। वो नकल अपने वकील को अपील दाखिल के बाबत देकर घर चली गयी लेकिन भूल से अपील अन्दर मियाद दाखिल नहीं हो सकी। जानबूझकर नहीं किया है। कानून मियाद हस्व दफा 5 का फायदा मिलना जरूरी है।

अतः अपील हाजा दाखिल उम्मीदवार हूँ कि कानून मियाद हस्व दफा 5 का फायदा देकर अपील मंजूर किया जाये। आ०नि० की भूमिधर घोषित किया जावे तथा प्रतिवादीगण रेस्पोंडेंट का नाम खारिज किया जावे।

अपीलान्त

16-04-82

न्यायालय एस०ओ०सी० महोदय हरैया बस्ती।

अ०नं० सन 82

राजपती देवी बनाम रामसुख

बयान हल्फी मिनजानिब श्रीमती राजपती

1- मैं बहलफ बयान करती हूँ और कसम खाती हूँ कि मेरा नाम राजपती मेरे पति का नाम राजेन्द्र सा० मझौवा तप्पा बेलवा परगना अमोढ़ा तहसील हरैया जिला बस्ती की निवासी हूँ।

2- मैं बहलफ बयान करती हूँ और कसम खाती हूँ कि आदेश दिनांक 19-2-82 की जानकारी 23-2-82 को हुई और उसी दिन नकल की दरखास्त दिया जो 5-3-82 को मिला नकल और अपील का खर्चा अपने वकील को देकर घर चली गई और आज जब तारीख पता लगाने आई तब पता चला कि वकील साहब अपील दाखिल करने से भूल गये इसलिए आज पुनः अपील दाखिल किया जा रहा है मैंने जान बूझ कर कोई गलती....तसाहुली नहीं किया हूँ इसलिए हर सूरत में दफा-5 कानून मियाद का फायदा पाने का मुसाहक हूँ।

3- मैं बहलफ बयान करता हूँ और कसम खाता हूँ कि उपरोक्त कथन बयान हल्फी....मेरे ज्ञान से सत्य है। इसमें कोई बात छिपाई नहीं गई है। और ना झूठ हूँ परमेश्वर मेरी मदद करें।

प्रार्थी

श्रीमती रामपती

ता० 16.4.82

12. After perusal of the grounds of appeal specially paragraph No.10 of the grounds of appeal filed by the petitioner as well as affidavit filed in appeal as well as delay condonation matter, the dismissal of title appeal on the ground of limitation will be against the justice oriented approach of the Court.

13. It is also material that on the earlier occasion, the matter was decided in favour of the petitioner on merit although that orders have been set aside by this Court while allowing the writ petition filed by the contesting respondents, but the fact remains that interesting question of title is involved in the matter as such, dismissal of

the petitioner's appeal which was filed within **two months** from the date of the order of Consolidation Officer, will be against the interest of justice.

14. Honble Apex Court in the case is reported in **AIR 1987 S.C. 1353 Collector, Land Acquisition Anantnag and others Vs. Mst. Kantiji and others** has held that matter should be adjudicated on merit in place of dismissal of the case on technical grounds. Paragraph No.3 of Judgment is relevant which is as follows:

"3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

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

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

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

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

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

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

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

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the

law is administered in an even handed manner. There is no warrant for according a step motherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides."

15. Apex Court in the case reported in (2010) 12 Supreme Court cases 159 Bhagmal and others Vs. Kunwar Lal and others has also considered the scope of delay condonation matter for setting aside the ex-parte decree. Paragraph Nos. 10, 11, 12 and 13 of the judgment of Apex Court

rendered in Bhagmal (Supra) are relevant which are as under:-

10. This well considered order of the appellate Court came to be interfered with by the High Court solely on the ground that there was no application for condonation of delay made by the appellants/defendants before the Trial Court in support of their application under Order IX Rule 13 CPC. The High Court observed that the appellate Court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not and went on to decide the application on merits and, therefore, it had exceeded its jurisdiction. The High Court also commented on the fact that the ex-parte decree was decided on 19.4.1985, while the application for setting aside the ex-parte decree was filed on 8.7.1988 and that no application for condonation of delay under Section 5 of the Limitation Act was filed. Relying on Article 123 of the Limitation Act, the High Court took the view that the application ought to have been filed within 30 days from the date of passing of the decree and since it was not so filed, at least a condonation of delay application should have been made under Section 5 of the Limitation Act and, therefore, in the absence of prayer for condonation of delay, the appellate Court could not have allowed the application under Order IX Rule 13.

11. In our opinion, the High Court was not justified in taking a hypertechnical view. We have seen all the orders. It is quite clear from the Trial Court's order that the Trial Court entertained the application on merits. The Trial Court undoubtedly has referred to the reply of the respondents

to the effect that the application for setting aside the ex-parte decree was beyond the limitation. However, the view taken by the Trial Court was based more on the merits. In fact, it went on to record the finding that there was no compromise and the theory of compromise and delay on account of that was not acceptable. The Trial Court has more or the less based its findings regarding delay on the basis of the order sheets. That was not right as the order sheets nowhere bore the signatures of the parties. They were mechanically written mentioning "parties as before". Therefore, the Trial Court did not throw the application under Order IX Rule 13 merely on the basis of the fact that no application for condonation of delay was made. It went on to consider the delay aspect as well as the merits and even allowed the parties to lead evidence.

12. It is to be seen here that the question of delay was completely interlinked with the merits of the matter. The appellants/defendants had clearly pleaded that they did not earlier come to the Court on account of the fact that they did not know about the order passed by the Court proceeding ex-parte and also the ex-parte decree which was passed. It was further clearly pleaded that they came to know about the decree when they were served with the execution notice. This was nothing, but a justification made by the appellants/defendants for making the Order IX Rule 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing Order IX Rule 13 application was, in our opinion, rightly considered by the appellate Court on merits and the appellate Court was absolutely right in coming to the

conclusion that appellants/defendants were fully justified in filing the application under Order IX Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex-parte proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. Under such circumstances, the High Court should not have taken the hyper-technical view that no separate application was filed under Section 5.

13. The application under Order IX Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchnama that the respondent No. 1/plaintiff would get his suit withdrawn or dismissed. The said compromise panchnama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the non-attendance of the appellants/defendants, which was proved in the further proceedings, was quite justifiable. The appellants/defendants, when ultimately came to know about the decree, had moved the application within 30 days. In our opinion, that was sufficient.

16. The judgment cited by the counsel for the petitioner rendered in **Smt. Kalawati Devi (Supra)** has also considered the judgment of Apex Court rendered in **Collector, Land Acquisition Anantnag and others (Supra)** & has held

that matter should not be thrown on the ground of limitation rather adjudication should be made on merit as such the judgment cited by learned counsel for the petitioner will be applicable but judgment cited by learned counsel for the respondent No.5 will not be applicable in order to advance the cause of justice..

17. Considering the entire facts and circumstances of the case as well as ratio of law laid down by the apex court in the **Collector, Land Acquisition Anantnag (Supra)**, the impugned appellate order dated 04.06.2016 as well as order dated 07.10.2016 passed by respondent No.3-Settlement Consolidation Officer Basti in the appeal Nos.447 (Rajpati Devi Vs. Ramsukh etc) as well as revisional order dated 08.09.2021 passed by respondent No.2-Deputy Director of Consolidation in revision No.30 and revision no. 37 are liable to be set aside and same are hereby set aside. Considering the explanation of delay in filing the appeals under Section-11 (1) of U.P.C.H. Act as well as ratio of law laid down by Apex Court delay in filing appeal against the order of Consolidation Officer dated 19.02.1982 is hereby condoned.

18. The writ petition stands allowed in part and matter is remitted back before the respondent No.3 Settlement Consolidation Officer Basti to decide the appeal Nos.447, 448 and 449 on merit after affording opportunity of hearing to the parties expeditiously preferably within a period of four months from the date of production of certified copy of this order without granting any unnecessary adjournment from either of the parties.

No order as to costs.

(2023) 5 ILRA 343
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ C No. 32520 of 2016

Madhyanchal Vidyut Vitaran Nigam Ltd.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Sunil Kumar Tripathi, Sri Devesh Tripathi

Counsel for the Respondents:

C.S.C., Sri Goptal Narain

Civil Law - U.P. Industrial Disputes Act, 1947- Impugned award passed-reinSt.d the Opposite party-a workman-Labour Court not considered the documents filed by the Department- mere finding that oral termination was not according to law would not ipso facto lead to a conclusion that the workman should be reinSt.d with back wages-and continuity in service-a consolidated and lump sum amount of compensation could have served the purpose-as the age of respondent was 53 years- as of now he must have attained the age of superannuation- not just for reinSt.ment after attaining age of superannuation -relief of reinSt.ment with continuity in service and backwages is denied-Rs. 2,00,00/- as lumpsum compensation granted.

Writ allowed in part. (E-9)

List of Cases cited:

1. Deputy Executive Engineer Vs Kuberbhai Kanjibhai, (2019) 4 SCC 307,

2. St. of Uttarakhand Vs Raj Kumar, 2019 SCC OnLine SC 16,

3. Assistant Engineer, Rajasthan Development Corporation & anr. Vs Gitam Singh (2013) 5 SCC 136,

4. Range Forest Officer Vs S.T. Hadimani alongwith St. of Kar. & anr. Vs S.T. Hadimani (2002) 3 SCC 25

5. St. of U.P. & anr. Vs Chhunna Lal & anr. reported in 2019 SCC OnLine All 4262

6. St. of Karn. Vs Uma Devi reported in (2006) 4 SCC 1

7. Civil Misc. Writ Petition No.1110 of 1986 (U.P. St. Electricity Board & anr. Vs P.O. Labour Court, Gorakhpur & Anr.);

8. Gammon India Limited Vs Niranjana Dass (1984) 1SCC 509;

9. Management of M/s Willcox Buck Well India Ltd. v. Jagannath & ors. AIR 1974 Supreme Court 1166;

10. Bhagwati Prasad Vs Chandramaul reported in AIR 1966 Supreme Court 735;

11. Ram Sarup Gupta (dead) by L.Rs v. Bishun Narain Inter College & ors. reported in AIR 1987 Supreme Court 1242;

12. Surendra Kumar Verma & ors. v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi & anr. (1980) 4 SCC 443;

13. Sudarshan Rajpoot Vs Uttar Pradesh St. Road Transport Corporation ,(2015) 2 SCC 317;

14. Punjab Land Development & Reclamation Corp. Ltd. Chandigarh Vs Presiding Officer, Labour Court, Chandigarh & ors. Divisional Controller, Maharashtra St. Road Transport Corporation, Amravati Vs Chandrashekhar Maribhau Deshmukh & anr. , (1990) 3 SCC 682;

15. U.P. Drugs & Pharmaceuticals Co. Ltd. v. Ramanuj Yadav & ors. (2003) 8 SCC 334;

16. Devinder Singh Vs Municipal Council, Sanaur (2011) 6 SCC 584;

17. R.M. Yellatti Vs Assistant Executive Engineer (2006) 1 SCC 106.

(Delivered by Hon'ble Kshitij Shailendra, J.)

18. BSNL Vs Bhurumal reported in (2014) 7 SCC 177

19. Assistant Engineer, Rajasthan St. Agriculture Marketing Board, Sub-Division, Kota Vs Mohan Lal ,(2013) 14 SCC 543

20. Nagar Mahapalika Vs St. of U.P. & ors.,(2006) 5 SCC 127

21. Municipal Council, Sujanpur Vs Surinder Kumar (2006) 5 SCC 173

22. Haryana St. Electronics Development Corp. Ltd. Vs Mamni (2006) 9 SCC 434

23. Uttaranchal Forest Development Corp. Vs M.C. Joshi (2007) 9 SCC 353

24. Ghaziabad Development Authority & anr. Vs Ashok Kumar & anr. reported in (2008) 4 SCC 261

25. Telecom District Manager Vs Keshab Deb, (2008) 8 SCC 402

26. Jagbir Singh Vs Haryana St. Agriculture Marketing Board (2009) 15 SCC 327

27. Uttar Pradesh St. Electricity Board Vs Laxmi Kant Gupta ,(2009) 16 SCC 562,

28. Bharat Sanchar Nigam Limited Vs Man Singh ,(2012) 1 SCC 558

29. Senior Superintendent Telegraph (Traffic), Bhopal Vs Santosh Kumar Seal & ors., reported in (2010) 6 SCC 773

30. Sita Ram Vs Moti Lal Nehru Farmers Training Institute, AIR 2008 SC 1955

31. Incharge Officer Vs Shankar Shetty reported in JT 2010(9) SC 262.

32. Hari Nandan Prasad Vs Food Corporation of India: (2014) 7 SCC 190,

33. U.P. Power Corpn. Ltd. Vs Bijli Mazdoor Sangh, (2007) 5 SCC 755

1. This writ petition has been filed by Madhyanchal Vidyut Vitaran Nigam Ltd. challenging the impugned award dated 19.10.2015 published on 30.01.2016 passed by the respondent No.2-Presiding Officer, Labour Court, Firozabad with a further prayer to issue a writ in the nature of Mandamus commanding the respondent no.3 not to enforce the aforesaid award.

2. The facts of the case are that petitioner (hereinafter referred to 'as MVVNL') is a company incorporated under the Companies Act-1956 engaged in the business of distribution of electricity within specified areas under the license granted to it by U.P. Electricity Regulatory Commission in exercise of powers under the Electricity Act-2003. The writ petition contains various pleadings with regard to status of the petitioner-Company, however, since the writ petition arises out of an award passed under the provisions of U.P. Industrial Disputes Act-1947 (hereinafter referred to as 'the Act-1947'), it is not necessary to enter into details of such aspects which may not be relevant for the purposes of deciding the controversy. However, emphasis of the petitioner in the writ petition is that the U.P. Power Corporation Ltd. has framed U.P. Rajya Vidyut Parishad Parichalkiya Karmchari Varg Seva Viniymawali-1995 (hereinafter referred to the 'Regulations-1995') governing the services of its employees and workers.

3. The respondent no.4-Workman raised a dispute regarding termination of his services w.e.f. 21.03.2006 and pursuant to a reference made, a case was registered

as Adjudication Case No.42 of 2007. Thereafter, the case was transferred to the Labour Court, Firozabad wherein it was registered as Adjudication Case No.46 of 2015. The case of the workman is that he was appointed on the post of Sub Station Operator on 11.07.1986 on a temporary basis as a daily wager and he had worked in the Establishment upto 20.03.2006, whereafter, his services were orally terminated on 21.03.2006. He contends that oral termination of his services was contrary to law and, therefore, he was entitled to be reinstated on the post with continuity in past services alongwith arrears of salary,

4. On the other hand, the case of the petitioner-Department is that the workman was never appointed and he had never worked on any post. Relying upon the aforesaid Regulations of 1995, it is contended by the Department that all appointments in the Organisation were made by issuing letters of appointment by the Competent Authorities; that no letter of appointment was ever issued to the respondent; the respondent never joined the Department; the posts are filled up holding rigorous selection process; the respondent tried to secure employment in the Organization by hook and crook; the respondent did not fall within the definition of workman; there was no relationship of employer-employee in between the Department and the respondent since the respondent was not an employee/workman in the Organisation, no question of termination of his services arose; no salary was ever paid to the respondent; there was a ban imposed on appointment since 1979 from appointing employees on Muster Roll & temporary basis and that there was no post of Sub Station Operator.

5. The petitioner-Department also filed a rejoinder before Labour Court stating that respondent no.4 was never appointed as a daily wager; that Electricity Urban Division-III Bareilly was created on 01.04.1991 and that respondent no.4 had never worked in the Division, therefore, question of completion of 240 days did not arise. On behalf of the Department Shri G.K. Saxena, Retired Junior Engineer, Sri Pramod, Trainee Junior Engineer, filed affidavit on 17.01.2008 & Shri S.K. Saxena, employed in Division-III filed an affidavit on 09.01.2008. In the affidavit, Shri G.K. Saxena stated that he was employed as Junior Engineer from 20.09.1994 to 30.01.2006, Shri Pramod stated on oath that he was employed from 07.03.2005 to January 2006 and Shri S.K. Saxena, Executive Engineer, stated that he was employed from 28.06.2003 to 22.06.2007 in Vidyut Nagariya Vitaran Khand-III, Madhyanchal Vidyut Vitaran Nigam Ltd. Bareilly. During the period of employment, neither any work was taken from respondent No.4 nor was any payment of salary/wages made to him. The Department also filed various documents such as Notification dated 09.08.1995, letter dated 03.07.1979, Notification dated 13.06.1992, office letter dated 08.11.1990 etc. to demonstrate that the alleged appointment claimed by the workman was not permissible as not only the Department was created much much subsequent in point of time but also such alleged appointment was contrary to law.

6. The workman examined himself and in his statement dated 14.12.2011, he stated that he was appointed as a daily wager on the post of Sub Station Operator and during the period of strike, he continued to work. He referred to various

documents to establish that certain certificates were issued regarding his working and also attendance register on which his signatures were there. He also stated that after termination of his services, he was unemployed and used to get work from contractors from time to time. The workman was cross-examined by the Department and stated about intermittent payments made to him by the Officials of the Department.

7. Insofar as the Officials of the Department are concerned, they were cross-examined by the workman, however, during the cross-examination, consistent stand of the Officials was that the workman was never paid any salary etc. by any of the Officials; that the workman was never appointed as daily wager; that any appointment is made only after following due selection process; that no one was employed on Muster Roll or daily wage basis in the concerned Sub Station. These Officials also **denied** their signatures on the documents which were relied upon by the respondent-workman. The Department laid much emphasis on an Office Memorandum No.1989-C/SEB-I-10A/79 dated 03.07.1979 issued by the U.P. State Electricity Board Shakti Bhawan 14, Ashok Marg, Lucknow by laying much emphasis on the following portion of the said Memorandum:-

*“Board had issued orders vide B.O. No.147-G/SEB-I-10A/1979 that **no engagement** on Muster Roll or Daily rated basis in the categories of Coolies /Mazdoors/Beldars/Chowkidars/Skilled Coolies/ SSOs/ Linemen/ Electrician/ Dutymen/ Wiremen/ Meter Readers etc. would hence forth be made for the*

operation and maintenance of generation, transmission and distribution works from the date of receipt of these orders on February 1, 1979, whichever is earlier. “

8. Further reliance was placed on another Office Memorandum dated 11.06.1990 which reads as follows:-

*“परिषद ने अपने आदेश सं० 1989-जी/एसईवी/- 1-10ए/79 दि० 3 जुलाई, 1979 द्वारा दिनांक **1-8-79 से मस्टररोल या दैनिक वेतन पर कुली/मजदूरी/एस०एस०ओ० आदि किसी भी पद पर रखने तथा कार्य लेने पर रोक लगा दी थी।***

इसके उपरान्त भी इस कार्यालय के संज्ञान में आया है कि कुछ लोग गलत तरीके से विभाग के अवर अभियन्ताओं/ सहायक अभियन्ता भी से मस्टर रोल पर कार्य संबंधी प्रमाण पत्र प्राप्त कर रहे हैं तथा न्यायालयों में ऐसे प्रमाण पत्रों के आधार पर विवाद लगा रहे हैं। यह भी तथ्य प्रकाश में आया है कि कुछ विभागीय अवर अभियन्ता भी इस प्रकार के जाली प्रमाण पत्रों के निर्गत कर रहे हैं। पूर्व में भी इस कार्यालय के पत्रांक 42-मुथेअब/ दि० 10.1.90 द्वारा क्षेत्र के समस्त अधिकारियों के ऐसे प्रकरणों की प्राथमिकता के आधार पर जांच कर दोषी अवर अभियन्ताओं/ अधिकारियों के विरुद्ध कार्यवाही हेतु लिखा गया था। अतः यह स्पष्ट किया जाता है कि परिषद नीति के अन्तर्गत सेवा संबंधी किसी भी प्रकरण पर अधिशासी अभियन्ता स्तर से नीति के किसी भी अधिकारी/ कर्मचारी की **किसी भी प्रकार के प्रमाण पत्र निर्गत करने का अधिकार नहीं है।**

अतः अवर अभियन्ता/ सहायक अभियन्ता उपरोक्त प्रकार के तथा सेवा संबंधी अन्य किसी भी प्रकार के प्रमाण पत्र निर्गत करने के अधिकारी नहीं है और यदि उनके द्वारा इस संबंध में अभी तक कोई प्रमाण पत्र निर्गत किये गये है तो उन्हें **जाली प्रमाण पत्रों की श्रेणी में रखकर अवैध माना जाये।** यह भी अपेक्षा की जाती है कि उनके समस्त अधिशासी अभियन्ता, अधिक्षण अभियन्ता इस संबंध में अपने अधीनस्थ खंडो/ मंडलों के संदर्भ में व्यक्तिगत रुचि लेकर जांच कर वांछित विभागीय कार्यवाही आरम्भ करने तथा परिषद को इस प्रकार से हो रही वित्तीय हानि को रोकने के लिए सभी संभव प्रयास करेंगे।”

9. Placing reliance upon aforesaid, it was contended that the entire story cooked up by the workman regarding his appointment was contrary to the Departmental Circulars and, therefore, the question framed in the adjudication case be decided against the workman.

10. The matter was referred to the Labour Court to answer the Reference as to whether termination of services of the respondent w.e.f. 21.03.2006 from the post of Sub Station Operator was appropriate and/or lawful, if not, what benefit/relief the workman is entitled to.

11. The Labour Court, by impugned award dated 19.10.2015 arrived at a conclusion that the documents filed by the workman could not be disputed and, therefore, termination of his services was contrary to the provisions of the Act-1947, particularly, Section 6-N of the Act and, therefore, the workman was directed to be reinstated with continuity in his past services, 40 % salary for the unserved period and full salary w.e.f the date of award. Cost of Rs.1500/- was also awarded.

12. The contention of learned counsel for the petitioner is to the effect that since appointments in the Department are made after holding rigorous selection process as per the Service Regulations (referred to hereinabove), the respondent no.4 could not claim any relief as no letter of appointment was ever issued to him, he was neither appointed nor paid any remuneration and that since the Department itself was created in the year 1991 there was no question of

appointing the respondent in the year 1986. It was also argued that even if the contention of the workman was accepted, his status was, even as per his own case, that of a “daily wager” which did not fall within the definition and parameters of “workman” and, therefore, the award is illegal. It was further argued that even by looking to the evidence led by the workman, following is the position with regard to his working; particularly as per document W-19 which is alleged Attendance Register.

Exbt.	Date	Period of Employment	No proof of employment
8	26.07.86	11.07.86 to 22.07.86	23.07.86 to 09.11.87 (for one year)
	12.07.88	10.11.87 to 02.12.87	03.12.87 to 05.02.92 (for 4 years 3 months)
6		06.02.92 to 29.02.92	01.03.92 to 14.07.05 (for 13 years) service break
1		15.07.05 to 04.09.05	Finding of conti. Employment 11.7.86 to 20.3.06. perverse
2		05.09.05 to 16.11.05	Documents are forged yet it appears that he
3		17.11.05 to 20.01.06	hardly worked 15.07.05 to 20.03.06 (8 months only).
4		21.01.06 to 20.03.06	Without completing 240 days 6-N does not apply. Not entitled to any relief.

13. In the light of the aforesaid facts, it was argued that the award directing reinstatement with continuity in past services alongwith arrears of salary is thoroughly unsustainable and the findings recorded by the Labour Court are perverse. In support of his submissions, learned counsel for the petitioner has placed reliance upon judgments of Supreme Court in the cases of ***Deputy Executive Engineer v. Kuberbhai Kanjibhai*** reported in (2019) 4 SCC 307, ***State of Uttarakhand v. Raj Kumar*** reported in 2019 SCC OnLine SC 16, ***Assistant Engineer, Rajasthan Development Corporation & Anr. v. Gitam Singh*** reported in (2013) 5 SCC 136, ***Range Forest Officer v. S.T. Hadimani alongwith State of Karnataka & Anr. v. S.T. Hadimani*** reported in (2002) 3 SCC 25 and ***State of U.P. & Anr. v. Chhunna Lal & Anr.*** reported in 2019 SCC OnLine All 4262.

14. A counter affidavit has been filed by respondent no.4 and the stand taken therein is that the Department did not produce any evidence contrary to the case of the workman; that the contention of the Department regarding Service Regulations etc. or the case of ***State of Karnataka v. Uma Devi*** reported in (2006) 4 SCC 1 was unconcerned and unconcerned with the disputes arising out of Act-1947. The defense taken is that Labour Court has rightly passed award on the basis of material placed before it and, therefore, it does not call for any interference. It is further pleaded that since the oral termination was made in violation of the provisions of Act-1947, there was no illegality in awarding reinstatement with backwages and past continuity in service. In support of this submissions, learned

counsel for the respondent no.4 has placed reliance upon following Authorities:-

(a). ***Civil Misc. Writ Petition No.1110 of 1986 (U.P. State Electricity Board & Anr. v. P.O. Labour Court, Gorakhpur & Anr.)***;

(b). ***Gammon India Limited v. Niranjana Dass*** reported in (1984) 1 SCC 509;

(c). ***Management of M/s. Willcox Buck Well India Ltd. v. Jagannath & Ors.*** reported in AIR 1974 Supreme Court 1166;

(d). ***Bhagwati Prasad v. Chandramaul*** reported in AIR 1966 Supreme Court 735;

(e). ***Ram Sarup Gupta (dead) by L.Rs v. Bishun Narain Inter College & Ors.*** reported in AIR 1987 Supreme Court 1242;

(f). ***Surendra Kumar Verma & Ors. v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi & Anr.*** reported in (1980) 4 SCC 443;

(g). ***Sudarshan Rajpoot v. Uttar Pradesh State Road Transport Corporation*** reported in (2015) 2 SCC 317;

(h). ***Punjab Land Development & Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh & Ors. alongwith Divisional Controller, Maharashtra State Road Transport Corporation, Amravati v. Chandrashekhar Maribhau Deshmukh & Anr.*** reported in (1990) 3 SCC 682;

(I). ***U.P. Drugs & Pharmaceuticals Co. Ltd. v. Ramanuj***

Yadav & Ors. reported in (2003) 8 SCC 334;

(j). Devinder Singh v. Municipal Council, Sanaur reported in (2011) 6 SCC 584;

(k). R.M. Yellatti v. Assistant Executive Engineer reported in (2006) 1 SCC 106.

15. Now discussing the legal position as referred to in the Authorities cited by the petitioner-Department, the Supreme Court in **Deputy Executive Engineer** (supra) has held that, in case, the respondent worked as “daily wager” hardly for few years, reinstatement could not be an automatic consequence. The Supreme Court relied upon its judgement in the case of **BSNL v. Bhurumal** reported in **(2014) 7 SCC 177** with specific reference to paragraphs 33, 34 and 35 which are reproduced as under:-

“33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or mala fide and/or by way of victimisation, unfair labour practice, etc. However, when it comes to the case of termination of a daily-wage worker and where the termination is found illegal because of a procedural defect, namely, in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view that in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of

justice. Rationale for shifting in this direction is obvious.

34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non- payment of **retrenchment** compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the **retrenchment** compensation. Since such a workman was working on daily-wage basis and even after he is reinstated, he has no right to seek regularisation [See **State of Karnataka v. Umadevi** (2006) 4 SCC 1]. Thus when he cannot claim regularisation and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of **retrenchment** compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

35. We would, however, like to add a caveat here. There may be cases where termination of a daily-wage worker is found to be illegal on the ground that it was resorted to as unfair labour practice or in violation of the principle of last-come-first-go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him were regularised under some policy but the workman concerned terminated. In such circumstances, the terminated worker should not be **denied** reinstatement unless there are some other

weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied."

16. The Supreme Court took similar view in the case of **State of Uttarkhand** (supra) by placing reliance upon the same judgement of **BSNL v. Bhurumal** (supra). In the case of **Assistant Engineer, Rajasthan Development Corporation & Anr.** (supra), the Apex Court, after placing reliance upon various Authorities on the subject directed award of compensation of Rs.50,000/- as sufficient to meet the ends of justice in the light of the fact that daily wager has worked for a very short period. Learned counsel for the petitioner has laid much emphasis on the judgement of Supreme Court in the case of **Range Forest Officer** (supra) and argued that mere filing of an affidavit by the workman cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that he had worked for 240 days in a year. In 'paragraph 3' of the said judgment, the Supreme Court observed that no proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman and on this ground, the award was interfered with. The Supreme Court in the case of **State of U.P. & Anr. v. Chunna Lal & Anr.** (supra) after discussing the issue of reinstatement with backwages, allowed the writ petition filed by the State observing that the workman had failed to discharge the burden to prove his case of 240 days by leading cogent evidence and award was found to be unsustainable and was, accordingly, set aside.

17. Further in the case of **Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota Versus Mohan Lal reported in (2013) 14 SCC 543** in similar circumstances, a muster roll employee in a government establishment who had been found to have worked for 286 days in twelve calendar months period prior to his dis-engagement, and in whose case the industrial dispute was raised after six years, was found not entitled to reinstatement but compensation in lieu thereof, Rs. One lac only.

18. In **Nagar Mahapalika vs. State of U.P. and Ors. reported in (2006) 5 SCC 127**, it was held by Supreme Court that non compliance with the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947 (this provision is broadly pari materia with Section 25-F), although, leads to the grant of a relief of reinstatement with full back wages and continuity of service in favour of the workman, the same would not mean that such relief is to be granted automatically or as a matter of course. It was emphasised that the Labour Court must take into consideration the relevant facts for exercise of its discretion in granting the relief.

19. Supreme Court in **Municipal Council, Sujapur vs. Surinder Kumar reported in (2006) 5 SCC 173**, reiterated the above legal position. That was a case where the Labour Court had granted reinstatement in service with full back wages to the workman as statutory provisions were not followed. The award was not interfered with by the High Court. However, the Court granted monetary compensation in lieu of reinstatement.

20. In ***Haryana State Electronics Development Corporation Ltd. v. Mamni reported in (2006) 9 SCC 434*** following Nagar Mahapalika (supra), Supreme Court held that the reinstatement granted to the workman because there was violation of Section 25F, was not justified and modified the order of reinstatement by directing that the workman shall be compensated by payment of a sum of Rs.25,000/- instead of the order of the reinstatement.

21. In ***Uttaranchal Forest Development Corporation v. M.C. Joshi reported in (2007) 9 SCC 353***, the services were terminated on 24.11.1991 in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act. He had completed 240 days of continuous work in a period of twelve months preceding the order of termination. The workman approached the Conciliation Officer on or about 02.09.1996, i.e., after a period of about five years. The Labour Court granted to the workman, M.C.Joshi, relief of reinstatement with 50% back wages. In the writ petition filed by the Corporation, the direction of reinstatement was maintained but back wages were reduced from 50% to 25%. The Supreme Court substituted the award of reinstatement by compensation for a sum of Rs.75,000/-.

22. In ***Ghaziabad Development Authority and Another v. Ashok Kumar and Another reported in (2008) 4 SCC 261***, the Apex Court was concerned with the question as to whether the Labour Court was justified in awarding relief of reinstatement in favour of the workman who had worked as daily wager for two years. His termination was held to be violative of U.P. Industrial Disputes Act. The Supreme Court held that the Labour Court should not have directed reinstatement of the workman in service and substituted the order of

reinstatement by awarding compensation of Rs.50,000/-

23. In ***Telecom District Manager v. Keshab Deb, reported in (2008) 8 SCC 402***, the termination of the workman who was a daily wager, was held illegal on diverse grounds including violation of the provisions of Section 25-F. Supreme Court held that even in a case where order of termination was illegal, automatic direction for reinstatement with full back wages was not contemplated. The Court substituted the order of reinstatement by an award of compensation of Rs.1,50,000/-.

24. In ***Jagbir Singh v. Haryana State Agriculture Marketing Board reported in (2009) 15 SCC 327***, the workman had worked from 01.09.1995 to 18.07.1996 as a daily wager and was granted compensation of Rs.50,000/- in lieu of reinstatement with back wages.

25. It is also necessary to refer to subsequent three decisions of Supreme Court, namely, ***Uttar Pradesh State Electricity Board vs. Laxmi Kant Gupta reported in (2009) 16 SCC 562***, ***Bharat Sanchar Nigam Limited vs. Man Singh reported in (2012) 1 SCC 558*** and ***Senior Superintendent Telegraph (Traffic), Bhopal vs. Santosh Kumar Seal and Others, reported in (2010) 6 SCC 773***, where the view has been taken in line with the cases discussed above. As a matter of fact in ***Santosh Kumar Seal*** (supra), Apex Court awarded compensation of Rs.40,000/-to each of the workmen who were illegally retrenched as they were engaged as daily wagers about 25 years back and worked hardly for two or three years. It was held that the relief of reinstatement cannot be said to be justified and instead granted monetary compensation.

26. Further, The Supreme Court in several authorities some of which are mentioned below has held that if the only defect in the termination order is non payment of **retrenchment** compensation as required by Section 25 F of Industrial Dispute Act (or Section 6 N of U.P.I.D. Act) then it is not always necessary to direct reinstatement with full back wages and that in such situation more often than not proper relief may be to award consolidated damages/compensation particularly when the employer is Government or Governmental agency and relevant rules have not been followed before appointment.

- **Nagar Mahapalika v. State of U.P., AIR 2006 SC 2113**

- **Haryana State Electronics Devpt Corpn v. Mamni, AIR 2006 SC 2427**

- **Sita Ram v. Moti Lal Nehru Farmers Training Institute, AIR 2008 SC 1955**

- **Jagbir Singh Vs. Haryana State Agriculture Marketing Board and another, AIR 2009 SC 3004.**

27. In **Senior Superintendent, Telegraph (Traffic) Bhopal Vs. Santosh Kumar Seal and others, reported in AIR 2010 SC 2140**, it has been held that if daily wagers had worked for 2 or 3 years and their services were terminated without payment of **retrenchment** compensation then consolidated damages should be awarded to them (Rs.40,000/- to each of the workmen was awarded in the said case). It has also been held that daily wager does not hold a post and can not be equated with permanent employee. This view has been

reiterated in **Incharge Officer Vs. Shankar Shetty reported in JT 2010(9) SC 262.**

28. Now dealing with the Authorities cited by the learned counsel for the respondent-workman, the Supreme Court, in the case of **Surendra Kumar Verma (supra)**, held that in case termination was contrary to the provisions of Industrial Law, reinstatement with backwages should be ordered. In **Sudarshan Rajpoot (supra)**, the Apex Court held in paragraphs 23, 24 and 25 as follows:-

*“23. Further, the reliance placed upon the decision of this Court on **Uma Devi (supra)** case by the High Court to reverse the finding of fact recorded in the award in favour of the workman in answering the points of dispute in the negative, is not tenable in law in view of the judgment of this Court in **Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana, (2009) 8 SCC 556**, wherein, this Court after adverting to **Uma Devi’s** case (supra) at para 36, has held that the said case*

“does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of the Schedule IV where the posts on which they have been working exist.”

Further, this Court held that

*“36.....**Uma Devi’s** case cannot be held to have overridden the powers of Industrial and Labour Courts in passing appropriate order under Section 30 of the*

MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of the Schedule IV is established.”

24. We are of the opinion that the view taken in **Maharashtra State Road Transport Corpn. & Anr.**(supra) at para 36 after distinguishing **Uma Devi’s** case is the plausible view. Therefore, we have to hold that the finding of the High Court in setting aside the finding of fact recorded by the Labour Court in its award by applying **Uma Devi** case (supra) is wholly untenable in law. Therefore, the same is set aside by this Court.

25. This Court in the later judgment in the case of **Hari Nandan Prasad v. Food Corporation of India: (2014) 7 SCC 190**, after advertng to the law laid down in **U.P. Power Corpn. Ltd. v. Bijli Mazdoor Sangh (2007) 5 SCC 755** and **Maharashtra State Road Transport Corpn. & Anr.** (supra) wherein **Uma Devi’s** case is adverted to in both the cases, held that on a harmonious reading of the two judgments, even when there are posts available, in the absence of any unfair labour practice the Labour Court cannot give direction for regularisation only because a worker has continued as daily-wage worker/ad hoc/temporary worker for number of years. Further, such a direction cannot be given when the worker concerned does not meet the eligibility requirement of the post in question as per the recruitment rules.”

29. By relying on the aforesaid Authority, the submission of learned counsel for the respondent is that whatsoever arguments were advanced by the petitioner-Department regarding alleged appointment in violation of the Service Regulations and/or number of judgements

passed by the Supreme Court in the case of **State of Karnataka v. Uma Devi** (supra), are liable to be discarded as the case of **Uma Devi** (supra) cannot be held to have over-ridden the powers of the Industrial and Labour Courts in passing appropriate award.

30. The judgment of **Punjab Land Development & Reclamation Corporation Ltd. Chandigarh** (supra) was on the point of elasticity of the definition of **retrenchment** and it was held that whatever words are used in the Statute, the same have to be given their literal meaning and any other interpretation would not be according to law. The Apex Court in the case of **U.P. Drugs & Pharmaceuticals Co. Ltd.** (supra) held that after the workman had worked for more than 240 days in earlier years and even though during the year of his **retrenchment**, he had not worked for 240 days, he would be deemed to be in continuous service and his **retrenchment** would be violative of the provisions of Industrial Law. The Supreme Court’s decision in the case of **Devinder Singh** (supra) is on the point that even daily wager cannot be discriminated while considering their case under the Industrial Law as the definition of **workman means any person including an apprentice employed in any industry to do any manual, un-skilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be expressed or implied and includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of the dispute.** The Supreme Court held that source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the

quantum of wages/pay and the mode of payment are not at all relevant for deciding as to whether or not a person is a workman under the Act.

31. In **R.M. Yellati** (supra) in 'paragraph 17', the Supreme Court held that it is a burden upon employer to lead evidence regarding services of the workman as the workman can only call upon the employer to produce before the Court, nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, attendance register etc. Other judgments of **U.P. State Electricity Board & Anr.**, (supra), **Gammon India Limited** (supra) and **Management of M/s. Willcox Buck Well India Ltd.** (supra) are also on the point that when termination is found to be contrary to the provisions of Industrial Act, relief of reinstatement of the workman with continuity in services and backwages is just and proper.

32. Learned counsel for the respondent-workman has also vehemently argued that the case of the petitioner is contrary to the stand taken before the Labour Court. It is argued that the Department had alleged in the written statement that the workman had never worked prior to 21.03.2006 on any post, however, the case was argued, as if, a daily wager who had worked for certain period of time, could not be reinstated with backwages and continuity in service. It was also argued that relief should be founded on pleadings led by the parties and whenever the question about lack of pleading is raised, the Court should find out whether in substance, the parties knew the case and the issue upon which they went to trial. The

decisions of Supreme Court of **Ram Sarup Gupta (dead) by L.R.s** (supra) and **Bhagwati Prasad** (supra) are on the point of pleadings and evidence of parties.

33. I have heard learned counsel for the parties and perused the record. I find that award of the Labour Court is based upon the fact that the workman had produced certain documents establishing his work in the Organization and, in the opinion of the Labour Court the Department could not rebut the same. Certain certificates as well as attendance register were considered by the Labour Court to arrive at a conclusion that the workman had been employed and worked in the Organization. However, I find that the Labour Court has not considered the documents filed by the Department, i.e. to say that mode and manner of appointing persons, the ban put on appointments in 1979, subsequent creation of the Department in 1991, affidavits filed by the Officers stating that they had never taken any work from the workman nor was any payment made by them to the workman nor did the Labour Court consider the cross-examination of the Officials whereby signatures on the Certificates were specifically **denied** by them. The Labour Court further failed to appreciate that for making an award for reinstatement and backwages with continuity in services, mere finding that oral termination was not according to law would not ipso facto lead to a conclusion that the workman should be reinstated with backwages and continuity in service. Neither there is any finding to the effect that the workman was not gainfully employed after 2006 nor did the Labour Court examine the period for which the workman allegedly rendered his services. In fact, the award is simply based upon

alleged non-rebuttal by the Department as against the case set up by the workman, although I find that the Department by “tooth and nail” opposed the claim of the workman by leading cogent evidence, both oral and documentary, but the same has not been given due consideration by the Labour Court.

34. The question of gainful/non-gainful employment/engagement is considered in his statement dated 14.12.2011 wherein the respondent-workman took contradictory stand that is to say that, on one hand, he stated that after termination of his services, he was unemployed, on the other hand, in the same line, he stated that whenever he got work from the contractors, he used to perform the same and, therefore, it is not a case where workman was thoroughly unemployed and, hence, on this score, the relief of reinstatement with backwages or continuity in service would not be appropriate.

35. In the facts and circumstances of the case, a consolidated and lump sum amount of compensation could have served the purpose to console the respondent, inasmuch as, in the counter affidavit filed in the year 2016, the age of the respondent no.4 was described as 53 years and, therefore, as of now, he must have attained the age of superannuation and in view of the same, it would not be just and proper for this Court to direct for reinstatement as reinstatement after attaining the age of superannuation would not be in accordance with law. For this reason also, impugned award requires modification in terms of granting just and proper compensation.

36. In view of the above facts and considering the ratio of aforesaid authorities cited at the Bar, the writ petition is ***allowed in-part***. The impugned judgment and award dated 19.10.2015 published on 30.01.2016 passed by the respondent No.2- Presiding Officer, Labour Court, Firozabad is ***hereby modified*** and relief of reinstatement with continuity in service and backwages is hereby ***denied***. However, in totality of the facts and circumstances of the case, award of Rs. 2,00,000/- as lumpsum compensation to the workman would meet the ends of justice.

37. Accordingly, a Writ of ***Mandamus*** is issued to the petitioner to make payment of sum of ***Rs.2,00,000/- to the respondent no.4-workman within a period of one month*** from the date of production of certified copy of this order before the petitioner, failing which, it would be open for the respondent No.4-workman to get the award executed in accordance with law, and, in case, such execution proceedings are instituted, the same shall be concluded within a period of ***three months***, thereafter.

(2023) 5 ILRA 355

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 03.03.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Special Appeal No. 32 of 2023

Dr. Haider Ali

...Appellant

Versus

Akhilesh Kumar Singh & Ors.

...Respondents

Counsel for the Appellant:

Sri T. Islam, Sri A.B.N. Tripathi, Sri Syed Ali Murtaza

Counsel for the Respondents:

Sri Shashank Shekhar Singh, Sri Shailesh Upadhyay

A. Education/Service Law – Educational Qualification - Appointment - Aligarh Muslim University Act, 1920 - Section 19 - The educational qualification for recruitment to a post cannot ordinarily be condoned. If the essential educational qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified. An appointment which is contrary to the statute/statutory rules would be void in law. **An illegality cannot be regularized, particularly, when the statute in no unmistakable term says so. Only an irregularity can be.** (Para 18)

The University had framed Rules in 2016, making B.Ed. degree an essential qualification for the post of TGT (Agriculture). The Rules incorporating the qualification came to be duly approved by the Executive Council of the University. In the circumstances, Office Memo dated 30.04.2016, relaxing the qualification for internal candidate bypassing the Rules is nullity being in teeth of the statutory Rules. It is beyond the jurisdiction, power and authority of the Vice-Chancellor to bypass the Rules, as relaxation in qualification is not referable to S. 19(3) of the Act, 1920. Office Memo dated 30.04.2016, could not have been issued by the Vice-Chancellor as that would not fall within the expression "immediate action is necessary on any matter", for the reason that the competent authority of the University i.e. Executive Council had duly approved the Rules mandating minimum qualification for the post of TGT (Agriculture). Accordingly, Office Memo dated 30.04.2016, being issued in violation of the statutory provisions is unsustainable in the eye of law and cannot be given effect to. An appointment which is contrary to the statutory Rules/statutes would be void in law. (Para 15)

B. An appointment should be made strictly, in accordance with the statutory provisions, a candidate entitled to appointment should not be denied appointment on any pretext. Appointment should be made strictly in accordance with the statutory provisions and a candidate who is entitled for appointment, should not be denied the same on any pretext whatsoever as usurpation of the post by somebody else in any circumstances is not possible. (Para 19)

C. Any appointment made in violation of the mandate of Article 14 and 16 of the Constitution is not only irregular but also illegal and cannot be sustained. Article 14 is an integral part of our system, each and every State action is to be tested on the touchstone of equality. (Para 20)

Therefore, the appellant cannot take advantage of an Office Memo which was issued bypassing the mandate of the Executive Council approving the Rules governing the qualification of TGT (Agriculture). The document is *void ab-initio*, hence, nullity in the eye of law. (Para 21)

So far it relates to the qualification of TGT (Agriculture), since University had adopted the Rules and determined the minimum qualification for the post of TGT (Agriculture), inter-alia, mandating B.Ed. as an essential qualification, it was not open for the University to have approved selection of a candidate who admittedly, lacks the essential qualification. It is of no relevance that the candidate was an internal candidate working since 2010. Admittedly, on the date of application, pursuant to the advertisement for session 2022-2023, appellant lacked the essential qualification for the post of TGT (Agriculture), hence, was not qualified. (Para 22)

D. There cannot be relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved in the relevant statutory Rules. Even if the power of relaxation is provided in the Rules, it must still be mentioned in the advertisement, which was not the case in the case in hand. (Para 23)

E. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of quality contained in Articles 14 and 16 of the Constitution of India. (Para 23)

The record reflects that the writ petitioner/first respondent was the sole candidate fulfilling the essential qualification for the post of TGT (Agriculture), all other candidates, including the appellant, did not have B.Ed. degree. The candidature of the other two external candidates was rejected by the Selection Committee for the said reason, but, appellant was selected even though he did not have B.Ed. degree. The advertisement rightly did not grant any relaxation in the minimum qualification to internal candidate, as that would be hit by the Rules governing selection/appointment of TGT (Agriculture), duly approved by the Executive Council. The Vice-Chancellor lacked power, authority and jurisdiction to bypass the Executive Council on a subject (qualification) which came to be duly approved by Executive Council and the Vice-Chancellor as per the statutes. The Rules thus framed was binding upon all the authorities of the University and could not have been diluted by an administrative order. The selection and appointment of the appellant is per se illegal and violative of Article 14 and 16 of the Constitution of India. (Para 24)

F. The employee has absolute right to determine and decide the qualifications for any post, once such an exercise is undertaken under the rules, the same would bind the authorities and cannot be diluted even by the Courts. (Para 25)

G. Words and Phrases – Black's Law Dictionary – 'Void' - "Void" means-without any legal force, effect or consequence; invalid; null; worthless; sipher; useless and ineffectual. 'Void' has been defined as: ineffectual; nugatory; having having no legal force or legal effect: unable in law to support the purpose for which it was untended; nugatory and ineffectual so that nothing can cure it; not valid. "Void" means a contract entirely devoid of legal effect or it is devoid of main result contemplated.

"Void" means non-existent from its very inception and a ban again its recognition. It also means merely a nullity and may be ignored even in collateral proceeding as if it never were. "Void" does not have any legal force or effect, the validity of which may be ascertained by any person whose rights are affected at any time or at any place directly or indirectly. (Para 16, 17)

Special appeal dismissed. (E-4)

Precedent followed:

1. Kalawati Vs Bisheshwar, AIR 1968 SC 261 (Para 17)
2. Nutun Kumar Vs II A.D.J., AIR 1994 All 298 (Para 17)
3. Pramod Kumar Vs U.P. Secondary Education Services Commission & ors., (2008) 7 SCC 153 (Para 18)
4. Purshottam Vs Chairman, Maharashtra State Electricity Board, (1999) 6 SCC 49 (Para 19)
5. Delhi Development Horticulture Employees Union Vs Delhi Administration, Delhi, AIR 1992 SC 789 (Para 20)
6. St. of Har. Vs Piara Singh, 1992 SC 2130 (Para 20)
7. Prabhat Kumar Sharma Vs St. of U. P., AIR 1996 SC 2638 (Para 20)
8. J.A.S. Inter College Khurja, U.P. Vs St. of U. P., AIR 1996 SC 3420 (Para 20)
9. M.P. Housing Board Vs Manoj Shrivastava, AIR 2006 SC 3499 (Para 20)
10. M.P. State Agro Industries Development Corp. Ltd. Vs S.C. Pandey, (2006) 2 SCC 716 (Para 20)
11. St. of M. P. Vs Ku. Sandhya Tomar, (2013) 11 SCC 357 (Para 20)
12. Bedanga Talukdar Vs Saifudaullah Khan & ors., (2011) SCC 85 (Para 23)

13. Punjab National Bank Vs Anit Kumar Das, 2020 SCC Online SC 897 (Para 25)

Present special appeal challenges the judgment and order dated 08.12.2022, passed by learned Single Judge in Writ-A No. 13257 of 2022.

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

1. Heard Sri T. Islam, learned Counsel for the petitioner and Sri Shashank Shekhar Singh, learned Counsel for the respondent-University.

2. The instant intra Court appeal has been filed by the fifth respondent of the writ petition challenging the order of the learned Single Judge dated 08 December, 2022, whereby, the writ petition instituted by the petitioner / first respondent, herein, was allowed, setting aside the appointment of the appellant on the post of Trained Graduate Teacher (Agriculture), at Aligarh Muslim University/School, for want of essential qualification i.e. B.Ed. degree.

3. Learned Counsel for the appellant submits that appellant came to be appointed on temporary basis as a Trained Graduate Teacher (Agriculture), (for short TGT), vide appointment letter dated 20 November, 2010. The appointment was for an academic session which continued on year to year basis and finally an advertisement dated 20 May, 2022, came to be issued by the third respondent - Directorate of School Education, Aligarh Muslim University, Aligarh, (for short, "AMU"). The advertisement sought applications for various posts including TGT (Agriculture) for the session 2022 - 23. The qualification of the post, inter-alia, mandated that the candidate should have B.Ed. degree or equivalent from a recognized University. The advertisement

further provided for age relaxation as per Kendriya Vidyalaya Sanghathan (KVS) norms, to various categories. It is agreed between the parties that the relaxation does not pertain to qualification for TGT (Agriculture). Pursuant to the advertisement, the first respondent / writ petitioner had applied for the post and it is not in a dispute that he fulfills the educational qualifications duly notified in the advertisement i.e. he was having B.Ed. degree. In any case, the appellant came to be selected on 16 July, 2022, on the recommendation made by the Local Selection Committee, despite not having B.Ed. degree. The validity of the selection / appointment of the fifth respondent was challenged in writ petition.

4. Learned Single Judge in the impugned judgment noted that appellant is not having requisite minimum qualification i.e. B.Ed. degree and no relaxation with regard to the qualification was notified in the advertisement. Further, the counsel appearing for AMU submitted that there is no order with regard to relaxation of the eligibility conditions and neither, any relaxation was granted to the appellant. The writ petition accordingly came to be allowed. The relevant portion of the impugned order, reads as under :-

"10. Also, submission advanced by learned counsel for the respondent that the selection made is wholly temporary, carries no weight. Once the selection was required to be made in accordance with law, irrespective of the term for which it may have been made, that law must be seen to be fully applied. In any case, it is apparent that the respondent no.5 has continued on temporary basis for some time i.e. since 2020 against annual renewal/re-appointment.

11. In view of the above, present petition succeeds. It is allowed."

5. In this backdrop, learned Counsel appearing for the appellant submits that since the appellant has continued on temporary basis from the academic session 2010-11, and being an internal candidate of the University is entitled to relaxation in qualification which was duly exercised by the Vice-Chancellor in exercise of power under Section 19 of the Aligarh Muslim University Act, 1920, (for short "Act, 1920"). Section 19 (3) of the Act, 1920, which is relevant for the case, reads as under :-

19. The Vice-Chancellor :-

(1)

(2)

(3) The Vice-Chancellor may, if he is of opinion that immediate action is necessary on any matter, exercise any power conferred on any authority of the University by or under this Act and shall report to such authority the action taken by him on such matter;

Provided that if the authority concerned is of opinion that such action ought not to have been taken, it may refer the matter to the Visitor whose decision thereon shall be final;

Provided further that any person in the service of the University who is aggrieved by the action taken by the Vice-Chancellor under this sub-section shall have the right to appeal against such action to the Executive Council within three months from the date on which decision on such action is communicated to him and thereupon the Executive Council may confirm, modify or reverse the action taken by the Vice-Chancellor.

6. On a bare reading of Sub Section (3) of Section 19 of the Act, 1920, it does not transpire, nor can be inferred, that any specific power has been conferred upon the Vice-Chancellor to relax the qualification which has duly been adopted by such authority of the University after approval of the Executive Council. Sub Section (3) confers emergency / removal of difficulty power upon the Vice-Chancellor to take immediate action on any matter conferred on any authority of the University or under the Act, 1920, and thereafter shall report to such authority the action taken by the Vice-Chancellor on such matter. The authority of the University may agree / disagree with decision of the Vice-Chancellor, then in that event matter would be referred to the Visitor for final decision.

7. It is not the case of the appellant that the decision with regard to qualification of TGT (Agriculture) was yet to be taken by the competent authority of the University, therefore, the Vice-Chancellor had to take "immediate action" thereon. On the contrary the Executive Council had already approved the qualification for TGT which was to be followed while making appointment for the post. This fact is admitted to the parties.

8. Attention of the Court has been drawn to Office Memo dated 16 January, 2016, issued by the Deputy Registrar (Councils), (annexure CA-7 to the writ petition), wherein, it has been noted that the proposal of the Director, Directorate of School Education, relating to University Schools, the Vice-Chancellor in supersession of the earlier qualification approved by the Executive Council, has accorded approval to the Recruitment Rules / Qualifications for Selection and Promotion of AMU Schools Teachers, as

per KVS norms, under Section 19(3) of the AMU Act, 1920. In other words, the Rules relating to qualification of TGT (Agriculture) came to be approved which was binding upon the Selection Committee.

9. It is not in dispute that B.Ed. degree was included as an essential qualification for the post of TGT (Agriculture) in the Rules. In other words the qualification prescribed for the post of TGT (Agriculture) was in place on the date of advertisement.

10. Reliance has been placed by the learned counsel for the appellant on Office Memo dated 30 April, 2016, which provides for exemption in age limit and the mandated qualification to be granted only to those temporary teachers who were eligible at the time of their first appointment and thereafter appointed time and again subsequently for a period of three months with break.

11. It is on the strength of the aforementioned Office Memo dated 30 April, 2016, issued with the approval of the Vice-Chancellor, the learned counsel for the appellant submits that appellant was entitled to relaxation in the qualification being an internal candidate continuing as TGT (Agriculture) since 2010. It is submitted that the Office Memo dated 30 April, 2016, was not under challenge before the writ Court.

12. Learned Counsel appearing for the respondent-University had taken a categorical stand that no such relaxation was granted to the appellant pursuant to Office Memo dated 30 April, 2016. No document to that effect is available on the record of the University. In other words, it is urged that the University had

not granted relaxation in qualification to the appellant.

13. In any case, learned counsel appearing for the appellant submits that since the Office Memo dated 30 April, 2016, is available and it grants relaxation in qualification to temporary teachers, appellant was rightly appointed after relaxation being granted to him.

14. The short question that arises for consideration is as to whether the appellant was entitled to relaxation in qualification against the Rules.

15. It is not being disputed by the learned Counsel for the respective parties that the University had framed Rules in 2016, making B.Ed. degree an essential qualification for the post of TGT (Agriculture). The Rules incorporating the qualification came to be duly approved by the Executive Council of the University. In the circumstances, Office Memo dated 30 April, 2016, relaxing the qualification for internal candidate bypassing the Rules is nullity being in teeth of the statutory Rules. It is beyond the jurisdiction, power and authority of the Vice-Chancellor to bypass the Rules, as relaxation in qualification is not referable to Section 19(3) of the Act, 1920. Office Memo dated 30 April, 2016, could not have been issued by the Vice-Chancellor as that would not fall within the expression "immediate action is necessary on any matter", for the reason that the competent authority of the University i.e. Executive Council had duly approved the Rules mandating minimum qualification for the post of TGT (Agriculture). Accordingly, Office Memo dated 30 April, 2016, being issued in violation of the statutory provisions is unsustainable in the eye of law and cannot be given effect to.

An appointment which is contrary to the statutory Rules / statues would be void in law.

16. Void has been defined as: ineffectual; nugatory; having having no legal force or legal effect: unable in law to support the purpose for which it was untended; nugatory and ineffectual so that nothing can cure it; not valid¹. "Void" means a contract entirely devoid of legal effect or it is devoid of main result contemplated.

17. In **Kalawati versus Bisheshwar**², the Supreme Court held that "void" means non-existent from its very inception and a ban again its recognition. It also means merely a nullity and may be ignored even in collateral proceeding as if it never were. "Void" does not have any legal force or effect, the validity of which may be ascertained by any person whose rights are affected at any time or at any place directly or indirectly. "Void" means - without any legal force, effect or consequence; invalid; null; worthless; sipher; useless and ineffectual. [**Vide: Nutan Kumar versus II Additional District Judge**]³].

18. The educational qualification for recruitment to a post cannot ordinarily be condoned. In **Pramod Kumar versus U.P. Secondary Education Services Commission and others**⁴, the Court has held as under :-

"18. If the essential educational qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified. An appointment which is contrary to the statute/statutory rules would be void in law. An illegality cannot be regularized,

particularly, when the statute in no unmistakable term says so. Only an irregularity can be. {See Secretary, State of Karnataka and Others Vs. Umadevi (3) and Others [(2006) 4 SCC 1], National Fertilizers Ltd. and Ors. Vs. Somvir Singh [(2006) 5 SCC 493] and Post Master General, Kolkata and Ors. Vs. Tutu Das (Dutta) [(2007) 5 SCC 317] }"

19. An appointment should be made strictly, in accordance with the statutory provisions, a candidate entitled to appointment should not be denied appointment on any pretext. In **Purshottam versus Chairman, Maharashtra State Electricity Board**⁵, the Supreme Court has held that appointment should be made strictly in accordance with the statutory provisions and a candidate who is entitled for appointment, should not be denied the same on any pretext whatsoever as usurpation of the post by somebody else in any circumstances is not possible.

20. Article 14 is an integral part of our system, each and every State action is to be tested on the touchstone of equality. Any appointment made in violation of the mandate of Article 14 and 16 of the Constitution is not only irregular but also illegal and cannot be sustained in view of the judgments rendered by Supreme Court in **Delhi Development Horticulture Employees' Union versus Delhi Administration**, Delhi⁶; **State of Haryana versus Piara Singh**⁷; **Prabhat Kumar Sharma versus State of Uttar Pradesh**⁸; **J.A.S. Inter College, Khurja, U.P. versus State of Uttar Pradesh**⁹; **M.P. Housing Board versus Manoj Shrivastava**¹⁰; **M.P. State Agro Industries Development Corporation Ltd. versus S.C. Pandey**¹¹; and **State of Madhya Pradesh versus Ku. Sandhya Tomar**¹².

21. In view thereof, the appellant cannot take advantage of an Office Memo which was issued bypassing the mandate of the Executive Council approving the Rules governing the qualification of TGT (Agriculture). The document is void ab-initio, hence, nullity in the eye of law.

22. In so far it relates to the qualification of TGT (Agriculture), we are in agreement with the reasoning assigned by the learned Single Judge that since University had adopted the Rules and determined the minimum qualification for the post of TGT (Agriculture), inter-alia, mandating B.Ed. as an essential qualification, it was not open for the University to have approved selection of a candidate who admittedly, lacks the essential qualification. It is of no relevance that the candidate was an internal candidate working since 2010. Admittedly, on the date of application, pursuant to the advertisement for session 2022 - 2023, appellant lacked the essential qualification for the post of TGT (Agriculture), hence, was not qualified.

23. There cannot be relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved in the relevant statutory Rules. Even if the power of relaxation is provided in the Rules, it must still be mentioned in the advertisement, which was not the case in the case in hand. In **Bedanga Talukdar versus Saifudaullah Khan and others**¹³, the Court has held as under :-

"29. In our opinion, it is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with Article 14 of the Constitution of India. In other words, there must be no arbitrariness

*resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure..... **There can not be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant Statutory Rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the advertisement. In the absence of such power in the Rules, it could still be provided in the advertisement.** However, the power of relaxation, if exercised, has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of quality contained in Articles 14 and 16 of the Constitution of India."*

24. The record reflects that the writ petitioner / first respondent was the sole candidate fulfilling the essential qualification for the post of TGT (Agriculture), all other candidates, including the appellant, did not have B.Ed. degree. The candidature of the other two external candidates was rejected by the Selection Committee for the said reason, but, appellant was selected even though he did not have B.Ed. degree. The advertisement rightly did not grant any relaxation in the minimum qualification to internal candidate, as that would be hit by the Rules governing selection / appointment of TGT (Agriculture), duly approved by the Executive Council. The Vice-Chancellor lacked power, authority and jurisdiction to bypass the Executive

Council on a subject (qualification) which came to be duly approved by Executive Council and the Vice-Chancellor as per the statutes. The Rules thus framed was binding upon all the authorities of the University and could not have been diluted by an administrative order. The selection and appointment of the appellant is perse illegal and violative of Article 14 and 16 of the Constitution of India.

25. The employee has absolute right to determine and decide the qualifications for any post, once such an exercise is undertaken under the rules, the same would bind the authorities and cannot be diluted even by the Courts. In **Punjab National Bank Vs. Anit Kumar Das**¹⁴, the Court observed as under:

21. "it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the Courts to consider and assess. A greater latitude is permitted by the Courts for the employer to prescribe qualifications for any post. There is a rationale behind it. Qualifications are prescribed keeping in view the need and interest of an Institution or an Industry or an establishment as the case may be. The Courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications....."

26. Learned Counsel for the appellant is unable to point out any illegality, infirmity or perversity in the impugned order.

27. We are unable to persuade ourselves to take an opinion different from that taken by the learned Single Judge.

28. The appeal being devoid of merit, is accordingly, dismissed.

(2023) 5 ILRA 363

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.04.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

THE HON'BLE PRASHANT KUMAR, J.

Special Appeal No. 183 of 2023

State of U.P. & Ors.

...Appellants

Versus

Ram Ji Singh

...Respondent

Counsel for the Appellants:

Sri Rama Nand Pandey

Counsel for the Respondent:

Sri Arvind Kumar Singh, Sri Akhilesh Singh,
Sri Rakesh Singh, Sri Ravish Kumar Singh

A. Service Law – Recovery from pension - It has been held by the Supreme Court that employer is entitled to recover the amount in cases where the employee has been given monetary benefits by mistake which could have occurred on account of a variety of reasons; including the grant of a status, which the concerned employee was not entitled to; or payment of salary in a higher scale, than in consonance of the right of the concerned employee; or because of a wrongful fixation of salary of the employee, consequent upon the upward revision of pay-scales or for having been granted allowances, for which the concerned employee was not authorised. Provided the excess payment was not attributable to any fraud or misrepresentation by the employee. (Para 5)

The categories which have been delineated by the Supreme Court are as follows :-

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recovery.

In the instant case, indisputably, the writ petitioner was a Class-III employee and, therefore, would fall under first category. The recovery was sought to be made after his retirement and consequently, he would also be covered under the second category. The amount sought to be recovered was allegedly paid to the writ petitioner during the period spread over 35 years while in service and, therefore, he would also be covered by Clause (iii). The small amount of house rent allowance that was paid to the writ petitioner on a monthly basis in last 35 years when recovered in lump sum post-retirement was definitely an action which was harsh and iniquitous and this would be covered under Clause (v) as well. (Para 7)

The judgement of the Supreme Court covers cases relating to wrong or excess payment of allowances therefore it would also cover the payment to the petitioner by way of house rent allowance. If there was any default in payment of rent, its recovery, if permissible at this distance of time would be a separate and distinct cause of action, but **it was wholly arbitrary and illegal to recover the house rent allowance, paid over the years, without any fraud or misrepresentation on part of the employee.** (Para 8)

Special appeal dismissed. (E-4)

Precedent followed:

St. of Pun. & ors. Vs Rafiq Masih (White Washer), 2015 (4) SCC 334 (Para 1)

Precedent distinguished:

High Court of Punjab & Haryana Vs Jagdev Singh, 2015 (4) SCC 334 (Para 9)

Present appeal challenges order of learned Single Judge dated 22.11.2022, by which the writ petition filed by the sole respondent was allowed and direction was issued to refund Rs. 3,46,804/-to him.

(Delivered by Hon'ble Manoj Kumar Gupta, J.

&

Hon'ble Prashant Kumar, J.)

1. The instant appeal is directed against the order of learned Single Judge dated 22.11.2022 by which the writ petition filed by the sole respondent (hereinafter referred to as the "writ petitioner") was allowed and direction was issued to refund Rs. 3,46,804/- to him. The amount aforesaid is the sum deducted by the State from his pensionary benefits towards house rent allowance alleged to be wrongly paid to him while in service. The writ court in issuing the said direction, has placed reliance on the judgement of the **Supreme Court in State of Punjab and others v. Rafiq Masih (White Washer), 2015 (4) SCC 334.**

2. The facts in brief are that the writ petitioner retired on 30.06.2016 from the post of Teleprinter Operator at Collectorate, Allahabad upon attaining age of superannuation. During his service tenure, he was allotted an official accommodation in the year 1981. According to the case of

the appellants, the writ petitioner did not deposit house rent in terms of the allotment letter and at the same time was also given house rent allowance every month until his retirement. On 03.10.2016 i.e. after retirement, the A.D.M, City, Allahabad passed an order holding that the petitioner had received Rs. 2,88,644/- as house rent allowance in an irregular manner and in addition, according to the norms, Rs. 58,260/- would be rent due till 30th June, 2016, consequently, he was directed to deposit Rs. 3,46,904/- in government treasury within three days failing which, the same would be recovered from his pensionary benefits. As the writ petitioner did not deposit the amount in government treasury, it was deducted from his pensionary benefits. The representation filed by the petitioner was rejected by the District Magistrate by order dated 22.05.2020 impugned in the writ petition.

3. Shri Ramanand Pandey, learned Additional Chief Standing Counsel appearing for the State submitted that under Government Order dated 15.12.1981, the writ petitioner was liable to pay rent of the government accommodation he was occupying during his service tenure. He further submits that in case, an employee occupying a government accommodation does not pay rent then he would not be entitled to house rent allowance. It is submitted that by mistake the State paid house rent allowance to the writ petitioner but as soon as the said mistake was discovered, the Additional District Magistrate, City passed the order directing the writ petitioner to refund the amount and when it was not refunded, the amount was rightly deducted from the pensionary benefits. It is sought to be contended that the judgement of the Supreme Court in **Rafiq Masih** would not apply to the facts

of instant case as that was a case where there was wrong fixation of salary while the instant matter relates to house rent allowance and is governed by a government order.

4. On the other hand, learned counsel for the respondent (writ petitioner) submits that the judgement of the Supreme Court applies on all fours to the instant case. It is urged that there is no finding in the impugned order that any fraud or misrepresentation was played by the writ petitioner at any stage. He submits that the impugned recovery after retirement of the writ petitioner had caused grave injury to him and the writ court has rightly directed the appellants to release the said amount.

5. The judgement of the Supreme Court in **Rafiq Masih** (supra) is not confined to cases where there is wrong fixation of salary and as a result whereof some excess amount was paid to an employee. In fact, the Supreme Court had decided a batch of petitions where the larger issue was whether an employer is entitled to recover monetary benefits mistakenly given to the employee. The mistake could have occurred on account of a variety of reasons; including the grant of a status, which the concerned employee was not entitled to; or payment of salary in a higher scale, than in consonance of the right of the concerned employee; or because of a wrongful fixation of salary of the employee, consequent upon the upward revision of pay-scales or for having been granted allowances, for which the concerned employee was not authorised. It has been held that in all such cases, the employer would not recover the amount provided the excess payment was not attributable to any fraud or misrepresentation by the employee. The

categories which have been delineated by the Supreme Court in paragraph 12 of the judgement are as follows :-

"(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recovery."

6. The Supreme Court, on a conspectus of different situations arising before it, specified four different categories where it would be harsh and iniquitous to permit recovery of excess payment of the monetary benefits. While specifying these categories, the Supreme Court was conscious of the fact that it was not possible to account for all eventualities. Accordingly, a fifth category was carved out where it was left to the wisdom of the Court not to permit recovery if it comes to the conclusion that it would be harsh, arbitrary or iniquitous.

7. In the instant case, indisputably, the writ petitioner was a Class-III employee

and, therefore, would fall under first category. The recovery was sought to be made after his retirement and consequently, he would also be covered under the second category. The amount sought to be recovered was allegedly paid to the writ petitioner during the period spread over 35 years while in service and, therefore, he would also be covered by Clause (iii). The small amount of house rent allowance that was paid to the writ petitioner on a monthly basis in last 35 years when recovered in *lump sum* post-retirement was definitely an action which was harsh and iniquitous and this would be covered under Clause (v) as well.

8. We find no merit in the submission that since the payment to the petitioner was by way of house rent allowance and, therefore it would not be covered by the judgement of Supreme Court inasmuch the judgement of the Supreme Court also covers cases relating to wrong or excess payment of allowances. If there was any default in payment of rent, its recovery, if permissible at this distance of time would be a separate and distinct cause of action, but it was wholly arbitrary and illegal to recover the house rent allowance, paid over the years, without any fraud or misrepresentation on part of the employee.

9. Learned Standing Counsel tried to place reliance on the judgement of Supreme Court in **High Court of Punjab and Haryana v. Jagdev Singh reported in 2015 (4) SCC 334**. It was a case where the employee was in judicial service and at the time of fixation of revised pay-scale and grant of selection grade, he furnished an undertaking to refund excess payment, in terms of the applicable service rules, if any mistake is detected subsequently. The Supreme Court in view of the specific

condition in the notification that the employee would be liable to refund excess payment if discovered subsequently followed by the undertaking furnished by the employee in terms of the said stipulation, held that the principles enunciated in proposition no. (ii) in the case of **Rafiq Masih** would not apply. The observations made in this regard is extracted below :-

"The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking."

10. In the instant case, there was no undertaking furnished by the petitioner for refunding the house rent allowance which was deducted from his post retiral benefits. Therefore, we are of the considered opinion that the judgement relied upon by learned counsel for the appellants would be of no help to him. The learned Single Judge was right in applying the principles laid down in **Rafiq Masih** in directing refund of the amount.

11. In the result, the appeal lacks merit and is accordingly, **dismissed**.

(2023) 5 ILRA 367

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 28.04.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

THE HON'BLE PRASHANT KUMAR, J.

Special Appeal Defective No. 196 of 2023

State of U.P. & Ors. ...Appellants

Versus

Mohd. Janbaz Alam ...Respondent

Counsel for the Appellants:

C.S.C.

Counsel for the Respondent:

Sri Upendra Upadhyay

A. Service Law – Recovery from pension – Civil Service Regulations - Regulation 351-A - The Governor has been given right to recover pecuniary loss from the pensionary benefits, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct or to have caused pecuniary loss to the Government by misconduct or negligence during his service. Moreover, the departmental proceedings, if initiated after retirement, would only be with sanction of the Governor and shall be in respect of any event which took place not more than four years before the institution of such proceedings. (Para 11)

In the instant case, admittedly, no departmental or judicial proceedings were initiated against the writ petitioner before directing recovery of the amount from the pensionary benefits. There was also no sanction of the Governor. Concededly, the alleged excess payment was made in the year 2011-12 and definitely, it related to an event which took place much more than four years before order was passed for recovery of the amount (Moreover, the State did not raise any objection in relation to this excess payment while the writ petitioner was in service). Therefore, the said amount was not recoverable at this distance of time in view of the safeguards provided u/Regulation 351-A. (Para 9, 12)

B. The letter of the petitioner dated 11.07.2016, cannot by any stretch of imagination, be construed as a concession

or undertaking on part of the writ petitioner to deduct the amount in question from his pensionary benefits on permanent basis. It, on the other hand, clearly shows that the petitioner, even at that time, did not agree to the recovery, but only agreed for withholding it temporarily so as to facilitate release of the remaining pensionary benefits.

The State had withheld the pensionary benefits of the writ petitioner for considerable period after his retirement. Consequently, the petitioner had agreed for temporary withholding of the amount in dispute and for releasing the remaining amount. It also transpires from the record that the respondents released the gratuity in the year 2017 only after deducting the aforesaid amount. It only reflects his helplessness and despair because of one-sided illegal action of the employer in withholding his pensionary benefits for more than two years, after his retirement. (Para 16)

Special appeal dismissed. (E-4)

Precedent followed:

1. St. of Pun. & ors. Vs Rafiq Masih (White Washer), (2015) 4 SCC 334 (Para 7)

2. Thomas Daniel Vs St. of Kerala & ors., Civil Appeal No. 7115 of 2010 (Para 7)

Present appeal assails judgement of learned Single Judge dated 02.11.2022 by which, the writ petition filed by the respondent was allowed and the amount recovered from the writ petitioner in pursuance of orders impugned dated 08.09.2016 and 02.05.2017 was directed to be restituted.

(Delivered by Hon'ble Manoj Kumar
Gupta, J.
&
Hon'ble Prashant Kumar, J.)

Order in the Delay Condonation Application

1. Heard learned counsel for the parties.

2. The explanation for the delay furnished in the affidavit accompanying the delay condonation application is found to be satisfactory.

3. Accordingly, the delay is condoned.

4. Office is directed to allocate a regular number to the instant appeal.

Order on the Memo of Appeal

5. Heard Shri Ramanand Pandey, learned Standing Counsel for the appellants and Shri Upendra Upadhyay for the respondent.

6. The State is in appeal against the judgement of learned Single Judge dated 02.11.2022 by which, the writ petition filed by the respondent (hereinafter referred to as the "Writ Petitioner") was allowed and the amount recovered from the writ petitioner in pursuance of orders impugned dated 08.09.2016 and 02.05.2017 was directed to be restituted within a period of three months.

7. The facts necessary for disposal of the instant appeal are that the petitioner had retired on 30.06.2014 from the post of Junior Engineer, Rural Engineering Services, Ghazipur. On 08.09.2016, the Executive Engineer, Rural Engineering Services, Division- Ghazipur, issued an Office Order approving recovery of a sum of Rs. 3,10,022/- from the petitioner. The order records that by mistake the petitioner was given benefit of the 3rd Assured Career Progression Scheme from 12.08.2008, though he was entitled to it from

01.12.2008. The difference amount was consequently sought to be recovered thereby. The order dated 02.05.2017 is a communication sent by Additional Director, Treasury and Pension, Varanasi Mandal, Varanasi to Senior Treasurar, Treasury, Ghazipur by which approval had been granted for release of gratuity to the petitioner after deducting Rs. 4,09,878/-. It is common ground between the parties that it includes the amount of Rs. 3,10,022/- allegedly paid in excess to the petitioner because of the petitioner having been granted benefit of A.C.P. from an earlier date. It also includes another sum of Rs. 99,856/-. It represents the amount allegedly paid in excess by the petitioner to a contractor during his service-tenure in the year 2011-12. The learned Single Judge has held that both the recoveries were illegal and could not have been made in view of the law laid down by the Supreme Court in **State of Punjab and Others v. Rafiq Masih (White Washer) (2015) 4 SCC 334 and Thomas Daniel v. State of Kerala & Others (Civil Appeal No. 7115 of 2010)**.

8. Shri R.N. Pandey, learned Standing Counsel submitted that learned Single Judge committed a manifest error of law in applying **Rafiq Masih** (supra) to the facts of the instant case inasmuch as recovery of Rs. 99,856/- was on account of excess payment made by the petitioner to the contractor. It is submitted that the judgement in case of **Rafiq Masih** (supra) would apply only to cases of wrong fixation of salary or payment of excess allowances but not where the employee was guilty of causing pecuniary loss to the State by making excess payment to the contractor.

9. On the other hand, learned counsel for the respondent submitted that the

alleged payment of excess amount to the contractor is based on a unilateral opinion formed by the respondent-Department after his retirement. It is submitted that a contract for a sum of Rs. 56.15 lakhs was duly approved and after the work thereunder was satisfactorily executed, the payment was released. The State did not raise any objection in relation to the payment made to the contractor while the writ petitioner was in service. After his retirement, no such recovery can be directed. It is submitted that under Regulation 351-A of the Civil Service Regulations, such an action is not permissible as there was no sanction of the Governor and also because the event in respect of which, the recovery is sought to be made, took place more than four years before the institution of the proceedings.

10. It is clear from the rival contentions that the instant appeal is confined only to the alleged excess payment made by the writ petitioner to the contractor. The relevant part of Regulation 351-A of Civil Service Regulations is extracted below :-

"The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused Government, if the pensioner is found in departmental or Judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement

:

Provided that-

(a) such departmental proceedings, if not instituted while the office was on duty either before retirement or during re-employment-

(i) shall not be instituted save with the sanction of the Governor.

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceeding ; and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a)."

11. The Governor has been given right to recover pecuniary loss from the pensionary benefits, if the pensioner is found **in departmental or judicial proceedings** to have been guilty of grave misconduct or to have caused pecuniary loss to the Government by misconduct or negligence during his service. Moreover, the departmental proceedings, if initiated after retirement, would only be with sanction of the Governor and shall be in respect of any event which took place not more than four years before the institution of such proceedings.

12. In the instant case, admittedly, no departmental or judicial proceedings were initiated against the writ petitioner before directing recovery of the amount from the pensionary benefits. There was also no sanction of the Governor. Concededly, the alleged excess payment was made in the

year 2011-12 and definitely, it related to an event which took place much more than four years before order was passed for recovery of the amount. Consequently, we are of the opinion that the said amount was not recoverable at this distance of time in view of the safeguards provided under Regulation 351-A.

13. Learned State counsel also tried to contend that the petitioner had agreed for deduction of the aforesaid amount in his letter dated 11.07.2016 and, therefore, cannot resile from the undertaking and challenge the same.

14. Learned counsel for the writ petitioner has vehemently disputed the said contention. He has invited the attention of the Court towards the alleged admission contained in letter dated 11.07.2016 and contended that thereby the writ petitioner only agreed for temporary withholding of the aforesaid amount so that the payment of the remaining amount is made to him without any further delay.

15. The letter of the petitioner dated 11.07.2016 containing alleged admission is as follows :-

16. It is clear from the letter that the State had withheld the pensionary benefits of the writ petitioner for considerable period after his retirement. Consequently, the petitioner had agreed for temporary withholding of the amount in dispute and for releasing the remaining amount. It also transpires from the record that the respondents released the gratuity in the year 2017 only after deducting the aforesaid amount. The said letter cannot by

any stretch of imagination, be construed as a concession or undertaking on part of the writ petitioner to deduct the amount in question from his pensionary benefits on permanent basis. It, on the other hand, clearly shows that the petitioner, even at that time, did not agree to the recovery, but only agreed for withholding it temporarily so as to facilitate release of the remaining pensionary benefits. It only reflects his helplessness and despair because of one-sided illegal action of the employer in withholding his pensionary benefits for more than two years, after his retirement.

17. The learned Single Judge has considered this aspect and has observed as follows :-

"Insofar as the loss suffered by the State on account of excess payment made by the petitioner to the tune of Rs. 99,856/- to the contractor for the work contract executed, such a loss is alleged to be suffered by the State is of the year 2011-12 when the petitioner was in service. After the retirement when the petitioner came to know with regard to the aforesaid recovery been made from the petitioner, the petitioner by means of application dated 12.03.2016 filed objection to the aforesaid recovery explaining that the amount has been paid to the contractor as is permissible under law. The objection raised by the petitioner against the aforesaid recovery of excess payment made to the contractor was not decided by the employer and as such reminder dated 20.03.2016 was sent to the Executive Engineer.

Thereafter on 31.03.2016, respondent no. 3 forwarded a letter to respondent no. 4 directing that the representation of the petitioner should be decided at the earliest. However, no order

was passed by the respondents on the aforesaid objection of petitioner. The petitioner thereafter has further submitted a representation dated 01.04.2017 and 22.05.2017. The stand in the counter affidavit in paragraph 15 is that the representations of the petitioner were decided by order dated 08.09.2016 and 20.04.2017. A perusal of above-mentioned orders dated 08.09.2016 and 28.04.2017 would demonstrate that the objection by the petitioner against the aforesaid recovery by filing of objection/representation has not been considered and an order has been passed mechanically and without application of mind to the objection raised by the petitioner against recovery. It is to be noted that the employee can always show by filing representation/objection that the recovery/loss to the State is not attributable to the petitioner and that the payment has been made in accordance with law. The employer is required to consider the case of the petitioner in the light of objection raised by the employee. However in the present case, the objection raised by the employee by means of representation have not been considered nor the same has been decided. Such an approach by the employer is in gross violation of principles of natural justice and fair play."

18. No exception can be taken to the view expressed in this regard by the learned Single Judge.

19. No other submission has been made by learned State Counsel.

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

21. No order as to costs.

(2023) 5 ILRA 372
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, C.J.
THE HON'BLE J.J. MUNIR. J.

Special Appeal No. 225 of 2023

Managing Director, U.P. State Bridge Corporation Ltd., Lucknow & Ors.

...Appellants

Versus

Prabhat Kumar Jha

...Respondent

Counsel for the Appellants:

Sri Pranjal Mehrotra

Counsel for the Respondent:

Sri Binod Kumar Tripathi, Sri Ashish Kumar Singh, Sri Binod Kumar Tripathi

A. Service Law – Disciplinary proceedings - Uttar Pradesh Cooperative Societies Employees Service Regulations, 1975 - In service jurisprudence disciplinary proceedings commence on the date when the charge-sheet is issued and not earlier. All other transactions in contemplation of disciplinary proceedings, such as the preliminary inquiry, a show cause and the like, do not constitute initiation of disciplinary proceedings. (Para 14)

Assuming that the charge-sheet was approved by the Managing Director in the month of February, 2012, whilst the writ petitioner retired from service on 31.12.2013, the Inquiry Officer issued the charge-sheet on 02.12.2014, a fact about which the parties are *ad idem*. We notice the oddity that the Managing Director's endorsement on the charge-sheet approving it, does not mention the date below his signatures, but merely mentions the month and the year. This kind of an endorsement in some way derogates from the sanctity of something as solemn as the approval of a charge-sheet.

It is almost impossible to accept the contention of the learned Counsel for the Bridge Corporation that the charge-sheet having been approved in the month of February, 2012, while the writ petitioner was still in service, disciplinary proceedings ought to be regarded as initiated against him in the year 2012. (Para 13, 14)

B. All laws affecting substantive rights are prospective in operation unless expressly made retrospective.

The writ petitioner retired from service on 31.12.2013 and the charge-sheet was issued on 02.12.2014. Disciplinary proceedings were initiated against the writ petitioner on 02.12.2014 and not in the month of February, 2012, while the writ petitioner was still in service. There is nothing in the amended rules notified on 27.10.2018 and framed in the meeting of the Board of Directors of the Bridge Corporation to show that these rules would have retrospective operation. There is no hint about it in the amended Rule 50 or 51 added to the Model Conduct Discipline and Appeal Rules for the Service of U.P. State Enterprises. **The amended Rules confer a substantive right on the Bridge Corporation to initiate disciplinary proceedings against a retired employee about matters that fall within four years when disciplinary proceedings are initiated. It likewise affects the substantive right of an employee to be insulated from initiation of departmental proceedings once he has retired and no longer in the employ of the Bridge Corporation.** Therefore, there is no basis to hold that the amended Rules that have come into effect from 27.10.2018, would have retrospective operation and govern the rights of the Bridge Corporation, vis-à-vis the writ petitioner. (Para 15, 17)

Disciplinary proceedings initiated against the writ petitioner by the Bridge Corporation on the basis of the impugned charge-sheet are without jurisdiction. (Para 18)

Special appeal dismissed. (E-4)

Precedent followed:

5 All. Managing Director, U.P. State Bridge Corporation Ltd., Lucknow & Ors. Vs. Prabhat Kumar Jha 373

1. Bhagirathi Jena Vs Board of Directors, O.S.F.C., & ors., (1999) 3 SCC 666 (Para 10)

2. Dev Prakash Tewari Vs Uttar Pradesh Cooperative Institutional Service Board, Lucknow & ors., (2014) 7 SCC 260 (Para 11)

3. UCO Bank & anr. Vs Rajinder Lal Capoor, (2007) 6 SCC 694 (Para 14)

Present special appeal challenges judgment and order dated 31.03.2022, passed in Civil Misc. WP No. 1920 of 2015.

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

1. This is a respondent's appeal, arising out of a judgment and order of the learned Single Judge dated 31.03.2022, allowing Writ-A No.1920 of 2015.

2. The writ petitioner-respondent, Prabhat Kumar Jha, who shall hereinafter be referred to as 'the writ petitioner', is an ex-employee of the Uttar Pradesh State Bridge Corporation Limited (for short, 'the Bridge Corporation'). He was in their employ since the year 1977. He retired from service upon attaining the age of superannuation on 31.12.2013. The Manager Personnel-I of the Bridge Corporation forwarded the writ petitioner's claim for payment of gratuity to the General Manager, Headquarters. The writ petitioner's claim for leave encashment was similarly recommended. There was inaction in the payment of the writ petitioner's gratuity, leave encashment, family pension and group insurance, aggregating a sum of Rs.25 lacs. The writ petitioner pursued his claim with the various officials of the Bridge Corporation, but to no avail.

3. The writ petitioner preferred a writ petition before this Court being Writ-A No.35132 of 2014, which was heard and

disposed of vide order dated 10.07.2014, relegating the writ petitioner to represent his case before the competent authority of the Bridge Corporation, who was directed to pass a speaking order within the shortest possible period of time, preferably within two months of the date of receipt of his representation. The writ petitioner faced continued inaction and filed a contempt application before this Court being Contempt Application (Civil) No.5762 of 2014, which was disposed of vide order dated 15.10.2014, directing the officers of the Bridge Corporation that in case a decision on the writ petitioner's representation is not taken within two months of the receipt of Contempt Court's order, without reasonable cause, the Court would have no option but to proceed against the officers in contempt.

4. At this juncture, the Bridge Corporation issued a charge-sheet dated 02.12.2014 framing two charges against the writ petitioner. The charge-sheet was issued approximately a year after the writ petitioner's retirement. Accordingly, the writ petitioner instituted the writ petition, giving rise to this appeal, where he prayed that the charge-sheet be quashed as one without jurisdiction. He further sought a mandamus against the Bridge Corporation and its various authorities ordering them to pay his entire post retiral dues. The writ petition, after exchange of affidavits, was heard by the learned Single Judge, who has allowed it by the judgment and order impugned. The learned Judge has quashed the charge-sheet and further ordered the Bridge Corporation and its various authorities to release the entire post retiral dues payable to the writ petitioner, along with 8% interest from the date of his retirement, until realization.

5. Aggrieved, the Bridge Corporation and five of its officers have preferred this appeal under Chapter VIII Rule 5 of the Rules of Court.

6. Heard Mr. Pranjal Mehrotra, learned Counsel for the Bridge Corporation and Mr. Ashish Kumar Singh, learned Counsel appearing for the writ petitioner.

7. The question involved in this appeal is whether departmental proceedings could be initiated against the writ petitioner after he had retired from service and if those proceedings are *ultra vires*. The general principle is that once an employee retires or the relationship of employer and employee otherwise comes to a terminus, the employer loses all disciplinary jurisdiction over the employee. The corollary is that generally speaking once an employee retires from service, disciplinary proceedings cannot be initiated against him; also, pending disciplinary proceedings cannot be continued after his superannuation. This general principle is, however, subject to the reputed exception that where by statutory service conditions or statutory service rules, a provision is made for initiation of disciplinary proceedings post retirement or the continuance of disciplinary proceedings pending on the date retirement, disciplinary proceedings can be validly initiated or continued, as the case may be.

8. The two situations, above mentioned, are different in law and are definitive exceptions to the rule that post retirement, there can be no initiation of disciplinary proceedings or continuance of pending disciplinary proceedings. These two situations are different, in the sense that continuance of disciplinary proceedings pending on the date of

retirement is one thing, and the initiation of disciplinary proceedings post retirement another. A statutory rule has to be specifically there to permit the employer in one case to continue disciplinary proceedings pending on the date of retirement, post retirement, and, in the other, initiate disciplinary proceedings, that were never there during service, after the employee's retirement. Sanction of the right to continue disciplinary proceedings, pending on the date of retirement under the statutory service rules, would not invest the employer with jurisdiction to initiate or institute disciplinary proceedings against a retired employee. The right to initiate disciplinary proceedings post retirement, like the right to continue pending disciplinary proceedings, would have to flow from a definitive statutory provision and the statutory service rules empowering the employer in this regard.

9. It is also to be remembered that the right to initiate disciplinary proceedings in cases where the statutory service rules confer that kind of a jurisdiction upon the employer may be hedged in with restrictions in the statute itself. As for example, in the case of government servants in the State of Uttar Pradesh, proceedings against a retired government servant cannot be initiated by the Government or the competent Disciplinary Authority, except with the sanction of the Governor, as envisaged by the proviso to Regulation 351-A of the Civil Services Regulations. There could be further restrictions, such as the period of time when the event about which disciplinary proceedings against a retired government servant are initiated took place. In the case of Civil Service Regulations for a retired government servant in the State of Uttar Pradesh, the event inviting action should

not have taken place more than four years before the initiation of disciplinary proceedings. Again, there can be restrictions about the kind of punishment that may be imposed, once disciplinary proceedings are initiated against a retired government servant. Statutory Service Rules can provide for punishment of dismissal or removal from service, even if the government servant has retired, but all these rights come to the employer sourced from statutory service rules. Else, the employer has no jurisdiction or right to proceed against a retired employee in their disciplinary jurisdiction.

10. This issue was considered by the Supreme Court in **Bhagirathi Jena v. Board of Directors, O.S.F.C., and others, (1999) 3 SCC 666** in the context of the right to proceed against an employee of Orissa State Financial Corporation, whose conditions of service were government by the Orissa Financial State Corporation Staff Regulations, 1975. The regulations in that case did not provide for continuance of pending disciplinary proceedings against an employee who had superannuated. In **Bhagirathi Jena (supra)**, proceedings against the employee were initiated by the issue of a charge-sheet while he was in service, but could not be concluded until his retirement. The question was whether proceedings could be continued after retirement. It was in that context that it was held by their Lordships in **Bhagirathi Jena** thus:

"7. In view of the absence of such a provision in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the

appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement.

8. Learned Senior Counsel for the respondent placed reliance on the judgment of this Court in *Takhatray Shivadattray Mankad v. State of Gujarat* [1989 Supp (2) SCC 110 : 1991 SCC (L&S) 927 : (1990) 12 ATC 692] . It is true that that was a case of imposing a reduction in the pension and gratuity on account of unsatisfactory service of the employee as determined in an enquiry which was extended beyond the date of superannuation. But the above decision cannot help the respondent inasmuch as in that case there was a specific rule namely Rule 241-A of the Junagadh State Pension and Parwashi Allowance Rules, 1932 which enabled the imposition of a reduction in the pension or gratuity of a person after retirement. Further, there were rules in that case which enabled the continuance of the departmental enquiry even after superannuation for the purpose of finding out whether any misconduct was established which could be taken into account for the purpose of Rule 241-A. In the absence of a similar provision with the regulations of the respondent-Corporation, the above judgment of Mankad case [1989 Supp (2) SCC 110 : 1991 SCC (L&S) 927 : (1990) 12 ATC 692] cannot help the respondent.

(emphasis by Court)

11. The question again fell for consideration of the Supreme Court in **Dev Prakash Tewari v. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others, (2014) 7 SCC 260**, where the employee concerned was governed by the Uttar Pradesh Cooperative Societies Employees' Service Regulations, 1975. Disciplinary proceedings were initiated while the employee was still in service, but on account of a plea of denial of opportunity, the order of dismissal from service was quashed by this Court on the ground of violation of principles of natural justice. Liberty was given to the employer to proceed afresh. While disciplinary proceedings were resumed and pending, the employee retired. The question was whether proceedings against him could continue in the absence of a provision in the statutory service rules enabling the employer in this behalf. It was in that context that their Lordships held in **Dev Prakash Tewari (supra)**:

"5. We have carefully considered the rival submissions. The facts are not in dispute. The High Court while quashing the earlier disciplinary proceedings on the ground of violation of principles of natural justice in its order dated 10-1-2006 [*D.P. Tewari v. U.P. Coop. Institutional Service Board*, Writ Petition (S/B) No. 4328 of 1988, order dated 10-1-2006 (All)] granted liberty to initiate the fresh inquiry in accordance with the Regulations. The appellant who was reinstated in service on 26-4-2006 and fresh disciplinary proceeding was initiated on 7-7-2006 and while that was pending, the appellant attained the age of superannuation and retired on 31-3-2009. There is no provision in the Uttar Pradesh Cooperative Societies Employees' Service Regulations, 1975, for initiation or continuation of disciplinary

proceeding after retirement of the appellant nor is there any provision stating that in case misconduct is established a deduction could be made from his retiral benefits.

7. In a subsequent decision of this Court in *U.P. Coop. Federation case [U.P. Coop. Federation Ltd. v. L.P. Rai, (2007) 7 SCC 81 : (2007) 2 SCC (L&S) 598]* on facts, the disciplinary proceeding against employee was quashed by the High Court since no opportunity of hearing was given to him in the inquiry and the management in its appeal before this Court sought for grant of liberty to hold a fresh inquiry and this Court held that charges levelled against the employee were not minor in nature, and therefore, it would not be proper to foreclose the right of the employer to hold a fresh inquiry only on the ground that the employee has since retired from the service and accordingly granted the liberty sought for by the management. While dealing with the above case, the earlier decision in *Bhagirathi Jena case [Bhagirathi Jena v. Orissa State Financial Corpn., (1999) 3 SCC 666 : 1999 SCC (L&S) 804]* was not brought to the notice of this Court and no contention was raised pertaining to the provisions under which the disciplinary proceeding was initiated and as such no ratio came to be laid down. In our view the said decision cannot help the respondents herein.

8. Once the appellant had retired from service on 31-3-2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits."

(emphasis by Court)

12. Here, it is not in dispute that the rules, as these stood at the time when the writ petitioner retired, had no provision for the continuation of disciplinary proceedings against an employee of the Bridge Corporation, or initiation of proceedings against a retired employee. The power to do so was introduced through an amendment by the Bridge Corporation w.e.f. 27.10.2018 to the Model Conduct Discipline and Appeal Rules for Service of U.P. State Enterprises, that govern the service conditions of the writ petitioner.

13. The Bridge Corporation has raised an issue that the amended Rules have retrospective operation and would apply to govern the writ petitioner's case. This contention will be dealt with shortly. For the present, we assume that on the date disciplinary proceedings were initiated against the writ petitioner, that is to say, 02.12.2014, he was a retired employee and out of the employer's jurisdiction for eleven months past. Learned Counsel for the Bridge Corporation has taken us through the charge-sheet dated 02.12.2014 and pointed out that it was approved by the Managing Director in the month of February, 2012 whilst the writ petitioner retired from service on 31.12.2013. He submits that the charge-sheet having been approved by the Managing Director in the month of February, 2012, while the writ petitioner was in service, the proceedings must be held to have been initiated against the writ petitioner while in service. We notice the oddity that the Managing Director's endorsement on the charge-sheet approving it, does not mention the date below his signatures, but merely mentions the month and the year. This kind of an endorsement in some way derogates from the sanctity of something as solemn as the approval of a charge-sheet.

14. Assuming that the charge-sheet was approved by the Managing Director in the month of February, 2012, the Inquiry Officer issued the charge-sheet on 02.12.2014, a fact about which the parties are *ad idem*. It is almost impossible to accept the contention of the learned Counsel for the Bridge Corporation that the charge-sheet having been approved in the month of February, 2012, while the writ petitioner was still in service, disciplinary proceedings ought to be regarded as initiated against him in the year 2012. It is an acknowledged principle in service jurisprudence that disciplinary proceedings commence on the date when the charge-sheet is issued and not earlier. All other transactions in contemplation of disciplinary proceedings, such as the preliminary inquiry, a show cause and the like, do not constitute initiation of disciplinary proceedings. In this connection, reference may be made to the guidance of the Supreme Court in **UCO Bank and another v. Rajinder Lal Capoor, (2007) 6 SCC 694**, where the position of the law has been stated thus:

"21. The aforementioned Regulation, however, could be invoked only when the disciplinary proceedings had clearly been initiated prior to the respondent's ceasing to be in service. The terminologies used therein are of seminal importance. Only when a disciplinary proceeding has been initiated against an officer of the bank despite his attaining the age of superannuation, can the disciplinary proceeding be allowed on the basis of the legal fiction created thereunder i.e. continue "as if he was in service". Thus, only when a valid departmental proceeding is initiated by reason of the legal fiction raised in terms of the said provision, the delinquent officer would be deemed to be

in service although he has reached his age of superannuation. The departmental proceeding, it is trite law, is not initiated merely by issuance of a show-cause notice. It is initiated only when a charge-sheet is issued (see *Union of India v. K.V. Jankiraman* [(1991) 4 SCC 109 : 1991 SCC (L&S) 387 : (1993) 23 ATC 322 : AIR 1991 SC 2010]). This aspect of the matter has also been considered by this Court recently in *Coal India Ltd. v. Saroj Kumar Mishra* [(2007) 9 SCC 625 : (2007) 5 Scale 724] wherein it was held that date of application of mind on the allegations levelled against an officer by the competent authority as a result whereof a charge-sheet is issued would be the date on which the disciplinary proceedings are said to have been initiated and not prior thereto. Pendency of a preliminary enquiry, therefore, by itself cannot be a ground for invoking Clause 20 of the Regulations. Albeit in a different fact situation but involving a similar question of law in *Coal India Ltd.* [(2007) 9 SCC 625 : (2007) 5 Scale 724] this Court held : (SCC p. 631, paras 12-13)

"12[13]. It is not the case of the appellants that pursuant to or in furtherance of the complaint received by the Vigilance Department, the competent authority had arrived at a satisfaction as is required in terms of the said circulars that a charge-sheet was likely to be issued on the basis of a preliminary enquiry held in that behalf or otherwise.

13[14]. The circular letters issued by the appellants put restrictions on a valuable right of an employee. They, therefore, are required to be construed strictly. So construed, there cannot be any doubt whatsoever that the conditions precedent contained therein must be satisfied before any action can be taken in that regard."

It was furthermore observed that : (SCC p. 632, para 18)

"18[20]. A departmental proceeding is ordinarily said to be initiated only when a charge-sheet is issued."

(See also *Union of India v. Sangram Keshari Nayak* [(2007) 6 SCC 704 : (2007) 6 Scale 348] .)"

15. It has, therefore, to be held in this case that disciplinary proceedings were initiated against the writ petitioner on 02.12.2014 and not in the month of February, 2012, while the writ petitioner was still in service. The position of the law, that we have noticed above, leaves us in no manner of doubt about the fact that the date on which the charge-sheet was issued to the writ petitioner, he had superannuated and the disciplinary proceedings were initiated against him while he was a superannuated employee of the Bridge Corporation, distanced by eleven months of rupture of the employer-employee relationship. Nothing has been shown to us on the existing state of rules, either when the writ petitioner retired or the time when the impugned charge-sheet was issued, that may have empowered the Bridge Corporation to initiate disciplinary proceedings against a retired employee of theirs. In our considered opinion, therefore, on this state of rules, the Bridge Corporation would have no jurisdiction to initiate disciplinary proceedings against the writ petitioner by means of the impugned charge-sheet.

16. Now, the only question that remains to be addressed, which Mr. Mehrotra has pressed with much vehemence is whether the amended Rules introduced w.e.f. 27.10.2018, have retrospective operation allowing them to govern the Bridge Corporation's rights to

take disciplinary action against the writ petitioner. The rules that have been brought in by amendment through a resolution of the Board of Directors passed in their 177th Meeting and notified by the Managing Director of the Bridge Corporation through his memo dated 27.10.2018, read:

"निदेशक मण्डल की दिनांक 03/10-2018 को सम्पन्न हुई 177वीं बैठक में शासकीय सेवकों के संबंध में शासनादेश संख्या-01/2015/13/9/98/सा-1-2015 दि० 22-04-2015 के पैरा 19 एवं 20 लागू व्यवस्था के अनुसार सेतु निगम में लागू आदर्श आचरण, अनुशासन एवं अपील नियमावली के अन्तिम नियम 49 के उपरान्त 2 नये नियमों का निम्नानुसार प्राविधान नियम 50 एवं 51 को जोड़े जाने की स्वीकृति प्रदान की गयी है:-

सेतु निगम के कर्मिकों के द्वारा सेवाकाल में की गयी अनियमितता/कदाचार के लिए उनकी सेवानिवृत्ति के उपरान्त अनुशासनिक कार्यवाही के सम्बन्ध में।	50-यदि विभागीय जॉच की कार्यवाही लम्बित रहते हुए आरोपित कर्मिक अधिवर्षता आयु प्राप्त कर सेवानिवृत्त हो जाता है को लम्बित जॉच को इस नियमावली के तहत उसके सेवानिवृत्त देयकों से वित्तीय क्षति की वसूली के लिए जारी रखा जा सकता है, परन्तु सेवानिवृत्त कर्मिक को दण्ड नहीं दिया जा सकता और न ही उक्त दण्ड के उद्देश्य से कार्यवाही प्रारम्भ/ जारी रखी जा सकती है।
	51- यदि सेवानिवृत्ति के उपरान्त कोई तथ्य सामने आये तो सेवानिवृत्ति के पश्चात् भी इस नियमावली के तहत कार्यवाही की जा सकती है बशर्ते कि जिस घटना के संबंध में जॉच प्रारम्भ की जाय, जॉच करने की तिथि को उस घटना को 4 वर्ष से अधिक समय न बीत चुका हो।"

17. The writ petitioner retired from service on 31.12.2013 and the charge-sheet was issued on 02.12.2014. There is nothing in the amended rules notified on 27.10.2018 and framed in the meeting of the Board of Directors of the Bridge Corporation to show that these rules would have retrospective operation. There is no hint about it in the amended Rule 50 or 51 added to the Model Conduct Discipline and Appeal Rules for the Service of U.P. State Enterprises. The well established cannon of statutory interpretation is that all laws affecting substantive rights are

prospective in operation unless expressly made retrospective. The amended Rules confer a substantive right on the Bridge Corporation to initiate disciplinary proceedings against a retired employee about matters that fall within four years when disciplinary proceedings are initiated. It likewise affects the substantive right of an employee to be insulated from initiation of departmental proceedings once he has retired and no longer in the employ of the Bridge Corporation. Therefore, there is no basis to hold that the amended Rules that have come into effect from 27.10.2018, would have retrospective operation and govern the rights of the Bridge Corporation, *vis-a-vis* the writ petitioner.

18. In the circumstances, we are of opinion that disciplinary proceedings initiated against the writ petitioner by the Bridge Corporation on the basis of the impugned charge-sheet are without jurisdiction.

19. For reasons added and slightly different from those that have weighed with the learned Single Judge, we concur in the conclusions.

20. In the result, this appeal **fails** and is **dismissed**. Costs easy.

(2023) 5 ILRA 379

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 01.05.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ A No. 23192 of 2016

Annapurna

State of U.P. & Ors.

Versus

...Petitioner

...Respondents

Counsel for the Petitioner:

Ram Kumar Singh

State of Uttar Pradesh & ors. Vs Premlata, 2022
(1) SCC 30 (Para 9)

Counsel for the Respondents:

C.S.C., Aprajita Bansal Rohit Tri

Present petition challenges order dated 07.09.2016, passed by the Secretary, State Election Commission, Lucknow, so far as it relates to appointment of the petitioner on class IV post.

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

A. Service Law – Compassionate Appointment – 'Suitable post' - U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 - Appointment on "suitable post" has to be considered considering the status / post held by the deceased employee and the educational qualification / eligibility criteria of the person to be offered compassionate appointment and that the offer is to be made considering the post held by the deceased employee and the suitability of the post of the persons to whom the compassionate appointment is being offered. (Para 10)

In the present case, the husband of the petitioner was working on a class III post who died in harness. Admittedly the petitioner has got educational qualification of Master of Arts but despite the proposal in her favour by the respondent no. 3 on 16.08.2016 for being given a class III post, she has been offered a class IV post. Thus considering the law laid down by Hon'ble the Apex Court in the case of *Premkata (infra)* and the interpretation given to the Rules 1974 it is apparent that the offer of appointment as given to the petitioner on a class IV post cannot be countenanced in any manner more particularly considering her educational qualifications and the post held by her husband. (Para 11)

Directions have been issued to consider the claim of the petitioner for compassionate appointment on a class III post considering the educational qualification of the petitioner of Master of Arts as well as the status of the post held by her deceased husband which was a class III post. (Para 12)

Writ petition disposed of. (E-4)

Precedent followed:

1. Heard learned counsel for the petitioner and Shri Rohit Tripathi, learned Standing Counsel for the State-respondent.

2. The instant writ petition has been filed praying for the following main reliefs:

"(i) A writ, order or direction in the nature of Certiorari to quash the impugned order dated 7.9.2016 passed by the opposite party no. 2, so far as it relates to appointment of the petitioner on class IV post, contained as Annexure No.1 to this writ petition.

(ii) A writ, order or direction in the nature of Mandamus commanding the opposite parties to provide compassionate appointment to the petitioner on class III post keeping in view her qualification as well as government order dated 17.06.2014 issued by the State Government."

3. Learned counsel for the petitioner submits that the husband of the petitioner was a Junior Assistant who died in harness on 15.06.2016. The petitioner being eligible for compassionate appointment under the provisions of U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 (hereinafter referred to as the Rules, 1974) applied for compassionate appointment and despite the respondent no. 3 having proposed the compassionate appointment of the petitioner on a class III post through

an order dated 16.08.2016, a copy of which is annexure 4 to the petition, she has been offered appointment on a class IV post vide order dated 07.09.2016, a copy of which is annexure 1 to the petition.

4. Placing reliance on the words "suitable post" as used in Rule 5 of the Rules, 1974 the contention is that the said Rules provide for giving of compassionate appointment on a "suitable post" in government service on a post except the post which is within the purview of U.P. Public Service Commission provided the person fulfills the educational qualification prescribed for the post.

5. The argument is that as the petitioner is a Master of Arts (MA) pass lady and her husband was also working on a class III post of Junior Assistant as such the respondents have patently erred in offering appointment on a class IV post and as such the petitioner is entitled for being given appointment on a suitable class III post as per her qualification and considering that the husband of the petitioner was working on a class III post.

6. On the other hand, Shri Rohit Tripathi, learned counsel for the respondents argues that in matter of compassionate appointment a person cannot have a choice of post and thus once the petitioner has already been offered appointment on a class IV post consequently either she accepts the said appointment or in case she refuses the same, it would be deemed that she does not require any compassionate appointment and there would not be any occasion for giving her appointment on a class III post as claimed by her.

7. Having heard learned counsel for the parties and having perused the record what emerges is that the petitioner is the widow of a Junior Assistant who died in harness on 15.06.2016. Thus it is apparent that the petitioners' husband was working on a class III post. Despite the recommendation made by the respondent no. 3 proposing the appointment of the petitioner on a class III post in terms of proposal dated 16.08.2016 the petitioner has been offered appointment on a class IV post through an order dated 07.09.2016. In pursuance to the order of this Court dated 29.09.2016 whereby this Court had made the petitioners' joining on a class IV post subject to final outcome of the petition, the petitioner has already submitted her joining on the class IV post on 30.09.2016.

8. The issue in question is that when the words used under the 1974 Rules is "suitable post" and the petitioner is a widow of a class III employee and has got her educational qualification of Master of Arts as to whether she can be offered appointment on a class IV post or she has to be offered appointment on a "suitable post"?

9. The issue is no longer res integra having been considered by Hon'ble Supreme Court in the case of the **State of Uttar Pradesh & others vs Premlata 2022 (1) SCC 30** wherein after considering the provisions of 1974 Rules the Apex Court has held as under:

"10.2 The Division Bench of the High Court in the present case has interpreted Rule 5 of Rules 1974 and has held that 'suitable post' under Rule 5 of the Rules 1974 would mean any post suitable to the qualification of the candidate irrespective of the post held by

the deceased employee. The aforesaid interpretation by the Division Bench of the High Court is just opposite to the object and purpose of granting the appointment on compassionate ground. ?Suitable post? has to be considered, considering status/post held by the deceased employee and the educational qualification/eligibility criteria is required to be considered, considering the post held by the deceased employee and the suitability of the post is required to be considered vis a vis the post held by the deceased employee, otherwise there shall be no difference/distinction between the appointment on compassionate ground and the regular appointment. In a given case it may happen that the dependent of the deceased employee who has applied for appointment on compassionate ground is having the educational qualification of Class II or Class I post and the deceased employee was working on the post of Class / Grade IV and/or lower than the post applied, in that case the dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post. The aforesaid shall be contrary to the object and purpose of grant of appointment on compassionate ground which as observed hereinabove is to enable the family to tide over the sudden crisis on the death of the bread earner. As observed above, appointment on compassionate ground is provided out of pure humanitarian consideration taking into consideration the fact that some source of livelihood is provided and family would be able to make both ends meet."

10. From a perusal of the aforesaid judgement in the case of **Premalata (supra)**

it emerges that Hon'ble the Apex Court has considered the words "suitable post" and has held that appointment on "suitable post" has to be considered considering the status / post held by the deceased employee and the educational qualification / eligibility criteria of the person to be offered compassionate appointment and that the offer is to be made considering the post held by the deceased employee and the suitability of the post of the persons to whom the compassionate appointment is being offered.

11. Being armed with the aforesaid interpretation as given by Hon'ble the Apex Court in the case of **Premalata (supra)** what this Court finds is that admittedly the husband of the petitioner was working on a class III post who died in harness. Admittedly the petitioner has got educational qualification of Master of Arts but despite the proposal in her favour by the respondent no. 3 on 16.08.2016 for being given a class III post, she has been offered a class IV post. Thus considering the law laid down by Hon'ble the Apex Court in the case of **Premalata (supra)** and the interpretation given to the Rules 1974 it is apparent that the offer of appointment as given to the petitioner on a class IV post cannot be countenanced in any manner more particularly considering her educational qualifications and the post held by her husband.

12. Keeping in view the aforesaid discussion, the writ petition is **disposed of** directing the respondent no. 2 i.e. the Secretary, State Election Commission, Lucknow to consider the claim of the petitioner for compassionate appointment on a class III post considering the educational qualification of the petitioner of Master of Arts as well as the status of the

post held by her deceased husband which was a class III post.

13. Let such consideration be done within a period of six weeks from the date of receipt of certified copy of this order. Needless to mention that appointment of the petitioner on a class IV post in pursuance to the order dated 07.09.2016 would be subject to the orders which are passed by the respondent no. 2 in this regard with a caveat that in case the respondent no. 2 rejects the claim of the petitioner she would still continue on the class IV post on which she has been appointed.

(2023) 5 ILRA 383
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.03.2023

BEFORE

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

Application U/S 482 No. 8171 of 2023

Ashraf Ali **...Applicant**
Versus
State of U.P. & Ors. **...Opposite Parties**

Counsel for the Applicant:

Sri Umesh Prasad Singh, Sri Satyendra Narayan Singh

Counsel for the Opposite Parties:

G.A., Sri Baleshwar Chaturvedi, Sri Mata Prasad

A. Criminal Law – Electricity Act, 2003 – Sections 135 & 151 – Theft of electricity – Discovery of a direct line drawn from the 100 KVA transformer to the low-tension line – Proviso was inserted to S. 151 vide Amendment Act No. 26 of 2007 making offence u/s 135 as an cognizable offence – Proceeding challenged – Held, amendment to Section 151 is clarificatory

in nature and action could be taken on complaints that were pending before the Amending Act of 2007 came into force, treating them to be cognizable cases – Satyendra Rai's case relied upon. (8 and 9)

B. Interpretation of Statute – Insertion of new proviso to Section 151 vide Amendment Act of 2007 – Nature of amendment – Relevance – Clarificatory nature – Effect – Applicability of Amendment – Whether have prospective effect or retrospective – Held, the amendment is clarificatory in nature, and therefore, retrospective – Amended provisions brought vide Act No. 26 of 2007 would apply with retrospective effect and not prospectively. (Para 11 and 12)

Application rejected. (E-1)

List of Cases cited:

1. Mustaq alias Mustafa Vs St. of U.P. & ors.; 2006 SCC OnLine All 1430 : (2006) 6 All LJ 257
2. U.O.I.Vs Mustaq @ Mustafa & ors.; (2016) 13 SCC 398
3. Assistant Electrical Engineer Vs Satyendra Rai & anr.; (2014) 4 SCC 513
4. Vishal Agarwal & anr. Vs Chhatisgarh Electricity Board & anr.; (2014) 3 SCC 696

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

1. Heard Mr. Satyendra Narayan Singh, learned Counsel for the applicant and Mr. Mata Prasad, Advocate holding brief of Mr. Baleshwar Chaturvedi, learned Counsel appearing for respondents nos. 3 and 4 and Mr. D.K. Srivastava, learned A.G.A. appearing on behalf of the State.

2. This application has been filed, seeking to quash the proceedings in Criminal Case No. 142 of 2005, State v. Ashraf Ali, under Section 135 of the

Electricity Act, 2003 ('the Act of 2003' for short), Police Station Khandauli, District Agra, pending in the Court of the Special Judge (E.C. Act), Agra.

3. The applicant has been reported to the Police through a first information report dated 10.08.2005 by the Junior Engineer, Enforcement Squad, Power Distribution Corporation, who, along with the Executive Engineer and a team of police officers, acting on an information, went over to the premises of a certain M/s. Aftab Ice Factory owned by the applicant Asharaf Ali. The information, on which the enforcement team proceeded, was about theft of electricity by the applicant. A checking of the premises followed, which led to the discovery of a direct line drawn from the 100 KVA transformer to the low-tension line, for the purpose of energizing the ice factory. The team found an effective illegally connected load of 74 H.P. and corresponding theft being committed by the applicant. The applicant is said to have moved away, feigning that he would produce papers. The cable was removed and taken into custody. The members of the public, who were offered to stand witness, declined to do so, citing reasons eschewing enmity.

4. Learned counsel for the applicant has argued that the time when the offence was committed and the crime registered on the basis of which the impugned charge sheet has been filed, that is to say, on 10.08.2005, the offence under Section 135 of the Act of 2003 was not a cognizable offence and only a complaint could be filed. It is argued by the learned counsel for the applicant that the applicant had filed Criminal Misc. Writ Petition No. 10415 of 2005, challenging the FIR that was registered against him. It was connected to

a bunch of writ petitions, where the common issue involved was if an FIR could at all be registered for an offence punishable under Section 135 of the Act of 2003, the offence being not cognizable as the Act then stood. The applicant was granted interim stay of arrest *vide* order dated 06.10.2005. The aforesaid writ petitions came to be heard and decided by a Division Bench of this Court on 15.09.2006 in **Mustaq alias Mustafa v. State of U.P. and others**, 2006 SCC OnLine All 1430 : (2006) 6 All LJ 257. The following directions were issued :

42. According to us, out of three directions the third one is edging over the others. We cannot dismiss the writ petitions since under this judicial pronouncement we have to hold about legality or validity of declaring theft of electricity non-cognizable offence. If we quash the proceeding, we shall arrive at the same result. Moreover, we are not recommending the police to arrest directly irrespective of taking cognizance by the Court. But if we postpone the arrest and allow the authorities including police to obtain leave or permission for investigation from the Court of competent jurisdiction then the purpose will be subserved.

43. Lot of submissions are made about applicability of Rule 12 of the Electricity Rules, 2005. It is further submitted that there is no provision of making such Rule of investigation and arrest by the police. We have seen the rule making power under S. 176 of the Act. Section 176 gives power to the Central Government to make the rule whereunder we find that some of the rule are specifically made without prejudice to the generality of the rule making power. Therefore, such power exists even under the general rule making power. According

to us, question is not the making of such rule but making its effectivity with the true spirit of the Act. The Act, 2003 provides certain offences punishable in accordance with law. One of such offence is theft of electricity under Section 135 of the Act. Section 135 of the Act does not preclude applicability of Cr. P.C. absolutely. Rule 12 of the Rules is speaking directly on the issue. But according to us, there is a direct conflict between such rule and Section 151 of the Act. Had it been the case that Section 151 is exercisable, we could have given thought in respect of the question/s raised by the petitioners, but now when the Bill has been presented proposing amendment of such section by converting non-cognizable offence to cognizable offence, we should not interfere with it. We can only keep the applicability of both Section 151 of the Act and Rule 12 of the Rules in abeyance till the amendment actually takes place. Naturally the question will arise how the law will take effect? It can take effect by applying the provision of S. 175 of the Act. Such section has made the entire Electricity Act, 2003 as a supplementary law in addition to and not in derogation to any other law for the time being in force. "Derogation" means the act of annulling or breaking a law, or some part of it as per Law Lexicon 1997 Edition. Therefore, when by such Section the Electricity Act, 2003 does not propose to break or annul the existing law, Cr. P.C. can act as a filler to meet the need or necessity. Now the question would be what is the need? The need is taking cognizance by the Court as regards non-cognizable offences and giving an appropriate direction to the police to do the needful. Section 155 of the Cr. P.C. is clear to that extent as given hereunder:

"155. Information as to non-cognizable cases and investigation of such cases.-- (1) when information is given to an

officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

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

44. However, from the aforesaid discussions the following inferences are drawn:

(a) Theft of electricity is social crime;

(b) electricity is saleable commodity per unit but not unsaleable abstract energy and supply of uninterrupted electricity to the citizens is essential service of the State, therefore, theft of electricity should be treated as cognizable offence;

(c) persons involved in theft of electricity do not necessarily mean the illegal user alone but persons adding or abating the theft either within or outside the department;

(d) objects and reasons, list of offences and Sections 135,151 and if necessary other sections of the Act, 2003 should be harmoniously construed;

(e) Section 151 and the word "non-cognizable" under the list of offences under the Act can be deleted to have more effective applicability;

(f) by virtue of Section 175 of the Act, 2003, the Act is supplemental to the general law, therefor, there is no bar to the applicability of Cr. P.C.

(g) "Electricity" being item No. 38 of the List III -- concurrent list of the Seventh Schedule of the Constitution of India, both Central and State have every right to form Special Task Force to entrust the duty at an appropriate circumstance especially in case of doubt about failure or connivance of the police with miscreants.

45. With the above inferences following order is passed hereunder: Both the existing Section 151 of the Electricity Act, 2003 and Rule 12 of the Electricity Rules, 2005 shall be kept in abeyance and can be made applicable when amendment of the Electricity Act, 2003 will actually take effect. The word "cognizance" under the Rule 12 of the Electricity Rules, 2005 will be read as "action". Since theft of electricity is declared as social crime and saleable commodity, there is no bar under Cr. P.C. to take care of the offences temporarily till its amendment by virtue of Section 175 of the Act. Necessary applications can be made by the appropriate authority and/or by the police to the Court of competent jurisdiction to obtain leave and/or permission for necessary investigation of the individual cases. After obtaining such leave/permission there will be no bar for them to investigate and/or arrest an offender or offenders. The arrest of the petitioners is stayed for a period of one month or till after order of the Court of competent jurisdiction to investigate the matter, whichever is earlier.

46. Thus, the writ petition stands disposed of. No order is passed as to costs."

5. It is argued by the learned counsel for the applicant that the Police submitted a charge-sheet and the Special Judge unmindful of the directions issued by the Division Bench, took cognizance and issued process. Therefore, the orders issuing process in this case are in violation of the directions of the Division Bench of this Court, where without seeking permission of the competent Court, the Police had filed a charge-sheet against the applicant.

6. The aforesaid plea has been contested by Mr. Mata Prasad, Advocate holding brief of Mr. Baleshwar Chaturvedi, learned counsel for respondents nos. 3 and 4 and Mr. D.K. Srivastava, learned A.G.A. appearing on behalf of the State.

7. It is argued that in view of the subsequent amendment of the provisions of Section 151 of the Act of 2003 *vide* Act No. 26 of 2007 and the decision of the Supreme Court in **Union of India vs. Mustaq alias Mustafa and others, (2016) 13 SCC 398** the said ground is no longer tenable.

8. The Act of 2003 was amended *vide* Act No. 26 of 2007 inserting the first proviso to Section 151 of the Act of 2003. By the said amendment, the offence under Section 135 was made a cognizable offence of which the Court could take cognizance upon a Police report filed under Section 173 (2) of the Code of Criminal Procedure, 1973. In **Assistant Electrical Engineer v. Satyendra Rai and another, (2014) 4 SCC 513**, the Supreme Court reversed a judgment of the Patna High Court, holding that the Court could not take cognizance of

an offence of electricity theft on a Police report, but on a complaint alone in writing by the appropriate Government. The said view was held untenable. In the Patna case, the offence had been committed on 24.01.2007 and the Amending Act No. 26 of 2007 making the offence cognizable came into force with effect from 15.06.2007. Therefore, it was argued before their Lordships of the Supreme Court in **Satyendra Rai** (*supra*) that the amendment made *vide* Act No. 26 of 2007 would not apply to the writ petitioners' case. There, the offence was committed prior to insertion of the first proviso to Section 151 of the Act of 2003 by the Amending Act of 2007. The aforesaid contention was repelled by the Supreme Court holding:

8. Mr Mohit Kumar Shah, learned counsel appearing for the appellant invites our attention to the present Section 151 of the Act and more particularly to the proviso which has been added by way of an amendment. This proviso came by way of Act 26 of 2007 and reads as under:

"Provided that the court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided further that a Special Court constituted under Section 153 shall be competent to take cognizance of an offence without the accused being committed to it for trial."

Therefore, ordinarily, there is no difficulty now in the way of the police to investigate as also to prosecute the accused if it is found that the accused has committed the offence. However, this proviso seems to have come only w.e.f. 15-6-2007, whereas the offence complained of in the present case is stated to have taken place on 24-1-2007. Therefore, it is argued

by the learned counsel for the respondent that the proviso could apply only if the offence is committed and reported after 15-6-2007.

9. We, however, do not agree as the learned counsel appearing for the appellant has also pointed out and invited our attention to the Statement of Objects and Reasons of the Act by which the amendment has come and further by which the proviso is added. Para 4 of the Statement of Objects and Reasons reads as under:

"4. As per the provisions contained in Section 151 of the Act, the offences relating to theft of electricity, electric lines and interference with metres are cognizable offences. Concerns have been expressed that the present formulation of Section 151 stands as a barrier to investigation of these cognizable offences by the police. It is *proposed to amend Section 151 so as to clarify the position that the police would be able to investigate the cognizable offences under the Act*. To expedite the trial before the Special Courts, it is also proposed to provide that a Special Court shall be competent to take cognizance of an offence without the accused being committed to it for trial."

(emphasis supplied)

Therefore, considering the language of Para 4 of the Statement of Objects and Reasons, it is clear that the amendment brought in is clarificatory in nature and as such it would take into its ambit even the pending matters and in that sense it would be a retrospective amendment.

10. There is one more reason why the High Court's order [*Satyendra Rai v. State of Bihar, Criminal Misc. No. 19178 of 2007, order dated 28-5-2009 (Pat)*] can be faulted. The High Court has clearly ignored

the First Schedule of CrPC and more particularly the second part thereof which is under the head "Classification of offences against other laws". The second entry reads as follows:

"If punishable with imprisonment for three years and upwards but not more than seven years, then such offences are held to be cognizable, non-bailable and triable by the Court of the Magistrate of the First Class."

11. Therefore, the High Court ought to have considered this provision which makes the first information report acceptable by the police in the sense that the police could investigate into the matter and if found guilty could have also filed a report under Section 173 CrPC before the court on which the court could have taken the cognizance of the offence."

9. Later on, the issue again came up before the Supreme Court in an appeal from the judgment of the High Court of Chhatisgarh in **Vishal Agarwal and another vs. Chhatisgarh Electricity Board and another**, (2014) 3 SCC 696. Following the decision in **Satyendra Rai**, it was held in **Vishal Agarwal** (*supra*) by the Supreme Court that the amendment to Section 151 is clarificatory in nature and action could be taken on complaints that were pending before the Amending Act of 2007 came into force, treating them to be cognizable cases. In paragraph no. 17 of the report in **Vishal Agarwal**, it was held :

17. In view of the aforesaid judgment of this Court in *Satyendra Rai* case [*Asstt. Electrical Engineer v. Satyendra Rai*, (2014) 4 SCC 513 : (2012) 1 PLJR 476 (SC)], conclusively holding that amendment to Section 151 is clarificatory in nature and further that notwithstanding the provisions of Section

151 of the Act, an FIR could be filed with the police, the matter stands clinched in favour of the Board. However, at the same time we would like to elaborate the view taken by this Court in the aforesaid judgment.

10. Thus, by the time, the challenge to the decision of the Division Bench of this Court in **Mustaq** (*supra*) came up before the Supreme Court in **Mustaq alias Mustafa** (*supra*), the principle was already well settled. Accordingly, the directions protecting the writ petitioners in **Mustaq** on the ground that the cases had been registered at a time when the Amending Act of 2007 had not yet come into force, were all vacated by the Supreme Court in **Mustaq alias Mustafa**. It was held :

2. The High Court has observed as follows: (*Mustaq case* [*Mustaq v. State of U.P.*, 2006 SCC OnLine All 1430 : (2006) 6 All LJ 257] , SCC OnLine All para 43)

"43. ... The 2003 Act provides certain offences punishable in accordance with law. One of such offence is theft of electricity under Section 135 of the Act. Section 135 of the Act does not preclude applicability of CrPC absolutely. Rule 12 of the Rules is speaking directly on the issue. But according to us, there is a direct conflict between such rule and Section 151 of the Act. Had it been the case that Section 151 is exercisable, we could have given thought in respect of the question(s) raised by the petitioners, **but now when the Bill has been presented proposing amendment of such section by converting non-cognizable offence to cognizable offence, we should not interfere with it. We can only keep the applicability of both Section 151 of the Act and Rule 12 of the Rules in abeyance till the amendment actually takes place.**"

(emphasis supplied)

3. The learned Additional Solicitor General has pointed out a decision of this Court in *Electrical Engineer v. Satyendra Rai* [*Electrical Engineer v. Satyendra Rai*, (2014) 4 SCC 513], wherein this Court has specifically held in para 9 as follows: (SCC p. 516)

"9. ... Therefore, considering the language of Para 4 of the Statement of Objects and Reasons, it is clear that the amendment brought in is clarificatory in nature and as such, it would take into its ambit even the pending matters and in that sense, it would be a retrospective amendment."

To that extent, the other decision of this Court in *Vishal Agrawal v. Chhattisgarh SEB* [*Vishal Agrawal v. Chhattisgarh SEB*, (2014) 3 SCC 696 : (2014) 4 SCC (Cri) 674] also plays the same role.

4. In view of the above-cited decisions of this Court, wherein it has been specifically stated that it is clear from the language of Para 4 of the Statement of Objects and Reasons that the amendment brought in is clarificatory in nature and as such it would be a retrospective amendment, we hold that the impugned order [*Mustaq v. State of U.P.*, 2006 SCC OnLine All 1430 : (2006) 6 All LJ 257] passed by the High Court cannot be given effect to and is hereby set aside and direct that the orders passed by this Court, which we have cited hereinabove, be followed.

11. In the aforesaid conspectus of facts, it is no longer open to the learned counsel for the applicant to argue that the learned Special Judge could not take cognizance of the case on the basis of a Police report filed against the applicant. The judgment of the Division Bench in **Mustaq** would not at all come to the applicant's rescue. The said judgment has been set aside by the Supreme Court in **Mustaq alias Mustafa**. Also, the Supreme Court has held the amendment makes the offence punishable under Section 135 of the Act of

2003 cognizable by virtue of the amendment to Section 151 of the Act of 2003 and has done so retrospectively. The reasoning there is that the amendment is clarificatory, and therefore, retrospective.

12. Be that as it may, the law has now been finally settled that in respect of an FIR or complaint pending prior to the date of the amendment, the amended provisions brought *vide* Act No. 26 of 2007 would apply with retrospective effect and not prospectively. Here, the amendment came into force with effect from 15.06.2007 and the offence was committed on 10.08.2005, but, that would not be a ground, as Mr. S.N. Singh wants, to quash the impugned proceedings, in view of the consistent holding of the Supreme Court that the amendment is retrospective, making the offence under Section 135 of the Act of 2003 cognizable.

13. No other point was pressed.

14. This application stands **rejected**.

15. It goes without saying that this order shall not adversely affect the applicant's right, if so advised, to move for discharge at the appropriate stage.

(2023) 5 ILRA 389

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 07.04.2022

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Application U/S 482. No. 12864 of 2021
With
Application U/S 482 No. 27758 of 2021
And Other Connected Cases

Soni Devi

...Applicant

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Applicant:

Sri Rashid Ali, Sri S.B. Singh

Counsel for the Opposite Parties:

G.A., Sri Saurabh Kumar, Sri Sudhir Kumar Agarwal

A.G.As. assisted by Sri Madnesh Prasad Singh, State Law Officer learned counsel for the State.

2. The germane facts of the aforesaid applications are as under:

(1) APPLICATION U/S 482 No. - 12864 of 2021

3. The applicant is the complainant in the present case.

4. The applicant belongs to Scheduled Caste category having bhumidhar of Khasra plot situated in Village Asana, which is adjacent to the property of the opposite party no.2. The opposite party no.2 started raising illegal construction over the plot of applicant and when she resisted, the opposite party no.2 herself moved an application for demarcation of her boundary, upon which the Sub-Divisional-Officer after calling for the report from the Revenue Inspector, measured the land and it was found that the opposite party no.2 has illegally entered into the property of the applicant. Again on 09.07.2020 at about 3 P.M. the opposite party no.2 tried to encroached upon the applicant's property and when she objected, the opposite party no.2 used caste indicating words and had beaten her in which she sustained injuries which were examined. She moved an application before the concerned police station for registering the case but the same was not lodged. Thereafter she moved an application before the Superintendent of Police on 27.07.2020 but to no avail. Thus, she was constrained to file an application under Section 156 (3) Cr.P.C. before the Special Judge SC/ST Act, which was treated as a complaint case vide order dated 19.01.2021, which order is impugned in the present application.

A. Criminal Law – Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Section 14 – Amendment Act No. 1 of 2016 – Jurisdiction of Magistrate – Cognizance – Offence punishable under SC/ST Act – Held, the Magistrate has no jurisdiction to entertain and take cognizance of offence under the Act of 1989 – Vide second proviso to Section 14 (1) of SC/ST Act, Act No. 1 of 2016, the Special Courts constituted under the aforesaid Act have been empowered to take cognizance of offence directly under this Act with effect from 1.1.2016 and therefore, the powers vested u/s 190 (1) (a) Cr.P.C. has come to an end. (Para 16 and 23)

B. Criminal Law – S.C. & S.T. (Prevention of Atrocities) Act, 1989 – Sections 15(9) & 18-A (1) (a) – S.C. & S.T. (Prevention of Atrocities) Rules 1995 – Rule 5 – Application u/s 156(3) was treated as the Complaint case – Permissibility – Held, Special Judge cannot treat the application u/s 156 (3) Cr.P.C. as a complaint case. (Para 24 and 31)

Applications allowed. (E-1)

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri S.B.Singh, learned counsel holding brief of Sri Rashid Ali, learned counsel for the applicant in leading application under Section 482 Cr.P.C. along with other counsel in the connected applications, Sri Sudhir Kumar Agarwal, learned counsel for the opposite party no.2 and Sri Rajeshwar Singh, along with Sri Rakesh Chandra Srivastava learned

(2) APPLICATION U/S 482 No. - 27758 of 2021

5. The applicants in this application are accused persons.

6. The opposite party no.2 had given Rs. 1,68,000/- to the applicant no.1 for executing a sale deed in his favour, however neither the sale deed was executed nor the amount was returned. On 07.10.2019 at about 3 P.M. the opposite party no.2 along with co-villagers Mobin, Sanjay, Furquan and Jai Karan reached the house of the applicant no.1 Prem, where all the accused persons (applicants) came out with lathi and danda, used Un-Parliamentary language and caste indicating words. When the informant/opposite party no.2 went to lodge a report, his report was not lodged, due to which, the opposite party no.2 sent an application before the Superintendent of Police but no heed was paid, therefore the opposite party no.2 moved an application under Section 156 (3) Cr.P.C. which was treated as a complaint case vide order dated 07.09.2020 in which, after recording of the statements under Sections 200 and 202 Cr.P.C. the learned Additional Sessions Judge/Special Judge (SC/ST Act), Amroha vide order dated 19.10.2021 summoned the accused-applicants to face trial under Sections 323, 504, 506 I.P.C. Section 3 (1) Dha SC/ST Act, Police Station Hasanpur, District Amroha. Being aggrieved by the summoning order, the accused-applicants have challenged the entire proceedings pursuant to the summoning order before this Court.

(3) APPLICATION U/S 482 No. - 27812 of 2021

7. The applicants in this application are accused in the present case.

8. On 28.07.2019 at about 4 P.M. when the opposite party no.2 was feeding her cows in the garden, the applicants armed with Danda and Axe came and started abusing her using caste indicating remarks and asked her as to how her cows entered into their field upon which altercation took place and they pushed her, due to which she fell down. Thereafter they mercilessly beaten her cows due to which the udders of the cows got burst. The opposite party no.2 returned to her house and told the entire happening to her husband. Again at about 11 P.M. the accused-applicants came to her house and pelted stones upon her door, used caste indicating words but due to fear, she did not open the door. Her husband made a call on 100 number and intimated the police about the incident. Thereafter, she went to lodge a first information report at Police Station Churki but the same was not lodged and a written report to the Superintendent of Police, Jalaun at Orai was sent by registered post on 03.08.2019 but the same met with same fate. Being aggrieved by the same, the opposite party no.2 filed an application under Section 156 (3) Cr.P.C. in the Court of Special Judge (SC/ST Act), Jalaun at Orai on 07.08.2019, which was treated as complaint case and registered as Complaint Case No.51 of 2019 (Smt. Usha Devi Vs. Arvind Batham and others). After recording of the statements under Sections 200 and 202 Cr.P.C., the accused-applicants were summoned to face trial under Sections 504, 506 I.P.C. and Section 3 (1) (Da) (Dha) of SC/ST Act, Police Station Churkhi, District Jalaun vide order dated 29.10.2021. The accused-applicants by means of the instant application have challenged the impugned summoning order dated 29.10.2021 passed in the aforesaid complaint case.

(4) APPLICATION U/S 482 No. - 4382 of 2022

9. The applicant is the complainant in the instant case.

10. The applicant filed an application under Section 156 (3) Cr.P.C. in the Court of Special Judge (SC/ST Act) Allahabad on 03.09.2021 with the averments that he came to know through his acquaintance Sri Guddo Mishra (Opposite party No.4) the selling of land by one Jamuna Prasad (opposite party no.3) situated at Village Brijsinghpur alias Ramgarh which is near to the house of his in-laws, he approached Jamuna Prasad and Arazi No. 256 area 0.2005 Hectare was agreed to be sold for a sale consideration of Rs. 10,00,000/-. Thereafter, said Jamuna Prasad (opposite party no.3) told the applicant to have conversaton regarding land through Guddo Mishra (opposite party no.4) and whenever Guddo Mishra (opposite party no.4) would ask him to execute the deed, the deed will be executed. With regard to the aforesaid transaction, Rs.50,000/- was advanced on 22.06.2021, to the Jamuna Prasad (opposite party no.3) in presence of Guddo Mishra (opposite party no.4) as well as in presence of witnesses namely Ram Murat, Pyare Lal, Samarjeet and Anil Kumar. Against which, the opposite party no.3 Jamuna Prasad issued a receipt on a stamp paper of Rs. 10 and the remaining Rs. 9,50,000/- was agreed to be paid through cheque at the time of execution of the sale deed. On 01.08.2021 the Guddo Mishra-opposite party no.4 came to the applicant and stated that Jamuna Prasad-opposite party no.4 is in urgent need of money and now he wants Rs. 4 lacs in cash, remaining Rs. 5,50,000/- through cheque. He further told to get the sale deed executed within one or two days. The applicant somehow managed the money and rushed to the Tehsil Soraon, District Allahabad on 03.08.2021 for execution of the sale deed in his favour of

his wife, namely, Smt. Usha. The accused-opposite party nos. 3 and 4 asked the applicant to handover the cash and cheque amount, whereupon, cheques nos. 227225 and 227226 amounting to Rs. 2,50,000/- and Rs. 3,00,000/- respectively and cash Rs. 4 lacs were handed over to the opposite party no.3-Jamuna Prasad in presence of witnesses Gyan Chand and Anil in the Tehsil premises. The opposite party no.3 after taking the cheques and cash handed over to opposite party no.4 and asked him to count the same, in the meantime, he was putting his signatures on the deed. The opposite party no.4 Guddo Mishra took away the cheques and cash and at the time of putting signatures and thumb impression on the photo copy of the deed in front of the Registrar, the accused-opposite party no.3 Jamuna Prasad avoided the same and told to wait for Guddo Mishra to come. In the meantime the opposite party no.3 also went away on the pretext that he is going to search Guddo Mishra-opposite party no.3 but he did not return till late evening. On the next day, the applicant alongwith his associates had traced out the opposite party nos. 3 and 4, who abused him and used caste indicating words and threatened them to forget the money, failing which to face dire consequences. With regard to the aforesaid incident, the applicant had given an application before the Station House Officer, Police Station Soraon, District Allahabad but nothing was done, therefore the applicant sent an application dated 12.08.2021 before the Senior Superintendent of Police, Prayagraj through registered post, however nothing was done and thus the applicant was constrained to file an application under Section 156 (3) Cr.P.C. before the Special Judge (SC/ST) Act, Allahabad which was dismissed vide order dated 12.10.2021.

(5) APPLICATION U/S 482 No. - 6688 of 2022

11. The subject matter in the instant application is different from the aforesaid applications and it appears that due to inadvertent the same has been wrongly connected with the present case.

(6) CRIMINAL REVISION No. - 2363 of 2021

12. The subject matter in the present revision is also different from the aforesaid applications and it appears that due to inadvertent the same has been wrongly connected with the present case.

13. Sri S.B.Singh, learned counsel for the applicant submits that the order dated 19.1.2021 passed by the Special Judge (SC/ST Act), Sonbhadra treating the application under Section 156(3) Cr.P.C. as a complaint case is against the law. He further submits that the applicant makes out a prima facie case for registration of the F.I.R. but the learned Court below without considering the same has passed an order to convert the application under Section 156 (3) Cr.P.c. as a complaint case. He next submits that if the information relating to the commission of an offence under the SC/ST Act, if given orally to an officer incharge of the police station that should be reduced in writing or under his direction and be read over to the informant and every such information whether given in writing or reduced to writing as aforestated, shall be signed by the persons giving it and the substance thereof shall be entered in a book maintained by the said Police Station. In the instant case, the complainant had filed an application under Section 156 (3) Cr.P.C. for registration of the case, which was rejected. On the other hand, the Court below has committed an illegality by treating the case as a complaint case. He next submits that the Special Judge is not empowered to convert the application under

Section 156 (3) Cr.P.C. as a complaint case against the offence under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act. He next submits that the F.I.R. ought to have been lodged by the concerned official of the Police station. He next submits that the order passed by learned Special Judge is contrary to the provisions of the Act. He also submits that a special duty has been casted upon the police officials, on receiving information of incident, to lodge an F.I.R. and in case of failure to do so, provision has been made for awarding punishment under section 4 of the Act.

14. On the other hand, learned A.G.A. as well as learned counsel for the opposite party no.2 has submitted that the impugned orders have been passed in accordance with law after considering the factual and legal aspects of the matter and thus there is no illegality in the impugned orders. Learned A.G.A. further submits that Section 190 Cr.P.C. provides for cognizance of an offence by the Magistrate and sub-Section (1) (a) provides that any Magistrate of the first class and any Magistrate of second class specially empowered in this behalf under sub-Section (2) may take cognizance of any offence upon receiving a complaint of facts which constitute such offences.

15. On the other hand, learned counsel for the applicants submits that after the amendment in the Section 14 of SC/ST Act, powers have been conferred upon Special Judge and therefore Section 190 (1) (a) Cr.P.C. stood barred and in matter of SC/ST, the powers of the learned Magistrate to take cognizance is extinguished due to the aforesaid amendment.

16. Now the question before this Court is to see, whether the Magistrate can

directly take cognizance of offence punishable under SC/ST Act or it is the Special Court constituted under Section 14 of the Act, which has the jurisdiction to take cognizance in view of amendment made in provisions of SC/ST Act, Amended Act 2015 (Act No.1 of 2016) and the second question before this Court is, whether the Special Judge can treat the application under Section 156 (3) Cr.P.C. as a complaint case or not.

17. Now, in light of the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as amended by the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 2015 [Act 1 of 2016], to resolve the aforesaid issue, it is necessary to go through the definition of the term 'Special Court' as defined in Section 2(d) of the Act, which reads as follows:

"Special Court, means a Court of Session specified as a Special Court in Section 14."

Section 14 of the Act, before the amendment Act of 2015, was as follows:

"14. Special Court.- For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act."

18. A reading of the said provision would indicate that a Court of Session shall be notified as a Special Court.

19. Section 14 of the SC/ST Act was drastically amended by the Amendment Act (1 of 2016). Section 14 has now been replaced by an entirely new provision.

Thus, the amended Section 14 of the Act reads as follows:

14. (1) For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

Provided further that the Courts so established or specified shall have powers to take cognizance directly of offences under this Act.

20. Thus in Section 14 (1), for the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:

21. Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

22. Provided further that the Courts so established or specified shall have powers to take cognizance directly of offences under this Act in view of amended provisions, exclusive Special Court as well

as Special Court shall exercise original jurisdiction to take cognizance of the offence under the Act and proceed with trial of the case not being hindered by Section 193 Cr.P.C. The said Special Courts, were not originally empowered to take cognizance of offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, directly as the Special Courts were hindered by Section 193 of Code of Criminal Procedure as already pointed out under the Special Court notified as per first proviso to Section 14 of the Act, as amended, has got power to directly take cognizance without there being any need for committal.

23. Therefore, the question as to whether the Magistrate can directly take cognizance of offence punishable under SC/ST Act or it is the Special Court constituted under Section 14 of the Act, 1989 which has the jurisdiction to take cognizance in view of amendment made in provisions of SC/ST Act, Amended Act 2015 (Act No.1 of 2016). The reply thereto is that Magistrate has absolutely no jurisdiction to entertain and take cognizance of offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Vide second proviso to Section 14 (1) of SC/ST Act, Act No.1 of 2016, the Special Courts constituted under the aforesaid Act have been empowered to take cognizance of offence directly under this Act with effect from 1.1.2016 and therefore, the powers vested under Section 190 (1) (a) Cr.P.C. has come to an end. Answered accordingly.

24. The second question for consideration before this Court is as to whether the Special Judge can treat the

application under Section 156 (3) Cr.P.C. as a complaint case or not.

25. To determine the aforesaid question, it is necessary to go through Rule 5 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules 1995.

**5. INFORMATION TO
POLICE OFFICER IN-CHARGE OF A
POLICE STATION:**

(1) Every information relating to the commission of an offence under the Act, if given orally to an officer in-charge of a police station shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the persons giving it, and the substance thereof shall be entered in a book to be maintained by that police station.

(2) A copy of the information as so recorded under sub-rule (1) above shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in-charge of a police station to record the information referred to in sub-rule (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who after investigation either by himself or by a police officer not below the rank of Deputy Superintendent of Police, shall make an order in writing to the officer in-charge of the concerned police station to enter the substance of that information to be entered in the book to be maintained by the police station.

26. In case, no action is taken then the aggrieved person has a right for redressal of his grievance under Section 15 (9) of the SC/SC Act by filing a complaint before the Special/Exclusive Special Judge, as the case may be, who shall refer the complaint to the supervisory Administrative Committee framed under Section 21 (iv) of the SC/ST Act read with Rule 4(4) and Rule 17 of the SC/ST Rules, which was replaced by G.S.R. 424 (E) dated 14.04.2016 (w.e.f 14.04.2016)

27. Section 18 A (1) (a) Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 as amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act 2018, is in the following terms:-

"18A. No enquiry or approval required-- (1) For the purpose of this Act (a) preliminary enquiry shall not be required for registration of a First Information Report against any person."

28. As no enquiry or approval is required for registration of the first information report against any person under Section 18A of the Act and in case F.I.R. is not lodged, Section 4 (1) of the Act provides for punishment of a public servant in neglecting its duties, after following the procedure as has been provided under Section 5 (3) of the Rules. Section 4 (1) of the Act reads as under:-

"4(1) Whoever, being a public servant but not being a member of a Scheduled Caste or a Scheduled Tribe, willfully neglects his duties required to be performed by him under this Act and the rules made thereunder, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to one year."

4(2) The duties of the public servant to in sub-section (1) shall include--

(a) to read out to an informant the information given orally, and reduced to writing by the officer in-charge of the police station, before taking the signature of the informant;

(b) to register a complaint or a First Information Report under this Act and other relevant provisions and to register it under appropriate sections of this Act;

(c) to furnish a copy of the information so recorded forthwith to the informant;

(d) to record the statement of the victims or witnesses;

(e) to conduct the investigation and file charge sheet in the Special Court or the Exclusive Special Court within a period of sixty days, and to explain the delay if any, in writing.

(f) to correctly prepare, frame and translate any document or electronic record;

(g) to perform any other duty specified in this Act or the rules made thereunder.

29. Section 4 (3) of the Act provides that the cognizance in respect of any dereliction of duty referred to in sub-section (2) by a public servant shall be taken by the Special Court or Exclusive Special Court and shall give direction for penal proceedings against such public servant.

30. Considering Rule 5 of the SC/ST Rules 1995 as amended by The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018, it is borne out that every information relating to commission of an offence under the Act, if given orally to an officer incharge of the police station shall be

reduced to writing since there is no bar under Section 18A of the Act that preliminary enquiry or approval is required for registration of the first information report and on refusal to reduce in writing such information by the police officer, the aggrieved person may move an application in writing and by post to the concerned Superintendent of Police, who may either by himself or by a police officer not below the rank of Deputy Superintendent of Police shall make an order in writing to the officer incharge of the concerned police station to enter the substance of information to be entered in the book to be maintained by that police station. Further, in case the grievance is not redressed, the aggrieved person may approach the Special Court or the Exclusive Special Court against the public servant for punishing him under Section 4 of the Act, for neglecting his duties by a public servant but not being member of Scheduled Caste or a Scheduled Tribe. Even if the grievance is not redressed, the aggrieved person may file a complaint under Section 15 (9) of SC/ST Act before the Special/Exclusive Special Judge, who shall refer the matter before the Administrative Committee formed under Section 21 (iv) of SC/ST Act Rules 4 (4) and Rule (17) of the SC/ST Rules for punishing the officer in charge as per provisions of Section 4 of the Act.

31. Therefore, the answer to the second question that the Special Judge can treat the application under Section 156 (3) Cr.P.C. as a complaint case or not? Answer is "No" in view of the Rule 5 (1) of the amended Act.

32. The case in hand is that in Criminal Misc. Application under Section 482 Cr.P.C. No. - 12864 of 2021, which is the leading case, the learned Special Judge (SC/ST) Act

Sonebhadra has treated the application under Section 156 (3) Cr.P.C. as a complaint case vide order dated 19.01.2021, which in the opinion of the Court is not tenable in the eyes of law.

33. The second and third case being Criminal Misc. Application under Section 482 Cr.P.C. Nos. 27758 & 27812 of 2021, wherein the accused persons/applicants have challenged the summoning order dated 19.10.2021 & 29.10.2021 passed by learned Spacial Judge (SC/ST Act), Amroha and District Jalaun, the proceedings are not maintainable so far as it relates to non-registering of the F.I.R. against the accused persons.

34. In the connected fourth case before this Court is Criminal Misc. Application under Section 482 No. 4382 of 2012, the complainant has challenged the order 12.10.2021 passed by learned Special Judge (SC/ST Act) Allahabad by which the application under Section 156 (3) Cr.P.C. has been rejected. That order, in the considered opinion of the Court is also not sustainable.

35. Thus the aforesaid four applications are allowed and the proceedings of the aforesaid case are quashed with liberty to the first informant/complainant to approach the concerned Station House Officer for registration of their information in writing as has been provided under Section 5 (1) of the Rules and in case the said information is not reduced in writing by the concerned Police Officer, the first informant/complainant may move an appropriate application before the concerned Superintendent of Police under Section 5 (3) of the Rules and it is expected that the Superintendent of Police would comply Section 5 (3) of the Rules.

36. It goes without saying that the subject matter of Criminal Misc. Application U/S 482 No. - 6688 of 2022 as well as Criminal Revision No. - 2363 of 2021 are different from the aforesaid applications and it appears that due to inadvertence both of them have been wrongly connected and thus the same are being un-tagged and are directed to listed as fresh on 13.04.2022 before appropriate Court.

(2023) 5 ILRA 398
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.02.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/S 482. No. 25838 of 2022

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

Counsel for the Applicants:

Sri Upendra Upadhyay, Sri Anil Tiwari (Sr. Advocate)

Counsel for the Opposite Parties:

G.A.

A. Criminal Law – Indian Penal Code – Section 153-A – Offence of promoting enmity on the ground of religion, race etc. – Constitution of offence – Intention – Relevance – Offending words were spoken in public meeting – Effect – Quashing of proceeding sought – Permissibility – Held, the question of proving mens rea to incite people to violence or cause disorder is to be proved during trial by leading evidence by the prosecution. However, if prima facie, the act, sign or words has propensity to disturb the public order or incite the people to violence, the proceedings cannot be quashed at the

threshold – Further held, considering the context and the intention with which the offending words were spoken in a public meeting, at this stage it cannot be said that the offence under Section 153-A IPC is not attracted against the petitioners. (Para 14 and 20)

B. Constitution of India, 1950 – Preamble – Unity and Integrity of nation – Significance in dealing with criminal proceeding – Held, Preamble to the Constitution consciously puts together fraternity assuring dignity of the individual and the unity and integrity of the Nation which are linked; one in the form of rights of individuals; and other in the form of individual's obligation to others to ensure unity and integrity of the Nation – The unity and integrity of the Nation cannot be overlooked and slighted, as acts that promote or are likely to promote divisiveness, alienation and schematism. (Para 17)

Application dismissed. (E-1)

List of Cases cited:

1. Balwant Singh & anr. Vs St. of Pun.; (1995) 3 SCC 214;
2. Bilal Ahmed Kaloo Vs St. of A.P.; (1997) 7 SCC 431;
3. Manzar Sayeed Khan Vs St. of Mah. & anr.; (2007) 5 SCC 1;
4. Amish Devgan Vs U.O.I. & ors.; (2021) 1 SCC 1; and
5. Shreya Singhal Vs U.O.I.; (2015) 5 SCC 1

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

1. Heard Sri Anil Tiwari, learned Senior Advocate, assisted Sri Upendra Upadhyay, learned counsel for the petitioners and Sri M.C. Chaturvedi, learned Additional Advocate General

assisted Sri Ratnendu Kumar Singh, learned AGA for the State.

2. The present petition under Section 482 Cr.P.C. has been filed seeking quashing of the charge sheet dated 11.5.2022 under Sections 171-F, 506, 186, 189 and 153-A and 120-B IPC in pursuance to the FIR dated 3.3.2022 registered at Crime No.97 of 2002, initially registered under Sections 506 and 171-F IPC at Police Station Kotwali Mau, District Mau. Further prayer has been made for quashing of the order of cognizance and summoning dated 23.5.2022 passed by the Special Judge (MP/MLA Court)/Additional Chief Judicial Magistrate, Mau in Criminal Case No.9720 of 2022.

3. The FIR in question came to be registered after petitioner no.1 made a statement in a public meeting during his election campaign for Member of Legislative Assembly from Mau Sadar Constituency. Petitioner No.1 was contesting the said elicitation on the ticket of Suheldev Bhartiya Samaj Party in March, 2022. The offending part of the statement made by petitioner no.1 would read "समाजवादी पार्टी के राष्ट्रीय अध्यक्ष श्री अखिलेश यादव जी से यह कहकर आया हूँ कि 6 महीने तक किसी का ट्रान्सफर पोस्टिंग नहीं होगी। भइया जो यहां है वो यहां ही रहेगा पहले हिसाब किताब होगा उसके बाद उसके जाने के सर्टीफिकेट पर मुहर लगाया जायेगा।"

4. The main contention of the learned counsel for the petitioners is that the said statement by no stretch of imagination would constitute an offence under Section 153-A IPC. It has been further submitted that to constitute an offence under Section 153-A IPC, there must be an intention of the person making the statement to create disorder or to incite people to violence.

Even if it is believed that petitioner no.1 had made the said statement, the statement was directed towards the Government people and not against any member, religion, racial, language or regional groups or castes or communities. It is further submitted that if the provisions of Section 153-A IPC are considered in proper perspective, the said offence would not get attracted against the petitioners for making the offending statement and, therefore, taking cognizance for an offence under Section 153-A IPC against the petitioners is wholly illegal and to that extent at least the cognizance order is bad in law and is liable to be set aside.

5. In support of his said contention, learned counsel for the petitioners has placed reliance on the following judgments:-

1. **Balwant Singh and another Vs. State of Punjab;** (1995) 3 SCC 214;

2. **Bilal Ahmed Kaloo Vs. State of A.P.;** (1997) 7 SCC 431;

3. **Manzar Sayeed Khan Vs. State of Maharashtra and another;** (2007) 5 SCC 1;

4. **Amish Devgan Vs. Union of India and others;** (2021) 1 SCC 1; and

5. **Shreya Singhal Vs. Union of India;** (2015) 5 SCC 1."

6. On the other hand, Sri M.C. Chaturvedi, learned Additional Advocate General has submitted that the investigating officer has prepared a report, which was sent to the Government for sanction of the prosecution against petitioner No.1 on 3.5.2022. Thereafter, the charge sheet has been submitted against both the petitioners on 11.5.2022. The Government had sanctioned the prosecution against both the petitioners on 24.8.2022 and the said

sanction order has been incorporated in the case diary of Parcha No.CD-11 and forwarded the same on 02.09.2022.

7. It has been further submitted that petitioner no.1 is having seven similar cases, including the present one, and petitioner no.2 is having to his credit five criminal case, including the present one. After making the offending statement by petitioner no.1, the Returning Officer of 356 Mau Assembly Constituency sent a notice dated 4.3.2022 to petitioner no.1 calling upon him to furnish his reply as to why action should not be taken against him under the relevant provisions of Representation of Peoples Act, 1951. However, petitioner no.1 did not give any reply to the said notice issued by the Returning Officer. The Election Commission of India had barred petitioner no.1 from holding any public meeting, public procession, public rallies, road shows and interviews, public utterances in media (electronic, print, social media) etc. in connection with the ongoing election for 24 hours from 7 PM from 4.3.2022.

8. Learned Additional Advocate General has further submitted that the offending statement made by petitioner no.1 was not only directed against the Government machinery, but it was also directed against the law abiding and peace-loving citizens/communities, who were feeling protected under the then government in the State from the atrocities and crimes of petitioner no.1 and his family and other co-accused. He has also submitted that the State Government had given free hand to the State machinery to handle law and order without being influenced from any political pressure. The Government officials had acted as per law without being coming under pressure from any quarter and, therefore, the residents

of the said constituency, who were not supporters of the petitioners, were threatened and made insecure by giving threats to the government officials. Not only the Government officials but all those who were feeling safe and secure, felt tremors and fear in their spines by the open threat given by the petitioners. He has, therefore, submitted that the offence under Section 153-A IPC is clearly attracted in the facts and circumstances of the case.

9. Learned Additional Advocate General has also submitted that the gesture, language and the context are relevant to see whether the offence under Section 153-A IPC is attracted or not. If one looks at the video recording of the statement given by petitioner no.1 in public meeting, the warning was not against the Government officials, but it was against all those who were feeling protected and saved under the then State government. Petitioner no.1 was sure that the Government of Samajwadi Party lead by Sri Akhilesh Yadav would occupy the seat of power in the State of Uttar Pradesh and, therefore, he made the threatening statement, which has propensity to disturb the public order. He, therefore, submits that the offence under Section 153-A IPC is clearly attracted against the petitioners and no interfere is required by this Court to quash the proceedings, and the petition being devoid of merit and substance, is liable to be dismissed.

10. I have considered the submissions advanced by the learned counsel for the parties and perused the record.

11. For the sake of argument, Section 153-A IPC reads as under:-

"153A. Promoting enmity between different groups on ground of religion, race, place of birth, residence,

language, etc., and doing acts prejudicial to maintenance of harmony.--(1) Whoever--

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill will between different religious, racials, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity,

(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Offence committed in place of worship, etc.--Whoever commits an offence

specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine."

12. The offence under Section 153-A IPC may get attracted where a person by words, either spoken, or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities or commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity. If the statement or the sign or representation has propensity to incite people to violence, the offence under Section 153-A IPC gets attracted.

13. The Supreme Court in the case of *Balwant Singh* (Supra) has held that the intention to cause disorder or incite people to violence is the *sine qua non* of the offence under Section 153-A IPC and the prosecution has to prove the existence of *mens rea* in order to succeed. Paragraph 9 of the said judgment would be apt to extract, which reads as under:-

"9. Insofar as the offence under Section 153-A IPC is concerned, it provides for punishment for promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, caste or community or any other

ground whatsoever or brings about disharmony or feeling of hatred or ill-will between different religious, racial, linguistic or regional groups or castes or communities. In our opinion only where the written or spoken words have the tendency or intention of creating public disorder or disturbance of law and order or affect public tranquillity, that the law needs to step in to prevent such an activity. The facts and circumstances of this case unmistakably show that there was no disturbance or semblance of disturbance of law and order or of public order or peace and tranquillity in the area from where the appellants were apprehended while raising slogans on account of the activities of the appellants. The intention to cause disorder or incite people to violence is the sine qua non of the offence under Section 153-A IPC and the prosecution has to prove the existence of mens rea in order to succeed. In this case, the prosecution has not been able to establish any mens rea on the part of the appellants, as envisaged by the provisions of Section 153-A IPC, by their raising casually the three slogans a couple of times. The offence under Section 153-A IPC is, therefore, not made out."

14. Thus, the question of proving *mens rea* to incite people to violence or cause disorder is to be proved during trial by leading evidence by the prosecution. However, if *prima facie*, the act, sign or words has propensity to disturb the public order or incite the people to violence, the proceedings cannot be quashed at the threshold.

15. The Supreme Court in the case of *Bilal Ahmed Kaloo* (supra) by placing reliance on the judgement of *Balwant Singh* (supra) has again reiterated that *mens rea* is an equally necessary postulate for the

offence under Section 153-A IPC and same can be discerned from the words "with intent to create to promote or which is likely to create or promote". Paragraphs 10 and 11 of the said judgement which would be relevant, would read as under:-

"10. Section 153-A was amended by the Criminal and Election Laws (Amendment) Act, 1969 (Act No. 35 of 1969). It consists of three clauses of which clauses (a) and (b) alone are material now. By the same Amending Act sub-section (2) was added to Section 505 of the Penal Code, 1860. Clauses (a) and (b) of Section 153-A and Section 505(2) are extracted below:

"153-A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.--(1) Whoever—

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or

(c) ***
shall be punished with imprisonment which may extend to three years, or with fine, or with both.

505. (2) *Statements creating or promoting enmity, hatred or ill will between classes.--Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both."*

The common ingredient in both the offences is promoting feeling of enmity, hatred or ill will between different religious or racial or linguistic or regional groups or castes or communities. Section 153-A covers a case where a person by "words, either spoken or written, or by signs or by visible representations" promotes or attempts to promote such feeling. Under Section 505(2), promotion of such feelings should have been done by making and publishing or circulating any statement or report containing rumour or alarming news.

11. *This Court has held in Balwant Singh v. State of Punjab [(1995) 3 SCC 214 : 1995 SCC (Cri) 432] that mens rea is a necessary ingredient for the offence under Section 153-A. Mens rea is an equally necessary postulate for the offence under Section 505(2) also as could be discerned from the words "with intent to create or promote or which is likely to create or promote" as used in that sub-section."*

16. *In the case of Manzar Sayeed Khan (supra), it has been held that the intention to cause disorder or incite the*

people to violence is the sine qua non of the offence under Section 153-A IPC and the prosecution has to prove prima facie the existence of mens rea on the part of the accused. The question of proof would arise only at the time of trial and the same can be proved by leading the necessary evidence. Paragraph 16 of the said judgement which would be relevant, would read as under:-

"16. Section 153-A IPC, as extracted hereinabove, covers a case where a person by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, disharmony or feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities or acts prejudicial to the maintenance of harmony or is likely to disturb the public tranquillity. The gist of the offence is the intention to promote feelings of enmity or hatred between different classes of people. The intention to cause disorder or incite the people to violence is the sine qua non of the offence under Section 153-A IPC and the prosecution has to prove prima facie the existence of mens rea on the part of the accused. The intention has to be judged primarily by the language of the book and the circumstances in which the book was written and published. The matter complained of within the ambit of Section 153-A must be read as a whole. One cannot rely on strongly worded and isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning."

17. *Preamble to the Constitution consciously puts together fraternity*

assuring dignity of the individual and the unity and integrity of the Nation which are linked; one in the form of rights of individuals; and other in the form of individual's obligation to others to ensure unity and integrity of the Nation. The unity and integrity of the Nation cannot be overlooked and slighted, as acts that promote or are likely to promote divisiveness, alienation and schematism do directly and indirectly impinge on diversity and pluralism. When such acts are done with the objective and intent to cause public disorder or to demean dignity of the targeted groups, they have to be dealt with as per law and such an act would attract the offence under Section 153-A IPC.

18. In the case of *Amish Devgan* (supra) while explaining the context of Section 153-A IPC regarding public tranquillity, the Supreme Court in paragraph 98 of the said judgement held as under:-

"98. In the context of Section 153-A(1)(b) we would hold that public tranquillity, given the nature of the consequence in the form of punishment of imprisonment of up to three years, must be read in a restricted sense synonymous with public order and safety and not normal law and order issues that do not endanger the public interest at large. It cannot be given the widest meaning so as to fall foul of the requirement of reasonableness which is a constitutional mandate. Clause (b) of Section 153-A(1), therefore, has to be read accordingly to satisfy the constitutional mandate. We would interpret the words "public tranquillity" in clause (b) to mean ordre publique a French term that means absence of insurrection, riot, turbulence or crimes of violence and would also include all acts which will endanger the security of

the State, but not acts which disturb only serenity, and are covered by the third and widest circle of law and order. Public order also includes acts of local significance embracing a variety of conduct destroying or menacing public order. Public order in clause (2) of Article 19 nor the statutory provisions make any distinction between the majority and minority groups with reference to the population of the particular area though as we have noted above this may be of some relevance. When we accept the principle of local significance, as a sequitur we must also accept that majority and minority groups could have, in a given case, reference to a local area."

19. Further, in paragraphs 104 to 106 of the aforesaid judgement, the Supreme Court held as under:-

*"104. The word "attempt", though used in Sections 153-A and 295-A of the Penal Code, has not been defined. However, there are judicial interpretations that an "attempt to constitute a crime" is an act done or forming part of a series of acts which would constitute its actual commission but for an interruption. An attempt is short of actual causation of crime and more than mere preparation. In *Aman Kumar v. State of Haryana* [*Aman Kumar v. State of Haryana*, (2004) 4 SCC 379 : 2004 SCC (Cri) 1266] it was held that an attempt is to be punishable because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment.*

105. Further, in *State of Maharashtra v. Mohd. Yakub* [*State of Maharashtra v. Mohd. Yakub*, (1980) 3

SCC 57 : 1980 SCC (Cri) 513] this Court observed : (SCC p. 62, para 13)

"13. ... What constitutes an "attempt" is a mixed question of law and fact, depending largely upon the circumstances of a particular case. "Attempt" defies a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt act or step to commit the offence. Such overt act or step in order to be "criminal" need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence."

106. On the scope of proximity, it was elucidated in *State of Maharashtra v. Mohd. Yakub* [State of Maharashtra v. Mohd. Yakub, (1980) 3 SCC 57: 1980 SCC (Cri) 513] that the measure of proximity is not in relation to time and place but in relation to intention."

20. Considering the context and the intention with which the offending words were spoken in a public meeting, at this stage it cannot be said that the offence under Section 153-A IPC is not attracted against the petitioners. The scope of power under Section 482 Cr.P.C. is limited, and it should be exercised in exceptional cases where the complaint or charge sheet does not disclose any offence. Whether the offence under Section 153-A IPC gets attracted or not, would depend on the

quality of evidence lead by the prosecution during trial. However, at this stage, this Court does not find any ground to interfere with the ongoing proceedings or the charge sheet.

21. Thus, the petition being devoid of merit and substance, is hereby **dismissed**. Interim order, if any, stands vacated. Trial court to proceed accordingly.

(2023) 5 ILRA 405

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 25.01.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Application U/S 482. No. 37804 of 2022

Jafar Abbas Zaidi

...Applicant

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Applicant:

Sri Syed Mohammad Jafer Husain

Counsel for the Opposite Parties:

G.A.

A. Criminal Law – Criminal Procedure Code, 1973 – Section 482 – Inherent power – Scope of interference – Interlocutory order, when can be interfered with – Alternative remedy, how far create bar in exercising inherent power – Held, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation warrants exercise of inherent jurisdiction. The limitation is self-restraint, nothing more – Availability of alternative remedy of criminal revision under Section 397 Cr.P.C. by itself cannot be a good ground to dismiss an application under Section 482 Cr.P.C. – Prabhu Chawla's case relied upon. (Para 12 and 14)

B. Criminal law – Criminal Procedure Code, 1973 – Section 156(3) – Allegation of committing dacoity by taking away the laptop, phone etc. was leveled – Question of recovery and collection of incriminating evidence is involved – However, application u/s 156(3) was treated as the complaint case – Validity challenged – Held, in the case in hand, CCTV footage was required to be retrieved and recovery of the materials taken away by the prospective accused persons was also required. No doubt that the recovery of the aforesaid materials was not possible to be done by the private complainant without the aid of the police – The learned Magistrate, while passing the impugned order, ignored the settled legal position in disposal of the application under Section 156 (3) Cr.P.C. and ordered to treat it as complaint. (Para 25, 28 and 31)

Application allowed. (E-1)

List of Cases cited:

1. Prabhu Chawla Vs St. of Raj. & anr.; (2016) 16 SCC 30
2. Sanjay Bhandari Vs St. of Raj.; (2009) (1) CrLR (Raj.) 282
3. Mohit alias Sonu & anr. Vs St. of U.P. & anr.; (2013) 7 SCC 789
4. Dhariwal Tobacco Products Ltd. Vs St. of Mah.; (2009) 2 SCC 370
5. R.P. Kapur Vs St. of Pun.; AIR 1960 SC 866
6. Som Mittal Vs St. of Karn.; (2008) 3 SCC 574
7. Raj Kapoor Vs St.; (1980) SCC (Cri) 72
8. Madhu Limaye Vs St. of Mah.; 1978 SCC (Cri) 10
9. Vijay Vs St. of Mah.; (2017) 13 SCC 317
10. Madhao Vs St. of Mah.; (2013) 5 SCC 615
11. Ram Babu Gupta Vs St. of U.P.; 2001 SCC OnLine All 264

12. Sukhwasi Vs St. of U.P.; (2007) 59 ACC 730
13. Ramdev Food Products (P) Ltd. Vs St. of Guj.; (2015) 6 SCC 439
14. Anil Kumar Vs M.K. Aiyappa; (2013) 10 SCC 705
15. Gulab Chand Upadhyaya Vs St. of U.P. & ors.; (2002) 44 ACC 670
16. Anmol Singh Vs St. of U.P. & ors.; (2021) 117 ACC 146

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

1. By way of present Application under Section 482 Cr.P.C., prayer has been made to quash the impugned order dated 3.10.2022 passed by Special Chief Judicial Magistrate, Varanasi in Case No.207529 of 2022 (Jafar Abbas Zaidi Vs. Ali Abbas Zaidi and others) whereby application under section 156 (3) Cr.P.C. of the applicant has been treated as complaint.

2. The brief facts of the case, as narrated in the affidavit, are as follows :

3. On 21.8.2021 at about 7:00 P.M., the opposite parties no.2, 3 and 4, in order to commit offence, alongwith 10 - 12 unknown persons entered into the house of the applicant and his laptop, oven, iron, wrist watch, handcam, digital camera, clothes and other costly items worth Rs.2,50,000/- were taken away by committing dacoity and further, sofa, chauki and other furniture were also damaged and thrown by the opposite parties. When the incident was not registered at the police station, application under section 156 (3) Cr.P.C. was filed before the Magistrate concerned. Report from the police station was called for which narrated that the applicant and opposite

party no.2 are real brothers and the house in dispute was divided amongst three brothers, but opposite party no.2 with intention to grab the property claims that her mother had executed Hibbanama of the half portion of the entire house and he had been appointed as Mutwalli and the same had got registered in the Nagar Nigam, Varanasi. However, the said application was rejected by the Court of Magistrate.

4. After rejection of the aforesaid application, criminal revision no.273 of 2021 was preferred, which was allowed by the revisional court vide order dated 26.9.2022 and the matter was remitted back to the Magistrate Court to reconsider the matter in the light of the observations made in the revisional order. Subsequently, in pursuance of the order dated 26.9.2022, the matter was reheard and this time by way of impugned order, the application under section 156 (3) Cr.P.C. was ordered to be treated as complaint vide impugned order dated 03.10.2022, which is under challenge.

5. The learned counsel for the applicant submits that the impugned order suffers from grave error of law and the jurisdictional error was also involved therein. The learned trial court did not take into account the observations and directions given by the revisional court. The said application has been ordered to be treated as complaint merely on the ground that the applicant is having knowledge of the entire facts and evidence in respect thereof can be adduced by him at his own label which was a wrong notion. It is further submitted that from the very perusal of the said application, a cognizable offence is made out, but the learned trial court being misled and misrepresented by police report and without there being due application of

mind, has passed the impugned order, which is against the settled preposition of law.

6. The facts alleged in the aforesaid application clearly show that the matter was requiring investigation by the police and the applicant was not competent to adduce all the evidence relating to the offence himself. The learned trial court did not even pay any attention to the direction of the revisional court to take into account the CCTV footage of the spot. The reasons behind the impugned order given by the learned Magistrate Court are totally contrary to the evidence available on record and on the aforesaid ground, a prayer to quash the impugned order dated 3.10.2022 passed by Special Chief Judicial Magistrate, Varanasi has been made.

7. The said application has been vehemently opposed by the learned A.G.A. mainly on two grounds. Firstly, the order of the Magistrate treating the application under section 156 (3) Cr.P.C. as complaint cannot be challenged by way of an application under section 482 Cr.P.C. and the applicant ought to have filed criminal revision against the said order. Secondly, the learned Magistrate has committed no error in passing the impugned order because there was nothing in the application under section 156 (3) Cr.P.C. which could be investigated by the police and the applicant / complainant could easily collect all the relevant evidence himself. There is no legal or jurisdictional error in the impugned order. The Magistrate is not bound to pass an order for investigation on each and every application under section 156 (3) Cr.P.C. which discloses the commission of a cognizable offence, rather it is well competent to treat such an application as a complaint also and

to proceed under the provisions of Chapter XV of Cr.P.C. even if a cognizable offence is made out from the perusal of the aforesaid application.

8. Learned counsel for the applicant has relied upon the decision of the three Judges Bench in the case of **Prabhu Chawla Vs. State of Rajasthan and Another, (2016) 16 Supreme Court Cases 30** in respect of the first point. In this matter, the point in issue was whether the inherent power of the High Court under Section 482 Cr.P.C. stands repelled when the revisional court power under Section 397 Cr.P.C. overlaps.

9. In this matter, in view of the judgment of Rajasthan High Court in the case of **Sanjay Bhandari Vs. State of Rajasthan, (2009) (1) CrLR (Raj.) 282** the High Court of Judicature for Rajasthan at Jodhpur dismissed the petitions preferred by the appellants under Section 482 of Cr.P.C. holding that availability of remedy under Section 397 Cr.P.C. would make a petition under Section 482 Cr.P.C. not maintainable and the same was challenged.

10. Hon'ble the Apex Court after hearing the parties found that the impugned judgments were not sustainable and also discussed the law laid down in **Mohit alias Sonu and Another Vs. State of U.P. and another (2013) 7 SCC 789** and held like this.

"7. As a sequel we are constraint to hold that the Division Bench, particularly in paragraph 28, in the case of Mohit alias Sonu and another (supra) in respect of inherent power of the High Court in Section 482 of Cr.P.C. does not state the law correctly. We record our respectful disagreement."

11. It will be relevant to note here that in Mohit alias Sonu (supra), it was held that when an order under assail is not interlocutory in nature and is amenable to the revisional court jurisdiction of the High Court, then there should be a bar in invoking the inherent jurisdiction of the High Court. It would also be pertinent to mention here that the matter was referred and decided by the larger Bench of the Hon'ble Apex Court for resolving the conflict in Prabhu Chawla case (supra).

12. It was held in Prabhu Chawla case (supra) that there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation warrants exercise of inherent jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face.

13. Hon'ble the Apex Court, discussing several laws promulgated in **Dhariwal Tobacco Products Ltd. Vs. State of Maharashtra, (2009) 2 SCC 370, R.P. Kapur Vs. State of Punjab, AIR 1960 Supreme Court 866, Som Mittal Vs. State of Karnataka, (2008) 3 SCC 574, Raj Kapoor Vs. State, (1980) SCC (Cri) 72, Madhu Limaye Vs. State of Maharashtra, 1978 SCC (Cri) 10**, finally held that -

"6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section 482 Cr.P.C. is unwarranted.....We venture to add a

further reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders! A situation wholly unwarranted and undesirable."

14. The final verdict given by the Hon'ble Apex Court in Prabhu Chawla case (supra) was that availability of alternative remedy of criminal revision under Section 397 Cr.P.C. by itself cannot be a good ground to dismiss an application under Section 482 Cr.P.C.

15. The aforesaid view was further reiterated in **Vijay Vs. State of Maharashtra, (2017) 13 SCC 317** and it was held that as Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders. In view of settled law, mere availability of alternative remedy cannot be a ground to disentitle relief under Section 482 Cr.P.C. and the first issue finds its reply in this manner.

16. In the present matter, the application under Section 156 (3) Cr.P.C. has been ordered to be registered as complaint. The question arises before this Court as to whether the Magistrate was competent to treat the application under Section 156 (3) Cr.P.C. as complaint or he was bound by law only to pass an order on the said application for the investigation by the police.

17. In **Madhao Vs. State of Maharashtra, (2013) 5 SCC 615**, it was held -

"13. When a Magistrate receives a complaint he is not bound to take

cognizance if the facts alleged in the complaint disclose the commission of an offence. The magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156 (3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself."

18. A Full Bench of this Court in the case of **Ram Babu Gupta Vs. State of U.P., 2001 SCC OnLine All 264** has observed as hereinbelow:

"Coming to the second question noted above it is to be at once stated that a provision empowering a court to act in a particular manner and a provision creating a right for an aggrieved person to approach a Court or authority, must be understood distinctively and should not be mixed up. While Ss. 154, 155 sub-section (1) and (2) of 156, Cr.P.C. confer right on an aggrieved person to reach the police, 156(3) empowers a Magistrate to act in a particular manner in a given situation. Therefore, it is not possible to hold that where a bare application is moved before Court only praying for exercise of powers under Section 156 (3) Cr.P.C., it will remain an application only and would not be in the nature of a complaint. It has been noted above that the Magistrate has to always apply his mind on the allegations in the complaint where he may use his powers under Section 156 (3) Cr.P.C. In this connection it may be immediately added that where in an application, a complainant

states facts which constitute cognizable offence but makes a defective prayer, such an application will not cease to be a complaint nor can the Magistrate refuse to treat it as a complaint even though there be no prayer seeking trial of the known or unknown accused. The Magistrate has to deal with such facts as constitute cognizable offence and for all practical purposes even such an application would be a complaint."

19. Also in the case of **Sukhwasi Vs. State of U.P., (2007) 59 ACC 730**, which has been referred in the impugned order passed by the Special Chief Judicial Magistrate, Varanasi, it has also been clarified by the Division Bench of this Court that the Magistrate, on receiving an application under Section 156 (3) Cr.P.C. and finding that cognizable offence is made out from the perusal of such application, is not bound in all cases to make an order for lodging of the F.I.R. and investigation of the case by police.

20. It has been reiterated that the Magistrate is competent enough to treat an application under Section 156 (3) Cr.P.C. as a complaint. This theory is also governed by the observation made by the Hon'ble Apex Court in **Suresh Chandra Jain Vs. State of Madhya Pradesh, (2001) 42 ACC 459** that a Magistrate has an authority to treat an application as a complaint.

21. Hence, indubitably the Magistrate had got jurisdiction to treat an application under Section 156 (3) Cr.P.C. as a complaint and he commits no legal wrong to make such an order.

22. However, in the given facts and circumstances of the present case, it is to be remembered as has been highlighted in a

catena of decisions that the Magistrate is always duty bound to apply his judicial mind as to the facts and circumstances mentioned in such application.

23. In **Ramdev Food Products (P) Ltd. Vs. State of Gujarat, (2015) 6 SCC 439**, the scope of exercise of power under Section 156 (3) Cr.P.C. by the Magistrate was dealt with and it was explicitly held that : (Pg.456, para 22)

"22.1. The direction under Section 156 (3) Cr.P.C. is to be issued, only after application of mind by the Magistrate."

24. In this case, reference of **Anil Kumar Vs. M.K. Aiyappa, (2013) 10 SCC 705** was made wherein it was observed -

"11. The scope of Section 156 (3) Cr.P.C. came up for consideration before this Court in several cases. This Court in **Maksud Saiyed case [(2008) 5 SCC 668]** examined the requirement of application of mind by the Magistrate before exercising jurisdiction under Section 156 (3) Cr.P.C. and held that where jurisdiction is exercised on a complaint filed in terms of Section 156 (3) or Section 200 CrPC, the Magistrate is required to apply his mind."

25. This fact can't be oversighted that there may be situations when some kind of question of recovery is involved in the matter and the Magistrate should always keep in mind, if he is going to treat an application under Section 156 (3) Cr.P.C. as a complaint, whether the applicant is in position to himself collect the incriminating evidence and to produce it before the Court.

26. Learned Single Judge of this Court in **Gulab Chand Upadhyaya Vs. State of U.P. and others, (2002) 44 ACC 670**, issuing some directive guidelines in the matter of the discretion of Magistrate to decide the application under Section 156 (3) Cr.P.C., in a particular manner, held -

"21. The scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some "investigation" is required, which is of a nature that is not possible for the private complainant, and which can only be done by the police upon whom statute has conferred the powers essential for investigation, for example

(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To illustrate by example cases may be visualised where for production before Court at the trial (a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or (b) recovery of case property is to be made and kept sealed; or (c) recovery under Section 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation."

27. Later on, another learned Single Judge of this Court in **Anmol Singh Vs.**

State of U.P. and Others, (2021) 117 ACC 146 reiterated that -

"The magistrate should apply judicial mind while exercising his powers under Section 156 (3) Cr.P.C. He could not act in a mechanical or casual manner and go on with the complaint after getting the report. The course adopted by the Magistrate i.e. direction to the police for registration of FIR and making investigation or to treat the application as a complaint case, must be supported by reasons. The order must also reflect that the Magistrate on relevant considerations has adopted one of these two modes open to him. Mere mention in the order that he has gone through the complaint and the police investigation is not required or otherwise, would not be sufficient compliance of application of judicial mind while deciding application under Section 156(3) Cr.P.C."

28. If the legal position discussed above is translated into the facts and circumstances of the present case and the application under Section 156 (3) Cr.P.C. is examined, it is found that there was a specific allegation in the aforesaid application that the prospective accused took away the laptop, phone, press, wrist watch, handcam, digital camera, clothing and other items of the applicant after entering into his room by committing dacoity. It was also mentioned in the aforesaid application that CCTV footage of the said occurrence is also available. In these circumstances, the question of recovery of the items taken away by the prospective accused committing dacoity in the house of the applicant was clearly involved. It was apparently clear that the applicant himself was not capable to make recovery of those items from the possession of the prospective accused and it could be

done only by the police and that is why police action into the matter was required. The learned Magistrate completely misguided when he wrongly interpreted principle laid down in the case of Sukhwasi (supra), which although empowers the Magistrate to treat an application under Section 156 (3) Cr.P.C. as a complaint, but also cautions that the order should be made after applying the judicial mind and in appropriate cases.

29. In Gulab Chand Upadhyaya (supra) case, some instances have been mentioned wherein police investigation is necessary to be directed.

30. One more factor has been impressed upon by the learned counsel for the applicant, who has drawn the attention of this Court, to the judgment and order dated 26.09.2022 passed by the Sessions Court, Varanasi whereby the impugned order dated 01.10.2021 passed by the learned Magistrate was set-aside and by allowing the criminal revision no.273 of 2021, the matter was remanded to the Magistrate concerned with a specific direction to rehear the matter in the light of the revisional court order after taking into account the whole evidence on record including the evidence relating to CCTV footage. It is in compliance of the revisional court order, the impugned order dated 03.10.2022 was passed by the learned Magistrate. It is amply clear from the perusal of the impugned order that the learned Magistrate even did not take care of the order of the revisional court and no attempt was made by the learned Magistrate even to make a preliminary inquiry in respect of CCTV footage and this Court does not find any whisper to the effect that the fact and evidence of CCTV footage was considered by the learned

Magistrate in passing the impugned order. Needless to say that the Magistrate was bound to comply with the directions given by the revisional court and its defiance is a matter of violation of judicial discipline.

31. In the case in hand, CCTV footage was required to be retrieved and recovery of the materials taken away by the prospective accused persons was also required. No doubt that the recovery of the aforesaid materials was not possible to be done by the private complainant without the aid of the police. The learned Magistrate, while passing the impugned order, ignored the settled legal position in disposal of the application under Section 156 (3) Cr.P.C. and ordered to treat it as complaint, which in the facts and circumstances of the case was not a reasonable and legally sustainable order and thus the second point in issue also finds its answer.

32. On the basis of aforesaid discussion, I find substance in the present application and hence the impugned order dated 03.10.2022 passed by the Special Chief Judicial Magistrate, Varanasi in Case No.207529 of 2022 (Jafar Abbas Zaidi Vs. Ali Abbas Zaidi and others) whereby the application under Section 156 (3) Cr.P.C. of the applicant has been ordered to be treated as complaint case, is not sustainable in law and is hereby quashed and the learned Magistrate is further directed to rehear the applicant into the matter after providing reasonable opportunity of hearing to him and also taking into account the directions given by the revisional court vide judgment and order dated 26.09.2022 and the observations of this Court as well.

33. Application under Section 482 Cr.P.C. is accordingly allowed.

(2023) 5 ILRA 413
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 37952 of 2022

Om Prakash @ Guddu & Ors.

...Applicants

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Pranav Tiwary, Sri Atharva Dixit, Sri Aushim Luthra, Sri Manish Tiwari, (Sr. Advocate)

Counsel for the Opposite Parties:

G.A., Sri Udai Chandani

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 498-A & 304-B , Dowry prohibition Act,1961 - Section 3/4 , Indian Evidence Act, 1872 - Section 32(1) - dying declaration ,Section 65B - Admissibility of electronic records , Section 113B - Presumption of dowry death - at the time of taking cognizance or framing charge there would be no requirement of certificate under Section 65B(4) even if the document so produced is a secondary evidence - when *prima facie* case of murder is made out, the discharge of the accused merely because the accused had no intention to kill the deceased is not proper - At the stage of charge, the standard of tests regarding guilt or otherwise of the accused cannot be applied - If two views are equally possible and the evidence gives rise to a grave suspicion, charge may be framed - It is the trial in which the guilt or the innocence of the accused will be

d etermined and not at the time of taking cognizance or framing of charge. (Para - 42,52,54)

Unnatural death within seven years of marriage - Demand of dowry - accused persons and deceased beaten -mental and physical cruelty - caused in her matrimonial house - ante mortem injury - mysterious circumstances - difference of opinion of the doctors - manual strangulation - maltreatment and cruelty - unethical relation between the applicant no.1 and the applicant no.5. **(Para - 29,50)**

HELD:- Charge sheet and the rejection of the discharge application of the applicants under Section 227 CrPC not liable to be interfered with. Court need not undertake an elaborate inquiry in sifting and weighing the materials nor is it necessary to delve deep into various aspects. Defence of accused not seen. No case made out in favour of applicants. Charge sheet submission lacks proper ground. Rejection of discharge application bad in view of the facts and law.**(Para - 52,54,55)**

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

List of Cases cited:

1. Anwar P.V. Vs P.K. Basheer & ors., (2014) 10 SCC 473
2. Arjun PanditraoKhotkar Vs Kailash KushanraoGorantyal, (2020) 7 SCC 1
3. Ravinder Singh @ Kuku Vs St. of Punj., 2022 Live Law (SC) 461
4. Anvar P.V. Vs P.K. Basheer, (2014) 10 SCC 473 (three-Judge Bench)
5. St. of U.P. Vs Ajai Kumar Sharma, 2016 (92) ACC 981 (SC)
6. Mukesh Vs St. (NCT) of Delhi & ors., AIR 2017 SC 2161
- 7.R.M. Malkani Vs St. of Maha., AIR 1973 SC 157

8. Ram Singh & ors. Vs Col. Ram Singh, 1985 (Supp) SCC 616

9. Harpal Singh Vs St. of Punj., (2017) 1 SCC 734

10. Vikram Singh Vs St. of Punj., (2017) 8 SCC 518

11. St. by Karn. Lokayukt P.S. Bengaluru Vs M.R. Hiremath, 2019 0 Supreme 590 (SC)

12. Arjun PanditraoKholkar Vs Kailash KushanraoGorantyal & ors., AIR 2020 SC 4908

13. Mohammad Arif @ Ashfaq Vs St. (NCT) of Delhi, 2022 0 Supreme (SC) 1113

14. Kewal Krishan Vs Suraj Bhan, AIR 1980 SC 1780

15. R.S. Nayak Vs A.R. Antulay & anr., AIR 1986 SC 2045

16. St. of Bihar Vs Ramesh Singh, AIR 1977 SC 2018

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

1. Heard Sri Manish Tiwari, learned Senior Advocate assisted by Sri Aushim Luthra, learned counsel for the applicants, Sri Pankaj Kumar Tripathi, learned AGA for the State, Sri Udai Chandani, learned counsel for opposite party no.2 and perused the record.

2. This application has been moved to quash the charge sheet dated 20.01.2021 and the order dated 19.10.2022 passed by Additional Sessions Judge in ST No.298 of 2022 (State Vs. Umashankar and others) in Crime No.163 of 2020, under Sections 498-A, 304-B IPC and Section 3/4 DP Act, Police Station Manduadih, District Varanasi pending in the Court of CJM, Varanasi.

3. In the application it has wrongly been mentioned that the case was pending in the Court of CJM, Varanasi virtually the case has been committed to the Court of Sessions Judge and at present the case is pending in the Court of Additional Sessions Judge-IX, Varanasi as ST No.298 of 2022.

4. In brief, facts of the case are that the deceased was the daughter of opposite party no.2, Om Prakash and was the wife of applicant no.1, Om Prakash @ Guddu and daughter-in-law of applicant nos.3 and 4. Applicant no.2 is the real brother of applicant no.1 and applicant no.5, Radha Devi is the wife of applicant no.2.

5. As per this application marriage between the deceased, Nidhi Prakash and applicant no.1, Om Prakash @ Guddu was solemnized on 25.06.2018 without any dowry and charge of additional demand of dowry of a car and Rs.5,00,000/- has been denied by the applicant. It is wrong to say that the deceased was kept hungry due to which her health was significantly deteriorated. It is also wrong that during her pregnancy proper treatment was not provided to her but she was in the treatment and care of Dr. Sarojni Singh. The facts of the FIR are false and frivolous. There is an unexplained, inordinate delay of four days in lodging the FIR. Applicant no.1 belongs to a very well respectable family and is a Grade-II Officer in Indian Railway since 2005. Neither any demand of dowry was made at the time of marriage nor subsequent to it. The deceased was accorded full love and affection at her matrimonial house by the applicants. The relationship between the applicants and the deceased was extremely loving and cordial. Applicant no.1 had also encouraged and supported her in pursuing her B.Ed. degree and had furnished the requisite fees and

also helped in obtaining the admit card for the B.Ed. examination. From the text messages annexed as annexure-3 to the affidavit it would reflect that the informant was a man of limited financial means and a man of ordinary prudence would not believe that any demand of dowry was being made by the applicants from such informant. Some text messages between the applicant no.1 and the deceased which being sensitive and personal in nature have not been brought on record but they show that the deceased was leading a happily married life on very good terms with her husband. No FIR or complaint or any proceedings were initiated by the deceased or the informant prior to the lodging of the present FIR. Since the deceased became pregnant, she was receiving thorough and proficient medical attention and supervision on the clinic of Dr. Sarojni Singh, a renowned gynecologist in Varanasi where applicant no.5 Radh Devi, sister-in-law of applicant no.1 and the deceased was also supervised and treated and had delivered her child successfully. Hence, the deceased had been taken there. Allegation of opposite party no.2 that his daughter did not receive adequate treatment and was taken to an inferior clinic is completely baseless and unwarranted.

6. Earlier in the month of March, 2019, the deceased had become pregnant and had promptly received medical treatment at the New Life Hospital, Varanasi where she was being treated by Dr. Neelam Ohari. Knowing the news of pregnancy, her mother came to the house of the applicants and insisted that the first child be born at her parental house and had taken the deceased to the house of the first informant but when certain complications arose, opposite party no.2 took her to Dr. Akanksha Singh but seeing no positive

result, applicant no.1 immediately got his wife back home and took her back to Dr. Neelam Ohari. However, it was too late to handle the situation and the deceased had a miscarriage. Hence, when second time the deceased became pregnant, the applicants took no risk and immediately took her to Dr. Sarojni Singh where the deceased was regularly checked up and she was in a good medical condition during the entire course of her pregnancy. The estimated date of delivery was stated to be 04.05.2020.

7. In the night of 02.05.2020 the deceased claimed pain in her abdominal region, hence she was immediately rushed to the hospital of Dr. Sarojni Singh but at that time she was not present. Hence, her daughter Dr. Monisha Singh, gynecologist attended the deceased and opined that she was suffering from gastritis and had given an injection of asiloc after which she felt relief and was taken back to the home of the applicants. The doctor neither suggested nor indicated that the deceased was not in a good physical health and it was not safe for her to have a natural child birth on 04.05.2020, the estimated date of her delivery. The deceased was given regular medical check up during the entire period of her pregnancy and there was no abnormality suggested by the treating doctor regarding the health and condition of either the mother or the fetus and no special investigation was recommended by the treating doctors. The deceased was examined two days prior to the expected date of delivery by Dr. Monisha Singh and no alarms were raised regarding health of the mother or the fetus. It is evident that the septicaemia emanated from an infection post her operation conducted by Dr. Monisha Singh due to her negligent and careless handling of the case. Hence, no fault can be attributed to the applicants

regarding the unfortunate demise of his wife. As there was no need for admission of the deceased in the hospital two days prior to her estimated date of delivery, merely in an attempt to generate revenue, the hospital authorities were insisting for admission for no valid reason.

8. Accordingly, applicant no.1 took his wife to the hospital of Dr. Sarojni Singh on 04.05.2020 and as the deceased and the fetus were found to be in a good and healthy condition, no need arose for a cesarean delivery. Neither there was any such urgency nor need insisted upon by the treating doctor. Hence, the deceased underwent a natural birth. It is improper allegation that applicants were against the cesarean delivery and were adamant and insistent upon the natural birth, since applicant no.5 had undergone a cesarean delivery by Dr. Sarojni Singh on account of certain complications during her pregnancy four year prior to the present incident. On 04.05.2020 the deceased was treated by Dr. Monisha Singh who had completed her MS in the year 2019 and was an inexperienced doctor, a doctor on call supervising the delivery of the deceased. When the deceased went in for her delivery she was in good physical health. It appears that owing to the inexperience of Dr. Monisha Singh who operated the deceased without proper preparation and investigation whose negligent in performing her duties, it led to certain complications. The health of the deceased started deteriorating immediately after the delivery procedure. On account of the negligence of the operating doctor, Dr. Monisha Singh, the internal organs (chest, kidney and liver of the deceased) had infection and started deteriorating in a rapid manner and hence the applicants got her admitted at Apex Hospital for better treatment as she was in immediate need of

dialysis. However, during treatment the deceased passed away on 07.05.2020 in spite of best efforts of the applicants.

9. The unfortunate demise of the deceased was due to post pregnancy complications owing to the inexperience and negligence of the treating doctor for which applicants cannot be held liable. In the treatment of the deceased approximately Rs.7,00,000/- were remitted by the applicant nos.1 and 3 and under such circumstances no man of ordinary prudence would be tempted to believe that any demand of dowry was being made by either of the accused persons. Hence, it is evident that the FIR is the outcome of malice to harass the applicants and browbeating them into succumbing to his onerous and arbitrary demand for financial gratification under the threat of frivolous criminal litigation.

10. As per *post mortem* report the deceased died on account of septicaemic shock due to infection of lungs and uterus. Since the death of the deceased took place on account of natural causes ingredients of Section 304-B IPC are absolutely absent.

11. In parcha no.1 of the case diary dated 12.05.2020 the informant has tried to support the prosecution version and has made major development that his daughter was assaulted by the applicants and has also tried to support the contents of the FIR and upon being questioned by the investigating officer (I.O.) he has stated that he was informed by the treating doctor, Dr. S.S. Bohra that abrasion mark on the neck of the deceased was not on account of physical assault but the same was caused by installing the catheter for conducting dialysis on the deceased at the Apex Hospital. In parcha no.2 Smt. Kalawati

Devi has also tried to support the prosecution version in her statement. In parcha no.3 Dr. S.S. Bohra of Apex Hospital stated that at the time of admission of the deceased in the Apex Hospital there were no marks of injury on her body. The urine out put was nil, she was put in dialysis and a catheter was inserted and the abrasion mark on her neck would have been likely caused in the course of removal of dianaplast and in inquest report dated 07.05.2020, cause of death was informed to be sudden cardiac arrest and in which no bodily injury was observed.

12. It is a case of the prosecution that on 30.04.2020 the deceased made a phone call and narrated the physical violence caused by the applicants and also that a recording of said phone conversation was also made though the incident having occurred on 30.04.2020 and recording of such statement is denied and it is also evident that neither such mobile phone was submitted to the police nor alleged call recording has been certified in accordance with Section 65-B of the Indian Evidence Act, 1872 (in short 'the Act, 1872'). As enshrined by the Apex Court in the Case of **Anwar P.V. Vs. P.K. Basheer and others, (2014) 10 SCC 473** and **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1** it cannot be considered as evidence.

13. In parcha no.5 statements of Niti Prakash, Dipika and Pintoo were recorded by the I.O. As per parcha no.6 Apoorva Kumar, brother of the deceased provided a pen drive containing a phone call recording of a conversation between the deceased and her mother on 30.04.2020, the pen drive would be secondary evidence and without receiving a certification under Section 65-B

of the Act, 1872, the same cannot be considered as evidence.

14. A transcript of telephonic conversation is being attached as annexure no.4 to the affidavit filed in support of the instant application.

15. In parcha no.7, statement of Dr. Monisha Singh has been recorded in which she has tried to cover up her negligence due to which the deceased contacted an infection which spread to her vital organs and the applicants are being made scapegoat in the present case. Dr. Monisha Singh has stated that there were no injury marks on the body of the deceased at the time of her admission. A report was also sought from the Apex Hospital. On keeping the reports of Dr. Monisha Singh and those of Apex Hospital in juxtaposition would lead to severe contradiction. The report of Dr. Manoj Kumar Pathak in the capacity of forensic expert transcribed in parcha no.14 is merely based on insinuations and assumptions which cannot be relied upon on the basis of the photographs of the *ante mortem* injuries, the *post mortem* report and the treatment history shown to him and he had not attended the body of the deceased himself.

16. In cases of dialysis, first a vein is chosen for insertion of a dialysis catheter in a right jugular vein which can be ascertained from perusal of point 5.4.2 of the KDIOG (Clinical Practice Guideline for Acute Kidney Injury) which is annexed as annexure-20 to the affidavit.

17. Dr. Prakash Kumar Bharti and S.S. Bohra have given contrary opinion to that offered by Dr. Manoj Kumar Pathak. On the basis of above, it is evident that no criminal offence is made out.

18. The deceased died on account of complications arose during child birth and negligence by the treating doctor. Prior to the present charge sheet a charge sheet dated 07.10.2021 was filed against applicant nos.1, 2 and 3 under Sections 498-A, 304-B IPC and Section 3/4 DP Act. Applicant no.1 had been released on bail vide order dated 01.11.2021 in which the Hon'ble Court observed that the opinion sought from Dr. Pathak was unethical when two professional doctors have two different opinions and it cannot be said with certainty that whose opinion is wrong. The deceased had died as a result of post cesarean operation at Apex Hospital, Varanasi and the death of the deceased has no connection with any dowry being demanded by the applicants. Applicant nos.2 and 3 have also been granted bail on 20.08.2020 and 07.09.2020 respectively. Applicant nos.4 and 5 have also been released on bail by the court below.

19. The applicants preferred a discharge application (annexure-26 to this application) before the Additional Sessions Judge, Varanasi which was rejected on 09.10.2022. The trial court has passed the impugned order in a very mechanical manner and has completely ignored the fact that the said death was due to natural causes and the so called injuries on the body of the deceased had been duly explained during the course of investigation. The applicants are innocent and have been falsely implicated in this case. This case is a gross abuse and misuse of process of law. Applicants are peace loving and law abiding citizens. They have only criminal antecedents owing to the dispute between the family members which has already been explained. Hence, the application be allowed and the charge sheet and the impugned order regarding rejection of discharge application be quashed.

20. All the papers referred in the application have been annexed with the affidavit.

21. Opposite party no.2 has filed counter affidavit to the application and has alleged that the deceased chatted with her family on 30.04.2020 stating that the accused persons will murder her and there is serious threat to her life and requested her family members to protect her from the applicants and other accused persons. This conversation has been attached with the affidavit as annexure-CA-1. On 20.10.2019 also there was a chat between Neetu, Om Prakash (father of the deceased) and Nidhi Prakash in which she disclosed that there is serious threat to her life and liberty from the applicants. It is attached as annexure-CA-2. The police authorities were hand in gloves with the accused and were not registering the FIR and, therefore, several complaints were made to the superior police officer for registration of the FIR by the informant and brother of the deceased which have been annexed as annexure-CA-3. The photographs of the deceased clearly established that abrasions wound is present alongwith a punctured wound which demonstrates strangulation. An expert opinion (annexure-CA-4) was obtained from the professor and head of department of forensic medicine (BHU) which reveals serious *ante mortem* injuries caused to the deceased by the accused persons. The doctor who conducted the operation has also filed her affidavit on 19.05.2020 whereby it is established beyond doubt that there were *ante mortem* injuries and there was serious problem faced by the deceased due to the illegal act committed by the accused persons which is annexed as annexure-CA-5. During the inquest serious injuries have been found and that the death is not only due to medical reasons which is

annexed as annexure-CA-6. All the aforementioned documents are the part of the case diary and were supplied to the I.O. but the I.O. in connivance with the accused persons, was not investigating properly.

22. The informant, Smt. Kalawati Devi (mother of the deceased) and Apoorva Kumar (brother of the deceased) have disclosed in their statements that the deceased was murdered due to demand of dowry by the applicants. The statement of Ravi Prakash and Rajneesh Kumar, witnesses of inquest has also been annexed as annexure-CA-9. The mobile recording was provided to the I.O. by the brother of the deceased which was made part of the case diary vide paper no.CD-6. The CMO, Varanasi had also requested the Deputy Director, SSPG, Varanasi to constitute a medical board so that the truth about injuries found during the *post mortem* can be examined which is annexed as annexure-CA-13.

23. It has been further stated that the entire incident comes under the cloud of suspicion but from bare perusal of the expert opinion alongwith *post mortem* report and the affidavit of Dr. Sarojni Singh, it is evident beyond doubt that the act of the accused persons is clearly establishing the offence under Sections 498-A, 304-B IPC and Section 3/4 DP Act and the presumption under Section 113-B of the Act, 1872 is also established. Serious injuries were caused to the deceased by the accused which is evident and established from the *post mortem* report. Prior to the death, the deceased had informed her family members that there is likelihood of her murder and the baby which is not yet born. Only by mentioning that applicants belonged to a respectable family does not in any way take away the serious, heinous

offence committed by them and when from the very beginning there was demand of dowry and cruelty on the deceased and the relationship of the applicants with the deceased was not at all cordial and loving but the same was cruel just to fulfil the demand as raised time to time by them. The entire fees and expenditure regarding B.Ed. examination was borne by the informant, father of the deceased and no financial help had been accorded by the applicants by any means and a completely concocted and manufactured story has been cropped up in this regard. It is evident from the statement of Dr. Sarojni Singh that the deceased had sustained *ante mortem* injuries and her condition was very critical when she was brought to the hospital and even though on the insistence of Dr. Sarojni Singh deliberately the applicants avoided her to be taken to intensive care unit of specialized hospital due to which she expired. It was not the act of negligence but sheer deliberation of committing the offence under Section 304-B IPC.

24. It is further stated that the deceased was never taken for medical treatment by the applicants but father of the deceased and her family members were taking care and she was living with them but the applicants forcefully took the deceased back to their house where the deceased sustained miscarriage and the deceased was taken for regular medical check up during pregnancy by her father or her family members and not by the applicants. The said version in this regard is completely unacceptable. The deceased was not suffering from any disease. The applicants never informed the family members of the deceased that they are taking her to the hospital for delivery. After death of the deceased the family members came to know about the same and when

they verified the facts from the medical expert and Dr. Sarojni Singh, the entire picture relating to the misdeed of the applicants came to the knowledge of the deponent and his family members. There were serious injuries caused to the deceased by the accused persons which is evident from the *post mortem* report. From the photographs of the deceased it is clearly established that the abrasion wound was present alongwith a punctured wound which in the opinion demonstrates strangulation which has been confirmed by the professor and head of forensic medicine department of BHU. The doctor who had conducted the operation has filed her affidavit dated 19.05.2020 which established beyond doubt that the *ante mortem* injuries were in existence and there was serious problem faced by the deceased due to illegal act committed by the accused persons and the expert also specifically stated that it is a case of manual strangulation and serious act of throttling as potential cause of death and there were *ante mortem* injuries consisting of abrasion and punctured wound. The informant has not manipulated the facts and it has been misinterpreted and manipulated by the applicants. The medical evidence and the expert opinion as well as the last recording of the deceased with her family members and the statements of the witnesses established the case beyond doubt against the applicants. Dr. S.S. Bohra is hand in gloves with the applicants and his testimony is unreliable as the same refuted from the expert opinion. There is no reply by the applicants regarding bodily injuries sustained by the deceased as under what circumstances she sustained injuries and the burden lies upon them under Section 113-B of the Act, 1872.

25. The recording dated 30.04.2020 is an electronic evidence and the same established doubt that the physical violence

and threats to the life of the deceased was being done time and again by the applicants and the recording dated 30.04.2020 obtained from the mobile phone of Apoorva Kumar is an electronic evidence in the eyes of law and cannot be overlooked by the Court as the mobile phone of the deceased was tampered and was in the custody of the applicants and the I.O. was hands in gloves with the applicants and till today the mobile of the deceased has not been recovered by the I.O. and the charge sheet has been submitted though the same was the most credential evidence. Dr. Monisha Singh has stated that there was no negligence on her part but the applicants deliberately delayed the process and not even considered the opinions made by the doctors and there were serious injuries caused to the deceased by the accused persons which is quite evident from the *post mortem* report and the photographs established abrasion alongwith a punctured wound which demonstrates strangulation. The Apex Hospital is a private hospital. On the basis of reports of this hospital it cannot be presumed that the deceased died a natural death while the concerned doctor was a close friend of the applicants and is hand in gloves with them. The report of forensic department of BHU is a substantive, corroborative piece of evidence which clearly established that the deceased was assaulted and had received *ante mortem* injuries due to which she expired. Since the report and statement of Dr. Prakash Kumar Bharti and Dr. S.S. Bohra were not in consonance with, therefore, expert opinion was obtained from Forensic Science Department of BHU. The doctor who conducted the operation in her affidavit dated 19.05.2020 stated that the deceased was facing serious problems due to the illegal act of the accused persons. She has

specifically stated that it is a case of manual strangulation and serious act of throttling as potential cause of death. On the basis of above, a prayer has been made to dismiss this application filed by the applicants.

26. The applicants have filed rejoinder affidavit and have denied the contents of the counter affidavit and have alleged that the alleged conversation dated 30.04.2020 does not find any mention in the FIR, it has been added through statement under Section 161 CrPC as an afterthought more so the same has not been certified in accordance with Section 65-B of the Act, 1872. Hence, the same cannot be considered as evidence. The whatsapp chats have again not been certified in accordance with Section 65-B. The deceased had died due to post pregnancy complications and the charge sheet has been submitted which shows that the police was actually hand in gloves with the informant. The *ante mortem* injuries were caused due to cesarean operation and abrasion on the neck was due to the use of catheter which was inserted for the purpose of dialysis. There was no punctured wound on the body of the deceased. From the perusal of the photograph, nature of injury cannot be definitively determined. Hence, the report of forensic expert cannot be relied on.

27. Dr. Sarojni Singh had not conducted the operation. She has stated just to cover up the medical negligence on the part of her hospital. The injury report has no evidentiary value in the eyes of law. It is the *post mortem* report which is to be relied upon and the injuries found in the *post mortem* report have been duly explained. Apoorva Kumar brother of the deceased has clearly admitted that the abrasion on

the neck was caused due to use of catheter. Electronic evidence cannot be considered due to non-compliance of the direction of Section 65-B of the Act, 1872. There is no dying declaration of the deceased and the statement made by the deceased to her family members would be hearsay and extra judicial in nature.

28. Heard and perused the record.

29. On the basis of above submission these facts come out that there is allegation of unnatural death within seven years of marriage. There is allegation of demand of dowry. According to the I.O. on the basis of oral, documentary and medical evidence it is not a case of medical negligence. According to the applicants if it is a case of medical negligence caused by Dr. Monisha Singh why no FIR had been lodged by the applicants against her is a point of consideration and it goes against the applicants.

30. The conversation dated 30.04.2020 disclosed that the deceased was in fear to her life with the applicants. On 30.04.2020 the deceased had told to her sister Deepa that *"whether she will remain alive or not. Now it is high time beyond the limit of tolerance. Yesterday both the brothers beaten her together with kicks and punches. Tell me, let us eat poison, die or run away. Now the bier will go from the house. You guy make arrangement for this. You will not get any news. Hands and legs will be raised. There will be no news about it. The mother of the deceased is telling why did you not talk after asking from the phone. The deceased replied that phone is not available here, if asked for phone, it is said that there are many things in the phone how phone can be given. After telling a lot the phone is being received.*

Mother spoke your condition is not good, speak quietly. The deceased said that all the respect is gone. They are sitting her all around. They are listening what we are talking about. Again being questioned by mother, the deceased replied that her position was finished. The deceased further states, now you come with police but they refused. She has further stated that something is happening, we are not getting relief. She further stated that she was beaten with kicks and punches. Her mother spoke, in such situation who beaten you, is it not a matter of shame. The deceased replied, your son-in-law has beaten. The deceased has further said that the accused persons are saying to leave his son. They will give her more and more money. She cannot move anywhere, they are not letting her to go out. The deceased has clearly stated that these people are saying that you leave their son, they will pay her money multiple to twice-thrice. Now there is no peace, whole plan has been made to remove the thorn. Every one is saying to leave our son (husband), they will give her money multiplied three-four times. They are considering her as home farming. The mother-in-law is saying to take three times money from them to spare the life of her child (husband of the deceased). Nothing can happen. Now you will see my dead face, just you take away me. Mother of the deceased had replied that keep calm and give the phone to bauji".

31. In the meantime a person reached to the deceased and said that *your wish has come true and now go from here. Thereafter mother of the deceased is trying to talk again with the deceased but the phone was disconnected.*

32. The statement recorded on 20.10.2020 is between the deceased, her

sister - Niti, father Om Prakash and it has also been made basis for submission of charge sheet. The relevant part of this conversation is also noted herein below in which the deceased was saying that *"she has heard so much in the night. There is no here to keep calm. Now everyone here is going to hit the tone "your father is a shoe polisher". I am hearing that my father has polished the shoe. Did you tell that you have polished their shoes..... Here I am hearing a lot of tone that I am the girl of shoe polisher. I will not stay here at all, no one is here to take guarantee".* In this conversation opposite party no.2 also made allegation that applicant no.1, husband of the deceased had illicit relation with his brother's wife. Opposite party no.2 angrily said that if his son-in-law, applicant no.1 was cohabiting his sister-in-law by keeping her as mistress, then why he solemnized marriage with his daughter. He said to call *mausa* of the deceased to take her back.

33. From the above discussion it is clear that all was not well within the matrimonial family of the deceased and between the deceased and applicant no.1. It has also been argued that if accused applicant no.1 was in service in Class-II of Railway Department since 2005 why he solemnized marriage after such unreasonable time.

34. Learned counsel for the applicants has raised objection that such conversation cannot be read in evidence in view of Section 65-B of the Act, 1872. In this regard several decisions are available which are as under:-

(I) In **Ravinder Singh @ Kuku Vs. State of Punjab, 2022 Live Law (SC) 461** it was held that the certificate under Section 65-B(4) is a mandatory

requirement for production of electronic evidence. It was also held that oral evidence in place of such certificate cannot be possibly suffixed. It was also held that in cases based on circumstantial evidence from the circumstances and inference as to the guilt of the accused have to be proved beyond reasonable doubt and have to be shown to be closely related with the principal facts sought to be inferred from those circumstances. In the present case the electronic evidence is the primary evidence not the secondary evidence and sufficient material is available on the record to prove the chain of the circumstantial evidence against the accused applicants beyond all reasonable doubts. For convenience Section 65-B(4) of the Indian Evidence Act reads as under:-

"65B. Admissibility of electronic records.--(4) *In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say--*

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to

be stated to the best of the knowledge and belief of the person stating it."

(II) In **Anvar P.V. Vs. P.K. Basheer, (2014) 10 SCC 473 (three-Judge Bench)** it has been ruled that under Section 65B(4) certificate is necessary for admissibility of the secondary evidence.

(III) In **State of UP Vs. Ajai Kumar Sharma, 2016 (92) ACC 981 (SC)** (para 14) it is laid down that a "Compact Disk" is a "document" on which admission and denial may be made by both the parties or their advocates.

(IV) In **Mukesh Vs. State (NCT) of Delhi and others, AIR 2017 SC 2161** (three-Judge Bench) Computer Cell Expert revealed no tampering or editing of the CCTV footage. It was held to be admissible under Section 65B of the Evidence Act.

35. Under Section 3(2) of the Act, 1872, electronic records are the documents and they are relevant and admissible under Sections 17, 22A, 34, 35, 39, 45A, 47-A, 59, 65-A, 65-B, 67-A, 73-A, 81-A, 85-A, 85-B, 85-C, 88, 88-A, 90-A and 131 of the Evidence Act.

36. In **R.M. Malkani Vs. State of Maharashtra, AIR 1973 SC 157** and in **Ram Singh and others Vs. Col. Ram Singh, 1985 (Supp) SCC 616** and the **State (NCT) of Delhi** (supra) it is held that the relevant conversation recorded in the tape recorder is admissible in evidence.

37. In **Anvar P.V.** (supra) and **Harpal Singh Vs. State of Punjab, (2017) 1 SCC 734** the Apex Court held that proof of electronic record is a special proviso introduced under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to

electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete Code in itself. Being a special law, the general law on secondary evidence under Sections 63 and 65 has to yield. An electronic record by way of secondary evidence therefore shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc. the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which the secondary evidence pertaining to that electronic record, is inadmissible.

38. In **Vikram Singh Vs. State of Punjab, (2017) 8 SCC 518**, the original tape recorded conversation of ransom calls was handed over to the police, it has been held that the original tape record was primary evidence, therefore certificate under Section 65B of the Evidence Act was not required for its admissibility. Such certificate is mandatory only for secondary evidence and not for the primary evidence.

39. In **State by Karnataka Lokayukt P.S. Bengaluru Vs. M.R. Hiremath, 2019 0 Supreme 590 (SC)** it is held that the certificate under Section 65B is sought to be produced in evidence at the trial, not at the stage of framing of charge.

40. In **Arjun Panditrao Kholkar Vs. Kailash Kushanrao Gorantyal and others, AIR 2020 SC 4908** (three-Judge Bench) it has been held that certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record. Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law.

Section 65B(4) clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose. *The requisite certificate in sub-section (4) of Sections 65B is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device on which the original information is first stored, is owned and/or operated by him. In cases where "the computer", as defined happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4).*

41. In **Mohammad Arif @ Ashfaq Vs. State (NCT) of Delhi, 2022 0 Supreme (SC) 1113** (three-Judge Bench) the Apex Court discussed the judgment **Anvar P.V.** (supra) and other pronouncements and held that "it must now be taken to have been settled that the decision of this Court in **Anvar P.V.** (supra) as clarified in **Arjun Panditrao** (supra) is the law declared on Section 65B of the Evidence Act. In para 22, the reference of the judgment of **Arjun Panditrao** (supra) has been given which is as under:-

"73. The reference is thus answered by stating that:

73.1. *Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473, as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in Tomaso Bruno v. State of*

U.P., (2015) 7 SCC 178, being per incuriam, does not lay down the law correctly. Also, the judgment in *Shafhi Mohammad v. State of H.P.*, (2018) 2 SCC 801 and the judgment dated 3-4-2018 reported as *Shafhi Mohd. v. State of H.P.*, (2018) 5 SCC 311s, do not lay down the law correctly and are therefore overruled.

73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473 which reads as "... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ..." is thus clarified; it is to be read without the words "under Section 62 of the Evidence Act,...". With this clarification, the law stated in para 24 of *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473 does not need to be revisited.

73.3. The general directions issued in para 64 (*supra*) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information

Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers."

42. From the above discussion it is very much clear that first of all the Court has to ascertain as to whether the electronic document provided by either of the parties is primary or the secondary evidence. If it is a secondary evidence not the primary evidence only then a certificate would be required under Section 65B(4) of the Act, 1872. Similarly the production of above certificate would be necessary only at the appropriate stage when the parties have entered into evidence and not before that. Hence, at the time of taking cognizance or framing charge there would be no requirement of certificate under Section 65B(4) even if the document so produced is a secondary evidence.

43. If according to the applicants the death was the result of sheer negligence of Dr. Monisha Singh why an FIR was not lodged by the applicants against her.

44. The injuries on the person of the deceased were *ante mortem* injuries other than the medication or surgery can only be judged during the trial.

45. From the conversation present in the case diary it can be gathered that all was not well within the family and between the deceased and the accused persons and the deceased had been beaten and mental and physical cruelty had been caused with her in her matrimonial house and there was no respect for her father in the heart and mind of the accused persons.

46. Though the applicants are taking the plea of cesarean delivery of applicant no.5, Radha Devi by Dr. Sarojni Singh that

they had no reservation regarding normal delivery but from the statement of Dr. Monisha Singh it is crystal clear that there was no possibility of normal delivery even then family members of the deceased were adamant for normal delivery at any cost and were pressurising her for that. She tried to explain the situation but neither the husband of the deceased nor her family members were ready for cesarean delivery and they were creating pressure for normal delivery. Therefore, anti-biotic and supportive medicines were administered to the patient. The accused persons were saying that today is the Saturday and their panditji has said that if a child is born in your place, it would be unlucky day. It was taken in writing from the husband of the patient (deceased) that the patient is not making any progress and the doctor and the hospital cannot guarantee the safety of the life of mother and the child and they took to the patient at 08:30 a.m. writing that they are getting discharge of the patient at their own will. On 04.05.2020 at 02:00 p.m. the patient's husband came to her hospital with his wife Nidhi Prakash in very nervous position. The patient was having unbearable abdominal pain. The patient told that the movement of the baby in the stomach is reduced past 8 hours. She has also fever and icterus. Heart beat of the child was at the rate of 80-100. There was leaking to the patient which was meconium stained. Operation was the only necessary option for the safety of the mother and the child which had been told to them two days earlier. The patient had urine infection and the patient had jaundice and the liver enzymes were increased. Consent for the operation was given by her husband. Doctor tried to manage the nerves of the child in womb. The operation was started at 03:30 p.m. by Dr. Monisha Singh with the help of Dr. Sarojni Singh, anaesthetic Dr.

Surendra Kumar Srivastava and consultant child specialist Dr. Gyanendra. It was found that there was an ascitic fluid in her stomach. After removing fluid the same was sent for investigation. The baby was shifted to NICU for better medical care. The operation was completed successfully. The patient started vomiting bile continuously from 06:00 p.m. On inquiry, the patient told that her mother-in-law had administered her deshi ghee an hour before coming to the hospital while it is completely prohibited for a jaundice patient. There was fever at 103F three hours after the operation for which injection and anti-biotics were given. From 08:00 p.m. in the evening, the patient had a slow urination. After 02:00 a.m. the urination was completely stopped. It was conveyed that further investigation and dialysis facilities are not available in the hospital. The patient would be kept in ICU. The condition of the deceased was conveyed to her husband at his mobile at 07:30 a.m. Abhishek - friend of Om Prakash (husband) came to the hospital and the patient was discharged for better treatment, for this he took referral from her hospital. During the treatment blood pressure, pulse rate, respiratory rate, oxygen saturation and general condition of the patient was normal.

47. In such a situation when no FIR or complaint had been made against Dr. Monisha Singh and the concerned hospital and the report and statement of Dr. Monisha Singh is in favour of the prosecution, this Court is of the view that the truth would appear only during and after the trial.

48. From the inquest report, it transpires that there was difference of opinion between the witnesses of inquest

about the cause of death of the victim hence she was referred for autopsy. The professor and head of forensic department has opined that the doctor was in a bit haste while doing *post mortem* and there was negligent attitude on his part that when in the presence of signs of injuries over neck, he had not dissected the neck to see the internal injuries present over the subjacent tissues and the neck muscles bruising to exclude asphyxia namely strangulation i.e. strangulation as potential cause of death.

49. In such situation this Court finds it difficult to decide the case and exonerate the applicants from trial. The reason of death was medical negligence or it is a case of dowry death, can only be judged by the trial judge after taking the evidence. Only on the basis that there are some photographs showing some moments of pleasure with the husband it cannot be concluded that the charge should not be framed and the trial should not be proceeded.

50. Learned counsel for opposite party no.2 argued that prior conversation by the deceased with her family members would be treated to be dying declaration under Section 32(1) of the Act, 1872. Since the death is within seven years from the marriage and there is allegation of cruel treatment and demand of dowry, Section 113B would come into picture and in this respect the witnesses have stated in support of the prosecution version. There is unexplained *ante mortem* injury. There is also suspicion that which material was administered by mother-in-law of the deceased soon before her admission in hospital. It is also noteworthy that when 04.05.2020 had already fixed by the doctor with regard to delivery, why the deceased was taken to the hospital so late and why she was not admitted earlier.

51. High Court can exercise its inherent powers under Section 482 CrPC if it finds necessary to give effect to any order under this Code or if this Court finds that there is abuse of process of Court or to secure the ends of justice it is imperative on the Court to exercise the jurisdiction and quash any order or the proceedings challenged by the applicants.

52. From the above discussion it follows that there are several mysterious circumstances, allegations of demand of dowry, unnatural death of a young lady, difference of opinion of the doctors. There is report and evidence of the treating doctor in favour of the prosecution. There is expert opinion that the death of the deceased might have been occurred by manual strangulation. There are statements of the deceased prior to her death showing maltreatment and cruelty with her by the applicants. There is also allegation of unethical relation between the applicant no.1 and the applicant no.5, this Court is of the considered view that the charge sheet and the rejection of the discharge application of the applicants under Section 227 CrPC are not liable to be interfered with. It is settled principle in **Kewal Krishan Vs. Suraj Bhan, AIR 1980 SC 1780** that when *prima facie* case of murder is made out, the discharge of the accused merely because the accused had no intention to kill the deceased is not proper. At the stage of charge, the standard of tests regarding guilt or otherwise of the accused cannot be applied.

53. In **R.S. Nayak Vs. A.R. Antulay and another, AIR 1986 SC 2045** it has been held that when materials in the form of statements made before the police, dying declaration, *post mortem* report furnish a clear *prima facie* case for framing charge, the Sessions Judge committed an error in discharging the accused.

54. In **State of Bihar Vs. Ramesh Singh, AIR 1977 SC 2018** it is held that

the standard of test, proof and judgment which is needed for finding of a guilt or otherwise is not necessary for framing charge at this stage and even a strong suspicion found upon materials before the Court may justify framing of charge. The Court can sift and weigh the evidence for the purpose of finding out whether *prima facie* case against the accused has been made out. If two views are equally possible and the evidence gives rise to a grave suspicion, charge may be framed. The word "ground" has been used in these two sections in the context of putting an accused on trial. It is the trial in which the guilt or the innocence of the accused will be determined and not at the time of taking cognizance or framing of charge. The Court, therefore, need not undertake an elaborate inquiry in sifting and weighing the materials nor is it necessary to delve deep into various aspects. At this stage defence of the accused has not to be seen.

55. On the basis of above discussion, this Court is again of the view that at this stage no case is made out in favour of the applicants and it cannot be concluded that the charge sheet has been submitted without proper and sufficient ground and the rejection of discharge application is bad in view of the fact and law of the case.

56. Accordingly, this application under Section 482 CrPC is **dismissed**.

(2023) 5 ILRA 428

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 18.05.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

CrI. Misc. Anticipatory Bail Application (U/S 438 Cr.P.C.) No. 3552 of 2023

Smt. Urmila Devi & Anr. ...Applicants

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Pramod Kumar Singh, Sri Praveen Chandra Mishra

Counsel for the Opposite Parties:

G.A., Sri Gaurav Sharma

Criminal Law - Criminal Procedure Code, 1973 – Sections 319, 437 & 438 - Indian Penal Code, 1860 - Sections 323, , 325, 392, 452, 504 & 506 - Application for Anticipatory Bail – FIR – earlier applicants were enlarged on Bail under sections 323, 325, 504, 506 IPC only by the Magistrate – thereafter, applicants were summoned by the court concern by invoking the power u/s 319 of Cr.P.C. - they applied for bail in the added sections 392, 452 of IPC - Court held that, no person can be permitted to apply for bail in part, that too firstly getting bail by invoking u/s 437 Cr.P.C. and later on taking recourse to section 438 Cr.P.C. in the other sections, he has to apply for bail in all the sections he is wanted either u/s 437 or 438 Cr.P.C. – Accordingly, Anticipatory Bail Application is rejected. (Para – 9, 11)

Bail Application Rejected. (E-11)

List of Cases cited:

Satyan Vs St. of Kerala (1981 Cri. L J 1313).

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.

2. Heard Sri Pramod Kumar Singh, learned counsel for the applicants, Sri Gaurav Sharma, learned counsel for the informant, Sri Ramesh Chandra Vaishya in person, Sri V.K.S. Parmar, learned A.G.A. for the State and perused the material placed on record.

3. The present application for anticipatory bail has been filed for

anticipatory bail in Case Crime No.58 of 2016, under Sections 392 and 452 I.P.C., Police Station Tharwai, District Allahabad, during the pendency of trial.

4. To avoid verbiage, the allegations levelled in the FIR are not been narrated here.

5. Learned counsel for the applicants has submitted that the applicants have been falsely implicated in the present case. The applicants were summoned by the court concerned by invoking the powers under Section 319 Cr.P.C. in the present case. Learned counsel has further stated that the summoning order under Section 319 Cr.P.C. dated 15.03.2021 was passed under Sections 323, 504, 506, 325, 452 and 392 I.P.C and the applicants had applied for bail under Sections 323, 325, 504 and 506 I.P.C. only, as such they were enlarged on bail by the Magistrate concerned on 04.01.2022. Learned counsel has further stated that the applicants are entitled for bail in the added sections also as they have not misused the bail granted earlier on.

6. Per contra, learned AGA and the informant in person have vehemently opposed the anticipatory bail application on the ground that neither the Magistrate nor the Public Prosecutor took care to see under what sections the applicants were summoned and the bail was granted to the applicants except Sections 452 and 392 I.P.C. Thus, the applicants have misused the process of court as they were already enlarged on regular bail by the court concerned in some sections only. The applicants can't be permitted to apply in part before the Magistrate by invoking Section 437 Cr.P.C. and then apply in other sections by invoking Section 438 Cr.P.C. This is misuse of process of court. At the

outset, either the applicants should have applied under Sections 438 Cr.P.C. before the Sessions Court, Allahabad or should have applied under all the sections in the Court of the Magistrate concerned.

7. Learned A.G.A. has also argued that the Magistrate is competent to hear and either reject or grant a bail in the cases of triable by a Court of Magistrate even if the sentence of life imprisonment could be passed. He has placed much reliance on the judgment of **Satyan vs. State of Kerala** reported in **1981 Cri LJ 1313**, whereby the said opinion was expressed by the High Court.

8. The arguments advanced by informant in-person and A.G.A. carry conviction that the Magistrate was competent to hear and dispose of the bail under Sections 392 and 452 I.P.C. The said act at the part of the applicants and Magistrate concerned and even the Public Prosecutor was clearly not proper. The applicants have certainly not come with clean hands.

9. The accused was summoned under Sections 323, 504, 506, 325, 452 and 392 I.P.C. and should have applied for bail in all the sections. No person can be permitted to apply for bail in part, that too firstly getting bail by invoking powers u/s 437 Cr.P.C. and later on taking recourse to Section 438 Cr.P.C. in the other sections. He has to apply for bail in all the sections he is wanted either u/s 437 Cr.P.C. or 438 Cr.P.C.

10. After hearing learned counsel for the parties and taking into consideration the rival submissions and careful perusal of annexure nos.9 and 10 of the affidavit filed with the anticipatory bail application, I do

12. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of anticipatory bail application and the said observations shall have no bearing on the merits of the case during trial.

A. Criminal Law - Criminal Procedure Code, 1973-Section 438 - Indian Penal Code, 1860-Sections 354, 354B, 323, 504 & 506- application-rejection- There is a dispute between the parties over the disposal of garbage etc. an altercation has taken place between the parties -the applicant has agitated the provisions of Section 482 Cr.P.C. and has failed- the applicant and co-accused persons have outraged the modesty of two women and had even torn off the clothes of the

2. The present anticipatory bail application has been filed on behalf of the applicant in F.I.R./Case Crime No. 1277 of

2020, under Sections 354, 354B, 323, 504, 506 IPC, Police Station Majhola, District Moradabad, with a prayer to enlarge him on anticipatory bail.

Prosecution Story:

3. As per prosecution story, on 07.10.2020 at about 5.30 pm, the daughter of the informant had gone to see the water in the overhead tank of the house. Seeing her alone, the applicant Alok Kumar Mishra is stated to have outraged her modesty. On hearing her shrieks, the informant and her son came to the scene of occurrence. On seeing them, the applicant is stated to have called his wife and a friend at the scene of occurrence, and assaulted the informant and her son Prakhar Gupta. The applicant is stated to have also outraged the modesty of the informant and torn her clothes. The said incident has been video-recorded in the CCTV camera and the mobile.

Arguments for the Applicant:

4. Learned counsel for the applicant has stated that he is maliciously being prosecuted in the present case due to ulterior motive. The applicant has nothing to do with the said offence as alleged by the prosecution. Learned counsel has further stated that the FIR is delayed by about eleven days and there is no explanation of the said delay caused. Learned counsel has further stated that the applicant has genuine apprehension of arrest, as the police is continuously raiding his house. It is also stated by learned counsel that prior to the present anticipatory bail application, the applicant had also filed an CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. 1018 of 2021 and he was granted

anticipatory bail till the submission of police report under Section 173 (2) Cr.P.C. vide order dated 19.2.2021.

5. Learned counsel has further stated that after the filing of the final report (charge sheet) by the investigating officer, the applicant filed another CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. 4588 of 2022 and the applicant was granted fifteen days' time to get the non-bailable warrants issued against him cancelled vide order dated 13.6.2022 and the anticipatory bail application was disposed of. Learned counsel has stated that the non-bailable warrants issued against the applicant were cancelled by the C.J.M. Moradabad vide order dated 17.6.2022. Thereupon, the applicant moved the third anticipatory bail application No. 5746 of 2022, which was also finally disposed of by this Court vide order dated 1.7.2022 thereby granting fifteen days' time to the applicant to appear before the trial court and it was directed that the bail application of the applicant shall be considered and decided in view of the law laid down in ***Satender Kumar Antil vs. Central Bureau of Investigation and another*** and ***Puran Singh and others vs. State of U.P. and others*** vide order dated 1.7.2022.

6. In compliance of the order dated 1.7.2022 the applicant moved an application for regular bail as well as for interim bail before the Additional Chief Judicial Magistrate, Court No. 4, Moradabad, on 12.7.2022. Learned A.C.J.M. had declined to hear the regular bail application of the applicant without taking the applicant into custody vide order dated 14.7.2020 and had rejected the interim bail application of the applicant. Learned Court has opined that although in

the present matter, the sentence is below seven years but seeing the peculiar facts of the case that the offence is against women, it does not come within the category of normal crime and is serious in nature. As such, the bail application cannot be disposed of without taking the applicant in judicial custody.

7. Learned counsel has also stated that the Apex Court has not classified the cases on the basis of gender in the judgement of **Satender Kumar Antil (supra)**. Learned counsel has further placed reliance on the order of the Apex Court passed in Satender Kumar Antil dated 21.3.2023 whereby it had expressed displeasure over the non-compliance of the said order.

8. Learned counsel has also stated that the informant herein is a practicing advocate at District Court, Moradabad and is hell bent on getting the applicant send behind the bars somehow or the other and it is under her duress that the learned Magistrate has passed the said order dated 14.7.2022. It was also highlighted that the bailable warrants were issued against the applicant on 19.4.2022 and the learned Magistrate issued non-bailable warrants on 20.4.2022. Learned counsel has next stated that the applicant is a lecturer at Rishikul Brahmcharya Sanskrit Mahavidyalaya, Katghar Moradabad and had purchased the present house in the year 2019. There is a dispute between the parties over the disposal of garbage etc. an altercation has taken place between the parties on 7.10.2020. It is also argued that the applicant had called the police by dialing 112 at the spot. However, on the interference of the reputed persons of the locality, the compromise was entered into between the parties the same day on

7.10.2020 itself, which has been filed as Annexure-14 to the affidavit.

9. Learned counsel has next stated that the applicant has preferred a contempt petition against the non-compliance of the order of this Court dated 01.07.2022 before this Court vide Contempt Application No. 4552 of 2022 in which the Court has called instructions vide order dated 8.8.2021 and the petition is still pending.

10. Learned counsel has also stated that the applicant had also challenged the judicial order dated 14.7.2022 passed by the Magistrate before the Session Judge, Moradabad by filing criminal revision no. 211 of 2022 which was rejected by the Additional Session Judge, Court No. 1, Moradabad vide order dated 30.1.2023.

11. Learned counsel has next stated that after the rejection of the said criminal revision, the applicant again approached the Session Judge, Moradabad, seeking the anticipatory bail, but has rejected the same vide order dated 14.3.2023. Learned counsel has next stated that the fundamental rights enshrined in Article 21 of the Constitution of India stands violated as he has been subjected to litigation by the informant, who is an advocate.

12. Learned counsel has further stated that the statement of the informant and her daughter are contradictory to the FIR, thus, the prosecution story stands falsified. Learned counsel has next stated that the statement of the victim under Section 164 Cr.P.C. has been recorded after an inordinate delay of 45 days of the alleged incident. The said statement has been recorded after legal consultation and deliberations.

13. Learned counsel has also stated that the applicant is a lecturer in a degree college and has an unblemished record having no criminal history to his credit. The applicant has not misused the anticipatory bail granted by this Court vide order dated 19.2.2021 till the submission of report under Section 173(2) Cr.P.C. and has co-operated during investigation and is ready to do so during trial also.

Case Laws referred to by the Counsel for the Applicant:

(i) ***Satender Kumar Antil (supra)***
 (ii) ***Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 2553 of 2022*** order dated 12.5.2022, whereby it was opined that the C.J.M. Bijnor has not complied with the mandate of the law laid down in ***Satender Kumar Antil (supra)***, as such, he shall dispose of the bail application without taking the applicants to judicial custody.

(iii) In ***Chandmal vs. State of Madhya Pradesh and Another*** it has been held as under:-

"6. We are not also be able to appreciate the impugned order dated 24.1.2022 passed by the High Court calling upon the appellants, despite recognizing the fact that they are aged persons in their 70s and the alleged offences has a maximum punishment up to seven years, they have been called upon to surrender in the Court concerned.

(iv) In ***Criminal Misc. Anticipatory Bail Application No. 438 Cr.P.C. No. 3532 of 2022, Suresh Babu vs. State of U.P. and Another***, the proceedings under Sections 82 and 83 Cr.P.C. were undertaken during the pendency of the anticipatory bail application and the investigation was going on, as such, the

anticipatory bail application of the applicants was allowed.

Arguments for the Informant and the State:

14. In rebuttal, learned counsel for the informant and learned A.G.A. for the State have vehemently opposed the anticipatory bail on the ground that the applicant had relinquished all his rights already as this is the fourth anticipatory bail application. The applicant had even moved a regular bail application before the Magistrate concerned and the learned Magistrate has declined to hear the bail application without taking him into custody.

15. Learned counsel has further stated that the judgement of the Apex Court passed in ***Satender Kumar Antil (supra)*** has used the word "may" and not "shall". The Apex Court has left it to the discretion of the Court concerned to take him to custody or not. Learned counsel has next stated that the applicant and other co-accused persons had filed an Application u/s 482 Cr.P.C. No. 24115 of 2021 and the same was dismissed vide order dated 8.3.2022. The substantial period of time has elapsed since the disposal of the said petition filed by the applicant. Learned counsel has also stated that the learned trial court has issued notice against the applicant u/s 82 Cr.P.C. on 15.3.2023 while the present anticipatory bail application has been filed on 21.3.2023 before this Court, as such, the applicant is not entitled for anticipatory bail in light of the judgement of the Apex Court passed in ***Lavesh vs. State (NCT of Delhi)***, whereby it is opined that the accused is not entitled for anticipatory bail after the proclamation u/s 482 Cr.P.C. has been made.

Conclusion:

18. Considering the facts and circumstances of the case and also the arguments advanced by the learned counsel for the parties, and taking into

19. In view of the above, the present anticipatory bail application is **rejected**.

(2023) 5 ILRA 434
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2023

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 10336 of 2022

Rajesh ...Applicant (In Jail)
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:

Sri Vijay Tripathi, Sri Ajay Pratap Singh, Sri Prem Shankar, Sri Shailja Kant Tripathi, Sri Utkarsh Singh

Counsel for the Opposite Party:

G.A., Sri Rajendra Kumar Srivastava

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 439 - Indian Penal Code, 1860 - Section 376 - 3/4 POCSO Act-victim in her statement both under section 161 and 164 Cr.PC has made serious allegation of rape against the victim-After investigation charge sheet has been submitted u/s 376AB of IPC and presumption u/s 29 of the POCSO Act shall also be drawn against the applicant-allegation of the prosecution is not supported by the medical examination

report of the victim is not relevant where the female child is aged about 7 years-Children are ignorant of the act of the rape and become easy prey for lusty brutes.(Para 1 to 17)

B. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. To do so is to justify the charge of male chauvinism in a male dominated society.(Para 11)

The application is rejected. (E-6)

List of Cases cited:

1. H.P. Vs Asha Ram (2006) Cri L.J. 139
2. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. (1993) AIR SC 753
3. St. of A.P Vs Bodem Sundara Rao (1995) 6 SCC 230
4. Madan Gopal Kakad Vs Naval Dubey & anr.. (1992) SCR 2 921

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

1. Heard learned counsel for the applicant, learned Additional Government Advocate representing the State and learned counsel appearing on behalf of the first informant.

2. By means of this application, applicant Rajesh, who is involved in Case Crime No. 14 of 2022, under Sections 376AB of I.P.C., & under Section 5m/6 POCSO Act, Police Station Dauki, District Agra, seeks enlargement on bail during the pendency of trial.

3. As per prosecution case in brief, the informant who is mother of the victim lodged a first information report on 14.01.2022 for an alleged offence under Section 376 I.P.C.

and Section 3/4 of POCSO Act against the applicant Rajesh making allegations inter-alia that on 14.01.2022 at about 05:50 PM when her daughter aged about 7 years had gone to field, the applicant by alluring her for giving Rs. 10/- bodily lifted her to the mustard field and committed rape on her.

4. The main substratum of argument of learned counsel for applicant is that the applicant has been falsely implicated in this case and that the allegation of the prosecution is not supported by the medical examination report of the victim as no injury was found on her body and her hymen perineum was found intact. Therefore, the applicant who is languishing in jail since 15.01.2022 may be enlarged on bail.

5. Per contra, learned Additional Government Advocate vehemently opposed the prayer for bail of the applicant by contending that the victim in her statement both under Section 161 and 164 Cr.P.C. has made serious allegation of rape against the applicant. Victim is minor child aged about 7 years, and the offence is heinous in nature, therefore bail application of the applicant is liable to be rejected.

6. Victim in her statement under Section 164 Cr.P.C. has specifically stated that when she had gone to fetch mustard from the field, accused took her to the field in the lap and inserted his penis into his vagina.

7. It is well settled that to constitute an offence of rape complete penetration of penis with emission of semen and the rupture of hymen is not necessary.

8. Modi in his book **Modi Textbook of Medical Jurisprudence and Toxicology, 23rd Edition**, at page 897, opined thus:

"To constitute the offence of rape, it is not necessary that there should be complete of the penis with the emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without the emission of semen, or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the Medical Officer should mention the negative facts in his report, but should not given his opinion that no rape had been committed. "

At page 928: In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum.

9. In Parikh's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

"Sexual intercourse: In Law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

10. State Of **Himachal Pradesh vs Asha Ram, 2006 Cri.L.J. 139** was a case in which High Court of Himachal Pradesh has acquitted the accused Asha Ram on the ground that no spermatozoa were found on the Salwar and underwear of the prosecutrix though according to the prosecution, complete act of sexual

intercourse was committed. Further no evidence has come on record to show that hymen was ruptured. The medical evidence coming on record, as discussed above, is highly unreliable and even otherwise it does not establish that the victim was subjected to sexual intercourse. Hon'ble Supreme while setting aside the judgement of the High Court, has held as under:

"We record our displeasure and dismay, the way the High Court dealt casually with the offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on the minor girls. The High Court was swayed by sheer insensitivity totally oblivious of growing menace of sex violence against the minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant

discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

11. In the case of **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753**, Hon'ble Supreme Court held thus:

In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society and its profile."

12. Hon'ble Supreme Court in **State of A.P. Vs. Bodem Sundara Rao, 1995 (6)**

SCC 230 has cautioned the Courts while dealing with the cases of sexual crime against women in the following words:

"Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The Courts are, therefore, expected to deal with the cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely."

13. In **Madan Gopal Kakkad vs Naval Dubey And another, 1992 SCR (2) 921**, Hon'ble Supreme Court held:

Before parting with the judgment, with deep concern, we may point out that though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms.

We feel that Judges who bear the Sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end if the gravity of the offences so demand.

14. It is also not disputed that after investigation charge-sheet have submitted

under Section 376AB of I.P.C., in which minimum sentence of 20 years has been provided. Apart from this presumption under Section 29 of the POCSO Act shall also be drawn against the accused-applicant.

15. Though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of the rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms.

16. Considering the overall facts and circumstances of the case as well as keeping in view the submissions advanced on behalf of parties, gravity of offence, role assigned to applicant and severity of punishment, I do not find any good ground to release the applicant on bail.

17. Accordingly, the bail application is **rejected**.

(2023) 5 ILRA 438

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 19.05.2023

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Crl. Misc. First Bail Application No. 10374 of
2023

**Prakash Narayan Sharma @ Babali
...Applicant (In Jail)**

Versus

State of U.P.

...Opposite Party

Counsel for the Applicant:

Sri V.P. Srivastava (Sr. Advocate), Sri Vijay Kumar Mishra

Counsel for the Opposite Party:

Sri Sunil Srivastava, A.G.A., Sri Yogendra Srivastava, Sri Deepak Kumar Kulshreshtha, Sri Shambhu Mani Tripathi

Criminal Law - Criminal Procedure Code, 1973 – Sections 161 & 164 - Indian Penal Code, 1860 - Sections 147, 323, 354, 354-K, 376, 406, 504 & 506 - Application for Bail

– FIR – applicant who is an active advocate and victim was his client - victim used to visit him for purpose of discussing cases and later on both of them became intimated and their intimacy was so open that she was comfortable with applicant even in presence of applicant's wife – due to certain monetary dispute, consensual relationship between applicant and victim become sour – considering the nature of evidence placed on record, it appears that applicant used to have photographs with dignitaries including Judges to show him to be a very influential person and victim was trapped in the web of pornography created by applicant and she was forced to act in terms of directions of applicant including to have physical relationship with him – court finds that, it may not be a case of honeytrap rather the applicant has acted beyond relationship of an advocate and client and entered in an arena where social boundaries were broken and later on led to various disputes and allegations – allegations of pornography and rival claim on financial dispute may be tilt towards applicant for consideration of his bail application and since during trial St.ment of victim has not been recorded till date, therefore, at this stage if applicant gets bail, he will definitely try to influence her – accordingly, bail application rejected – directions issued for record the St.ment of victim expeditiously. (Para – 12, 13, 14, 15)

Bail Application Rejected. (E-11)

List of Cases cited:

1. St. Of Raj., Jaipur Vs Balchand @ Baliy (AIR 1977 SC 2447 : 1978 SCR (1) 535;
2. Gurcharan Singh Vs St. (Delhi Administration), (1978) 1 SCC 118);
3. St. of U.P. Vs Amarmani Tripathi, (2005) 8 SCC 21;
4. Prasanta Kumar Sarkar Vs Ashis Chatterjee & anr.(2010)14 SCC 496;
5. Mahipal Vs Rajesh Kumar, (2020) 2 SCC 118;
6. Ishwarji Mali Vs St. of Guj. & anr., 2022 SCC OnLine SC 55;
7. Manno Lal Jaiswal Vs The St. of U.P. & ors., 2022 SCC OnLine SC 89;
8. Ashim Vs National Investigation Agency (2022) 1 SCC 695;
9. Ms. Y Vs St. of Raj. & anr.:2022 SCC OnLine SC 458;
10. Manoj Kumar Khokhar Vs St. of Raj. & anr. (2022)3 SCC 501;
11. Deepak Yadav Vs St. of U.P. & anr. (2022)8 SCC 559)

(Delivered by Hon'ble Saurabh Shyam Shamsbery, J.)

1. Applicant – Prakash Narayan Sharma @ Babali has approached this Court for bail in Case Crime No. 10 of 2023 under Sections 147, 323, 354, 354-K, 406, 504, 506, 376 I.P.C., Police Station-New Agra, District- Agra. He is in jail since 09.02.2023.

2. Before entering into merit of this case, it would be apt to advert to nature of relationship between a lawyer and his client which is solely founded on trust and confidence, however, the facts of present case are absolutely contrary to it.

3. Informant of present case is the victim herself and it has been alleged that she approached the applicant as his client to take up her cases and it appears that during frequent interactions, they became close and entered into relationship which includes victim to visit along with applicant and his wife to various places as well as along with applicant only to various places. Number of photographs are placed on record that victim was comfortable with applicant even in presence of his wife. The photographs also indicate that they were very close. Even certain photographs are also recovered which shows and that applicant and victim was not looking embarrassed rather comfortable even when their photographs are clicked in their birthday suits in intimating positions i.e. they were deeply involved in physical relationship also.

4. The victim has alleged that applicant has gained her confidence and even victim has provided a room on rent for him as there was certain dispute between applicant and his wife and that victim has given a loan of Rs. 40 lakh to applicant as he wanted to contest an assembly election after taking it from her elder sister but applicant not only refused to return money but disappeared for some time also and on the date of occurrence, i.e. 04.01.2023, on a road nearby Court campus, a scuffle took place between victim and applicant and his associates wherein she was mercilessly beaten even on her private parts.

5. The victim has further disclosed that earlier, the applicant has posed himself to be an influential person being close to prominent persons including Judges and officers and that he was involved in preparing porn films and has shown

multiple unsolicited photographs of other women and threatened the victim to act in terms of direction of applicant and even to allow him to click her photographs in intimating gestures and positions and has repeatedly made physical relationship with victim against her wishes also and has threatened of dire consequence, if victim refuses to act in terms of direction of the applicant.

6. Sri V.P. Srivastava, Senior Advocate assisted by Sri Vijay Kumar Mishra, learned counsel for applicant submits that applicant is not disputing that he has a very comfortable relationship with victim but it was only consensual relationship and victim has accompanied with applicant even along with his wife to various places and have very close intimacy with victim. Even the photographs of various places as well as intimate photographs have also been denied.

7. Learned Senior Advocate has further submitted that this relationship can be termed as a honeytrap that initially the victim has not objected of taking intimated photographs with applicant, even in their birthday suits. However, the allegation of money as mentioned by victim has been vehemently denied that it was the applicant who paid the victim and she refused to return and started blackmailing that in case huge amount has not been paid to her, she will make the circumstances worse and for that applicant has to face social disgrace.

8. Learned Senior Advocate has further submitted that it may be a case where strong intimacy and consensual relationship between applicant and victim become sour by passing time. No independent witness has been examined in regard to allegation of assault by applicant and his associates on a road near the

Court and that victim who has already given her statement during investigation and has also given number of photographs to prosecution which are part of record, therefore, there is no likelihood that applicant may influence the victim.

9. Prayer for bail have been vehemently opposed by S/Sri Sunil Srivastava, learned A.G.A. for State and Yogendra Kumar Srivastava, learned counsel for victim and submitted that applicant is an advocate only for name and his real business was to prepare porn films and for that he used his women clients earlier also and victim was also trapped in the web of porn industry.

10. Applicant has woven a web that initially he acted to be nice with victim and has gained her confidence and trust and entered into physical relationship as well as to visit many places along with her. He has also allowed victim to be a friendly entrance in his house even in presence of his wife. The nature of photographs prima facie indicate that applicant was not ashamed to be clicked along with victim in their birthday suits and that victim has remained consistent in her statement under Sections 161 and 164 Cr.P.C. about above referred modus-operandi of applicant and that he has repeatedly made physical relationship with victim against her will by extending threat of putting her unsolicited photographs for the purpose of pornography and that victim has given huge amount of money on loan to applicant but he has refused to return the same.

11. LAW ON BAIL - A SUMMARY

(A) The basic rule may perhaps be tersely put as bail, not jail.

(B) Power to grant bail under Section 439 Cr.P.C., is of wide amplitude

but not an unfettered discretion, which calls for exercise in a judicious manner and not as a matter of course or in whimsical manner.

(C) While passing an order on an application for grant of bail, there is no need to record elaborate details to give an impression that the case is one that would result in a conviction or, by contrast, in an acquittal. However, a Court cannot completely divorce its decision from material aspects of the case such as allegations made against accused; nature and gravity of accusation; having common object or intention; severity of punishment if allegations are proved beyond reasonable doubt and would result in a conviction; reasonable apprehension of witnesses being influenced by accused; tampering of evidence; character, behaviour, means, position and standing of accused; likelihood of offence being repeated; the frivolity in the case of prosecution; criminal antecedents of accused and a prima facie satisfaction of Court in support of charge against accused. The Court may also take note of participation or part of an unlawful assembly as well as that circumstantial evidence not being a ground to grant bail, if the evidence/ material collected establishes prima facie a complete chain of events. Parity may not be an only ground but remains arelevant factor for consideration of application for bail.

(D) Over crowding of jail and gross delay in disposal of cases when undertrials are forced to remain in jail (not due to their fault) may give rise to possible situations that may justify invocation of Article 21 of Constitution, may also be considered along with other factors.

(See, **State Of Rajasthan, Jaipur vs. Balchand @ Baliay (AIR 1977 SC 2447 : 1978 SCR (1) 535; Gurcharan Singh vs. State (Delhi Administration),**

(1978) 1 SCC 118); State of U.P. vs. Amarmani Tripathi, (2005) 8 SCC 21; Prasanta Kumar Sarkar vs. Ashis Chatterjee and Anr (2010)14 SCC 496; Mahipal vs. Rajesh Kumar, (2020) 2 SCC 118; Ishwarji Mali vs. State of Gujarat and another, 2022 SCC OnLine SC 55; Manno Lal Jaiswal vs. The State of U.P. and others, 2022 SCC OnLine SC 89; Ashim vs. National Investigation Agency (2022) 1 SCC 695; Ms. Y vs. State of Rajasthan and Anr :2022 SCC OnLine SC 458; Manoj Kumar Khokhar vs. State of Rajasthan and Anr. (2022)3 SCC 501; and, Deepak Yadav vs. State of U.P. and Anr. (2022)8 SCC 559)

12. In the present case, applicant has declared himself to be an active advocate and a person having luxurious car and luxurious lifestyle. The narration of facts in first information report as well as statement of victim recorded under Sections 161 and 164 Cr.P.C. are consistent as well as that the applicant has himself not denied that victim was his client. Victim used to visit him for the purpose of discussing cases and later on both of them became intimated and their intimacy was so open that she was comfortable with applicant even in presence of applicant's wife. Both of them have used to visit many places together as well as along with his wife and comfortably clicked photographs being together.

13. There is substance in argument of learned Senior Advocate that due to certain monetary dispute, consensual relationship between applicant and victim becomes sour. However, considering the nature of evidence collected during investigation, specifically, nature of photographs placed on record of applicant and victim being intimated even in their birthday suits prima facie indicates that applicant was having

15. Therefore, considering overall aspects of present case, position of

16. Registrar (Compliance) to take steps.

(2023) 5 ILRA 442
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE SAMEER JAIN, J.

Crl. Misc. Bail Application No. 14987 of 2023

Vijay Mishra ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:

Sri Saurabh Raj Srivastava, Sri G.S.
Chaturvedi (Sr. Advocate)

Counsel for the Opposite Party:

G.A., Sri Abhishek Yadav, Sri Ratnendu
Kumar Singh

Criminal Law - Indian Penal Code, 1860 - Sections 120-B, 302, 307, 376-D, 419, 420, 467, 468, 471, 406 & 506 - Arbitration and Conciliation Act, - Section – 11, 37 - Application for Bail – FIR – applicant is a hard core criminal and a leader of Inter District Gang and having history sheet of 85 cases in different districts and district wise criminal history – gravity of allegations and severity of punishment – court finds that, applicant is very influential political figure of the St. of UP and out of 85 case 13 cases are still pending and in two cases he has already convicted – therefore possibility cannot be ruled

out that after release on bail, applicant may tamper the witnesses - held, every crime committed by an individual is the crime against the society and it always affects the society at large and if such persons who have criminal antecedents of more than 80 cases would be enlarged on bail then they can again commit such offences and they may also create problem for the St. to maintain law and order – therefore, in the interest of public at large, bail applicant accordingly rejected.
(Para – 29, 30)

Bail Application Rejected. (E-11)

List of Cases cited:

1. Neeru Yadav Vs St. of U.P. (2016 (15) SCC 422),
2. Deepak Yadav Vs St. of UP & anr.(2022 (8) SCC 559),
3. Prahlad Singh Bhati Vs NCT Delhi & anr.(2001 vol. 4 Supreme Court Cases 280),
4. Prasanta Kumar Sarkar Vs Ashis Chatterjee & anr.(2010 vol. 14 SCC 496),
5. Ash Mohammad Vs Shiv Raj Singh (2012 vol. 9 SCC 446).

(Delivered by Hon’ble Sameer Jain, J.)

1. The instant bail application is listed before this Bench by the order of Hon’ble the Chief Justice dated 6.4.2023.

2. Heard Sri G. S. Chaturvedi, learned Senior Counsel assisted by Sri Saurabh Raj Srivastava, learned counsel for the applicant; Sri Ratnendu Kr. Singh, learned AGA for the State-respondent and Sri Abhishek Kr. Yadav, learned counsel for the informant.

Brief facts:-

3. FIR of the case was lodged on 1.9.2021. According to the FIR, applicant

and his son forcibly took possession over the land of the informant including his Firms and in this regard, informant lodged an FIR against the applicant, his wife and his son at P.S. Gopiganj, District Bhadoi at case crime No. 273 of 2020 and after registration of the above noted case applicant and his family members are continuously threatening the informant and pressuring him to withdraw the case and in this regard, son of the informant lodged an FIR at P.S. Gopiganj.

4. It is further mentioned in the FIR that applicant forcibly on the basis of illegal weapons has taken away the 19 vehicles of the informant and with the help of those vehicles, he is doing his illegal activities. It is further mentioned in the FIR that applicant also has taken possession of 20 bigha land of the informant and also prepared forged document of the same and got executed a fake sale deed in favour of his family members. As per FIR, applicant is detained in Agra jail and he is having criminal history of more than 84 cases and he is also one of the main accused in the case of causing serious injuries to Nand Kumar Gupta @ Nandi.

Submission advanced on behalf of the applicant:-

5. Learned counsel for the applicant submitted that entire allegations made against the applicant are totally false and baseless and applicant is a respectable person of the society and he was four consecutive times M.P. from Giyanpur, Bhadoi and entire story set up by the informant is politically motivated and admittedly at the time of lodgement of the FIR of the present case applicant was in jail in connection with another case.

6. He further submitted that applicant was not made accused in the present matter and he was made accused during investigation with the aid of section 120 B IPC. He next submitted that applicant and informant are family members and dozens of civil and criminal cases are pending between them. He further urged that applicant was arrested on 14.8.2020 pursuant to the FIR bearing case crime No. 273 of 2020 lodged by the informant and thereafter informant and his sons alongwith their associates with the help of local police lodged 15 frivolous FIRs against applicant and his family members.

7. He further submitted that actually vehicles which were disclosed in the FIR belong to the partnership Firm, M/s Krishna Mohan Tiwari and with regard to the partnership Firm, a dispute is pending between informant and family of the applicant. He further submitted that in the above partnership Firm, wife of the applicant is also one of the partner alongwith the informant and one Ashok Kumar and dispute with regard to the partnership Firm has travelled up to this Court and against the order passed by District Judge, wife of the applicant and informant both filed an appeal under section 37 of Arbitration and Conciliation Act and on 22.3.2021 this Court directed the informant to prepare separate account with regard to sale and purchase of the property of the partnership Firm. He further submitted that on 5.8.2021, this Court clubbed both the aforesaid appeal filed by the wife of applicant and informant.

8. He further submits that in the Arbitration Petition in Schedule-III, 46 heavy vehicles are mentioned as vehicles of the Firm and these include the vehicles mentioned in the FIR and therefore, this fact

clearly suggest that the allegation with regard to the forceful possession of the vehicles mentioned in the FIR are totally false and in fact these vehicles are the property of the partnership Firm and dispute, with regard to the partnership Firm, is pending between both the parties.

9. He further submitted that informant, being active partner of the aforesaid Firm, has alienated most of the vehicles of the partnership Firm and on 11.8.2021 wife of the applicant and another partner moved an application before this Court with a prayer to direct the informant to deposit the amount realized by him after selling the movable property of the partnership Firm M/s Krishna Mohan Tiwari.

10. He further submitted that although as per the prosecution, six vehicles were recovered from the premises of the applicant on 20.11.2021 but out of six vehicles, four vehicles were not even mentioned in the FIR of the present case and only two vehicles which were alleged to have been recovered are mentioned in the FIR and both are exclusive property of the Firm, M/s Krishna Mohan Tiwari and are part of the arbitration proceeding. He further submitted that applicant is having no concern with remaining vehicles as neither these vehicles are in the name of applicant nor these vehicles are being used by the applicant.

11. He further submitted that partners of the Firm also preferred a petition under section 11 for appointment of the Arbitrator and on 16.9.2022 this Court has appointed Hon'ble Justice Vineet Saran, a retired Judge of the Supreme Court as Arbitrator.

12. He further submitted that multiple cases under Negotiable Instrument Acts are also pending between the family of the

informant and the family of the applicant. He further submitted that multiple civil disputes are also pending between the families of both the sides.

13. He further submitted that although in the FIR, it is alleged that applicant took forcible possession of 19 vehicles but neither date nor time nor place has been mentioned. He further submits informant neither furnished any information to the police about the incident of alleged forceful possession of the vehicle by the applicant.

14. He further urged that due to the political rivalry and being opposition MLA various criminal cases were lodged against the applicant and till today, applicant has been implicated in as many as 85 cases but out of 85 cases, only in 13 cases applicant is facing trial and in other cases applicant has already either acquitted or proceedings have been dropped by the prosecution. He further submitted that out of 13 cases 8 cases are after the arrest of applicant i.e. after 14.8.2020. He further submitted that only on the basis of criminal antecedents of an accused, bail should not be refused if otherwise case of bail is made out.

15. He further submitted that although applicant is in jail since 14.8.2020 with regard to another case but in the present matter also applicant is in jail for almost one and a half years. He lastly urged that informant is also having criminal history of 9 cases and therefore, considering the facts and circumstances of the case applicant may be released on bail.

Submission advanced on behalf of the State and informant:-

16. Per contra, learned AGA as well as learned counsel for the informant vehemently

opposed the prayer for bail and submitted that there is specific allegation against the applicant that being MLA, he misused his position and status and after forcibly taking possession over the property of the informant, is continuously threatening him and he on the basis of illegal weapons took forcible possession of 19 vehicles of the informant. They further argued that six vehicles were recovered from the hot mix plant of the applicant on 20.11.2021 and even as per the applicant out of six vehicles, four did not belong to partnership Firm and applicant also did not claim these vehicles and this fact clearly suggest that the recovered vehicles were of informant.

17. They further submitted actually Firm, M/s Krishna Mohan Tiwari is not a partnership Firm but it is the Firm of informant and only to take possession of the Firm, applicant and his family members started claiming that the Firm is a partnership Firm and merely pendency of dispute does not dilute the seriousness of the allegation made against the applicant.

18. Learned AGA further submitted that there is specific allegation against the applicant in the FIR that he not only took possession over the property of the informant but he is also continuously threatening the informant to withdraw the case lodged by the informant against him and thereafter he on the gun point, forcibly took the vehicles of the informant and in spite of these allegations his name is not in the array of the accused then it does not mean, there is no accusation against him in the FIR and therefore, no benefit can be extended to him on the ground that he was not made accused in the FIR.

19. He next submitted that applicant is a hard core criminal and a leader of Inter

District Gang beaing registration No. D-12 at police station Gopiganj District Bhadohi and having history sheet No. 2-B P.S. Handia, District Prayagraj. Learned AGA further pointed out that applicant is having criminal history of about 85 cases in different districts and district wise criminal history has been appended alongwith the counter affidavit. He further submitted that after perusal of the criminal history of the applicant, it appears that he is not an ordinary criminal but a hardened criminal who involved in heinous and serious crimes like forceful possession of the Government property, possession of AK-47 and its ammunition, cases under section 307 IPC and U.P. Gangsters Act and number of times he has been detained under the provisions of National Security Act.

20. Learned AGA further submits that applicant was also made accused in number of cases of 302 IPC although due to his influence, he could not be convicted. He further submits, in number of cases applicant threatened the witnesses of the cases including the victim of case under section 376 D IPC. He further submitted that against the applicant, a case was also registered in the State of West Bengal.

21. Learned AGA further pointed out that recently applicant has also convicted in two cases of Arms Act, therefore, there is every possibility that after release on bail, he will temper the witnesses and such hardened criminal should not be released on bail.

22. He placed reliance on the judgement of the Apex Court passed in the case of *Neeru Yadav Vs. State of U.P. reported in [2016 (15) SCC 422]* and *Deepak Yadav Vs. State of U.P. and another reported in [2022(8) SCC 559]*.

Analysis:-

23. Applicant is X-MLA and he was four consecutive times MLA from Giyanpur, Bhadoi. Allegation against the applicant is that he misused his position and status and took possession over the properties of the informant and when informant lodged FIR against him then he is continuously threatening him alongwith his other family members and thereafter he forcibly took 19 vehicles of the informant on the point of illegal weapons.

24. As per the prosecution, six vehicles were recovered from the hot mix plant of the applicant. Although as per the applicant, the vehicles in question belonged to the partnership Firm and with regard to the partnership Firm, a dispute is pending before this Court, in which an Arbitrator has also been appointed but allegation made against the applicant are serious in nature and there is not only allegation of forceful possession of the vehicles of the informant but there are various allegations against the applicant like taking possession over 20 bigha land of the informant and threatening the informant.

25. Applicant is a well known political figure of the State of Uttar Pradesh and he was also X-MLA, therefore, it was his responsibility to maintain law and order but his criminal antecedents of about 85 cases indicates othewise and from its perusal, it appears that he indulged in every type of crime including murder, rape, attempt to commit murder etc.

26. The Apex Court in the case of *Prahlad Singh Bhati Vs. NCT, Delhi and another* reported in *[(2001) 4 Supreme Court Cases 280]* highlighted the aspect which should be considered by the Court

while dealing with bail applications and observed as follows:-

“8. *The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, **the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused,** reasonable possibility of securing the presence of the accused at the trial, **reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State** and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not excepted, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.”*

(emphasis supplied)

27. Again in case of ***Prasanta Kumar Sarkar Vs. Ashis Chatterjee and another*** reported in ***[(2010) 14 Supreme Court Cases 496]*** also observed as follows:-

“9. *We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused.*

However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

*(v) **character, behaviour, means, position and standing of the accused;***

*(vi) **likelihood of the offence being repeated;***

*(vii) **reasonable apprehension of the witnesses being influenced; and***

*(viii) **danger, of course, of justice being thwarted by grant of bail.”***

(emphasis supplied)

28. Therefore, from the above decisions of the Apex Court, it appears that although granting or rejecting the bail is discretionary power but discretionary power should be exercised judiciously and while granting bail to an accused the Court should not only consider the nature of evidence, gravity of allegations and severity of punishment but should also consider the character, behavior, means and standing of the accused and reasonable possibility of securing the presence of the accused at trial, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and the State and further, while granting bail, Court

should also consider the danger, of course, of justice being thwarted by grant of bail.

29. Applicant is very influential political figure of the State of Uttar Pradesh and as many as 85 cases were lodged against him and 13 cases are still pending. From perusal of the list of the cases, it reflects that number of cases were of serious and heinous crimes and in two cases he has already convicted, therefore, possibility cannot be ruled out that after release on bail, applicant may tamper the witnesses specially when such allegation against the applicant is itself in the FIR of the present case.

30. Further, every crime committed by an individual is the crime against the society and it always affects the society at large and if such persons who have criminal antecedents of more than 80 cases would be enlarged on bail then they can again commit such offences and they may cause danger to the society and they may also create problems for the State to maintain law and order, therefore, in the interest of the public at large and State, they in general should not be released on bail.

31. Although it appears that applicant is in jail since 14.8.2020 and in the present matter, he is in jail for last about one and a half years but the period of custody of an accused has to be weighed simultaneously with the totality of the circumstances and the criminal antecedents of the accused and the circumstances which may justify the grant of bail are to be considered in the larger context of the societal concern involved in releasing an accused, in juxtaposition to individual liberty of the accused seeking bail [*See: Ash Mohammad. Vs. Shiv Raj Singh reported in (2012) 9 SCC 446*].

32. In case of Neeru Yadav (supra) on which reliance was placed by the learned AGA, Apex Court held that while granting bail to an accused who is having criminal antecedents the Courts should be very cautious and Court cannot ignore the criminal antecedents of the accused. The Apex Court in case of *Neeru Yadav (supra)* further observed that law expects the judiciary to be alert while admitting these kind of accused persons to be at large.

33. Therefore, it is lucid that while deciding bail application, criminal antecedents of the accused can not be ignored.

34. Therefore, from the discussion made above, in my view, applicant is not entitled to be released on bail.

35. Accordingly the instant bail application stands *rejected*.

(2023) 5 ILRA 448
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.04.2023

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Crl. Misc. First Bail Application No. 16312 of
2023

Chhotu @ Raju		...Applicant
	Versus	
State of U.P.		...Opposite Party

Counsel for the Applicant:
Sri Atul Kumar

Counsel for the Opposite Party:
G.A.

Criminal Law - Criminal Procedure Code, 1973 – Sections 161 & 164 - Indian Penal Code, 1860 - Section - 376(2-G), -

Constitution of India – Article 21 - Application for Bail – FIR – offence of Gang rape – contradiction in Statement of under section 161 and 164 – trial is still pending – plea of prolonged incarceration of a person as an under trial is against fundamental right under article 21 of constitution – principle of reformation – court finds that, it is socking that victim become hostile, but trail is still pending since last 9 years - applicant is suffering the consequences of this delay - while the principle of the judicial process says that even if a hundred criminals are spared, not even a single innocent person should be punished – Accordingly, Bail Application is allowed.

Bail Application Allowed. (E-11)

List of Cases cited:

1. Indrani Pratim Mukerjea Vs Central Bureau of Investigation & anr. passed in Special Leave to Appeal (Crl.) No. 1627 of 2022.

2. Rajasthan Vs Balchand @ Baliay (AIR 2447, 1978),

3. Arnesh Kumar Vs St. of Bihar (AIR 1277 of 2014).

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. वर्तमान दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र आवेदक छोटू उर्फ राजू की ओर से मु०अ०स० 200/2014, अन्तर्गत धारा 376(2G) भा०दं०वि०, थाना शाहपुर, जिला मुजफ्फरनगर में जमानत पर मुक्त करने हेतु प्रस्तुत किया गया है।

2. वाद के तथ्य संक्षेप में इस प्रकार है कि, वादी सुधीर की बहन दिनांक 04.06.2014 को देर शाम करीब साढ़े नौ बजे अपनी बहन के गांव से वापस शाहपुर आयी थी। जैसे ही वह बसी रोड पर पहुंची तो करीब चार-पांच मुलजिमानों ने मेरी बहन को जबरदस्ती पकड़ लिया और कब्रिस्तान में ले जाकर बारी-बारी से

बलात्कार किया और बेहोशी की हालत में छोड़कर भाग गये।

3. अभियोगी सुधीर ने दि० 06.06.2014 को बयान दिया कि दि० 04.06.2014 को उसके गांव के लड़के विजय पुत्र प्रेम सिंह को थाना शाहपुर बुलाया और विजय ने मुझे थाने से ही फोन कर बताया कि तुम्हारी बहन थाना शाहपुर में बैठी है, मैं थाना शाहपुर पहुंचा और थाने से मेरी बहन को मेरे साथ भेज दिया। मैं अपनी बहन को लेकर घर आ गया। मुझे थाने पर यह मालूम नहीं चल पाया कि मेरी बहन के साथ दुष्कर्म हुआ है। घर आकर बहन ने अपनी मामी को बताया कि उसके साथ बलात्कार हुआ है।

4. आवेदक के विद्वान अधिवक्ता एवं विद्वान अपर शासकीय अधिवक्ता को सुना तथा पत्रावली का परिशीलन किया।

5. आवेदक के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि:-

1- आवेदक को इस प्रकरण में गलत एवं फर्जी ढंग से झूठा फंसाया गया है, उसने कथित अपराध कारित नहीं किया है। आवेदक प्रथम सूचना रिपोर्ट में नामजद नहीं है। प्रथम सूचना रिपोर्ट विलंबित है, जिसका कोई स्पष्टीकरण नहीं दिया गया है। वादी ने तथा कथित घटना के दो दिन बाद सुनी-सुनाई बात के आधार पर प्रथम सूचना रिपोर्ट दर्ज करवायी है तथा इस विलंब का कोई स्पष्टीकरण नहीं दिया है।

2- दिनांक 07.06.2014 को पीड़िता ने अपने मजीद बयान में यह कथन किया गया कि मामले के अभियुक्तगण द्वारा उसके साथ

बारी-बारी से दुष्कर्म किया गया एवं यह घटना रात्रि नौ बजे से रात एक डेढ़ बजे तक की थी। उसके बाद इन लोगों ने बारी-बारी बलात्कार करने के बाद पीड़िता के वहां से भगा दिया, लेकिन उसे बेहोशी सी आ रही थी और थकान लग रही थी व लड़खड़ा कर चल पा रही थी और सड़क पर आकर लड़खड़ा कर बैठ गयी थी तभी वहां दुकानों की चौकीदारी करता हुआ एक चौकीदार आ गया था जिसने अपना नाम गगन सिंह बताया था। चौकीदार ने हालत देखकर पूछा तो उसने उसे सारी घटना के बारे में बताया था उसके बाद पास वाली पुलिस चौकी पर ले गया था। वहां से थाने पर ले गये थे।

3- दिनांक 07.06.2014 को कथित पीड़िता का बयान विवेचक द्वारा लिया गया, जिसमें उसने कथन किया है कि वह 15 दिवस पूर्व अपने ससुराल खेड़ा हटाना से अपनी बहन प्रमिला की ससुराल कसेरवा गयी थी और मंगलवार 3 तारीख को वह कसेरवा से दोपहर के बाद रोडवेज बस से बुढ़ाना तक आई। उस समय हल्का हल्का अंधेरा हो गया था। शाहपुर आते-आते काफी रात हो गयी थी। शाहपुर में वह बदरी कला जाने वाली सड़क के सामने सड़क पर ही उतर गयी। उसके गांव की तरफ जाने वाली सड़क पर कई गांव के तांगे खड़े रहते हैं। वह सड़क पर ही एक तांगे के पास खड़ी हो गयी। तांगे के पास एक लड़का खड़ा था जो टोपी ओढ़े हुए था उस लड़के ने कहा कि तांगा कब्रिस्तान में खड़ा है। उसे ऐसा लगा जैसे कि उसकी कमर में कोई सुई जैसी चुभी है और वह लड़का पीड़िता का पकड़ कर कब्रिस्तान के अन्दर ले गया वहां पर मैदान ही मैदान और झाड़ियां थी। वहां मैदान में पहले दो अन्य व्यक्ति आये और उसके बाद दो फिर आये और

बाद में कुल मिलाकर नौ आदमी हो गये और सब लोगो ने मेरे साथ बहुत बदतमीजी की और सबने मुझे जमीन पर गिरा कर 8 लोगो ने मेरे साथ बुरा काम किया। एक आदमी जो तांगे के पास खड़ा था उसने गलत काम नहीं किया, जब चिल्लायी तो वहां पर दो पुलिस वाले मोटरसाइकिल से आये और पुलिसवाले उसे चौकी पर ले गये तथा फिर गाड़ी/जीप से थाने ले गये। मैं थाने पर बाहर बैठी थी और उसका भाई चार बजे सुबह मुझे थाने से घर लेकर गया।

4- मजीद बयान में पीड़िता का कथन है कि वह घटना के बाद स्वयं सड़क पर आ गयी, तभी दुकान की चौकीदारी करने वाला चौकीदार आ गया और वह पीड़िता को पुलिस चौकी ले गया, वहीं दूसरी तरफ पीड़िता द्वारा विवेचक को दिए गए बयान में कथन किया गया है कि जब कह चिल्लायी तो पुलिस वाले मोटरसाइकिल से आ गए और उसे चौकी पर एवं थाने पर ले गए। इस प्रकार यह दोनों बयान परस्पर विरोधाभाषी हैं।

5- पीड़िता के बयान में यह भी आया है कि उसके चिल्लाने पर पुलिसवाले मोटरसाइकिल से आ गए तभी, पुलिसवालों के आने पर अभियुक्तगण भागे, इसका मतलब पुलिसवालों ने भी अभियुक्तगण को भागते हुए देखा, किंतु न तो उन्होंने अभियुक्तों को पीछा किया और न ही उनका बयान दर्ज हुआ कि उन्होंने किसी को पहचाना या नहीं।

6- कथित पीड़िता द्वारा अवर न्यायालय में पी०डब्लू०-1 के रूप में यह कथन किया है कि हाजिर अदालत वसीम, गुलफाम उर्फ सोनू, शमशाद, शहजाद, अहसान, छोटू उर्फ राजू आरिफ, काला पुत्र यामीन, नसीम उर्फ

बिल्ली को देखकर गवाह ने कहा कि "इनमें से कोई भी व्यक्ति वह नहीं है जिन्होंने मेरे साथ घटना वाले दिन कब्रिस्तान में बुरा काम (बलात्कार) व बदमीजी की थी।" एवं जब गवाह को धारा 161 दं०प्र०सं० व मजीद बयान पढ़कर सुनाया तो गवाह ने कहा कि "मैंने ऐसा कोई बयान पुलिस वालों को कभी नहीं दिया और ना ही मैंने किसी पुलिस अधिकारी को किसी भी मुल्जिमान का नाम नहीं बताया मेरा बयान कैसे लिख दिया मैं इसकी कोई वजह नहीं बता सकती हूँ।" इस प्रकार वह अवर न्यायालय में पक्षद्रोही हो गयी है।

7- संपूर्ण घटनाक्रम को देखते हुए ऐसा प्रतीत हो रहा है कि घटना की प्राथमिकी पुलिस की मिलीभगत से कल्पित तथ्यों के आधार पर लिखवायी गयी है। जो सांप्रदायिकता द्वेषभावना व सामाजिक सद्भाव निकृष्ट करने के उद्देश्य से किया गया है, चूंकि घटना के बाद भीड़ एकत्र हुयी है, नारेबाजी की गयी है एवं थाने का घेराव भी किया गया है।

8- उनका यह भी कथन है कि मामले के जो अभियुक्तगण संपन्न थे वो विधिक प्रक्रिया के माध्यम से जमानत पर छूट गये, चूंकि आवेदक गरीब व्यक्ति है एवं उसकी पैरवी करने वाला कोई व्यक्ति उपलब्ध नहीं है। उनका यह भी कथन है कि कथित पीड़िता अवर न्यायालय में दिनांक 12.01.2016 को सत्र परीक्षण के दौरान पक्षद्रोही हो गयी, इसके बावजूद भी आवेदक गरीब होने तथा जमानत प्रार्थना पत्र न दाखिल कर पाने के कारण दि० 06.06.2014 से लगभग 9 वर्षों से कारागार में निरुद्ध है। इसलिए आवेदक को जमानत पर छोड़ दिया जाय।

9- मामले के केस डायरी के अवलोकन से यह दर्शित हो रहा है कि मामले के अन्य सहअभियुक्तगण को जमानत मिल चुकी है। आवेदक का कोई पूर्व आपराधिक इतिहास भी नहीं है। कथित पीड़िता, सत्र परीक्षण के दौरान पक्षद्रोही हो गयी है। आवेदक को मात्र परिस्थितिजन्य तथ्यों के आधार पर मामले में नामित किया गया है। कथित पीड़िता के पूरक चिकित्सीय आख्या प्रपत्र के अनुसार अभियोजन कथानक का समर्थन नहीं हो रहा है। उनका यह भी कथन है कि मामले के समस्त तथ्यों से प्रदर्शित हो रहा है कि इस कथित पीड़िता के मजीद बयान, धारा 161 एवं 164 दं०प्र०सं० के बयान में विरोधाभास है। आवेदक लंबे समय से जेल में निरुद्ध है और मामले में तथ्य के गवाहों के साक्ष्य अंकित हो चुके हैं, किंतु सत्र परीक्षण अभी भी लंबित है एवं आवेदक के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि इसलिए आवेदक को जमानत पर छोड़ दिया जाय। अवर न्यायालय के आदेश फलक को देखने से सत्र परीक्षण का निकट भविष्य में शीघ्र निस्तारण होने की संभावना नजर नहीं आ रही है, इसलिए आवेदक को जमानत पर छोड़ दिया जाय।

10- आवेदक के विद्वान अधिवक्ता ने अपने तर्क के समर्थन **Indrani Pratim Mukerjea Vs. Central Bureau of Investigation and another** passed in **Special Leave to Appeal (Crl.) No. 1627 of 2022** to submit that prolonged incarceration of a person as an under trial is against his fundamental rights under Article 21 of the Constitution of India. में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि-व्यवस्था की ओर न्यायालय का ध्यान आकृष्ट किया।

6. विद्वान अपर शासकीय अधिवक्ता ने आवेदक के जमानत का प्रबल विरोध करते हुए तर्क प्रस्तुत किया कि आवेदक द्वारा कारित अपराध संज्ञेय एवं गंभीर प्रकृति का है, इसलिए आवेदक को जमानत पर न छोड़ा जाय।

7. मैंने पत्रावली पर उपलब्ध साक्ष्य का गहनतापूर्वक परिशीलन किया गया, आवेदक के विद्वान अधिवक्ता द्वारा जमानत आवेदन पत्र में आवेदक के जेल में निरुद्ध होने की तिथि 06.06.2014 अंकित किया गया है, किंतु वाद के सी०डी० अवलोकन से अभियुक्त के अभिरक्षा में लेने की तिथि 09.04.2014 अंकित है तथा उभय पक्ष के विद्वान अधिवक्ताओं के तर्कों पर सम्यक रूप से विचार किया गया। मेरा अभिमत है कि:-

1- *Rajasthan Vs. Balchand alias Baliy* (AIR 2447, 1978) के ऐतिहासिक फैसले में 1978 के मामले में सटीक रूप से कहा गया है कि: "मूल नियम को शायद जमानत के रूप में रखा जा सकता है, जेल नहीं।" इसे आधार बनाने के लिए भारत के संविधान के तहत एक अभियुक्त को गारंटीकृत अधिकारों पर जोर दिया। इन अधिकारों में सबसे विशिष्ट अधिकार संविधान के अनुच्छेद-21 के तहत दिया गया अधिकार है। किसी व्यक्ति की हिरासत उसके जीवन और स्वतंत्रता के अधिकार को प्रभावित करती है और हिरासत का मुख्य उद्देश्य बिना किसी असुविधा के मुकदमे के लिए आरोपी की आसानी से उपलब्धता सुनिश्चित करना है।

2- इस प्रकार, यदि यह सुनिश्चित किया जाता है कि अभियुक्त विचारण चरण के लिए आवश्यक होने पर उपलब्ध हो, तो व्यक्ति को हिरासत में लेना अनिवार्य नहीं है। इसलिए,

यह माना गया कि अदालतों को, किसी व्यक्ति की गिरफ्तारी से संबंधित दंड प्रक्रिया संहिता (सी०आर०पी०सी०) के प्रावधानों की व्याख्या करते समय, हिरासत से बचना चाहिए जब तक कि यह अपरिहार्य न लगे और आरोपी को जमानत दे देनी चाहिए।

3- मानवाधिकार सक्रियता पिछले कुछ वर्षों में अधिक विकसित हुई है और वर्तमान में जेल में निरुद्ध किये जा रहे किसी व्यक्ति की स्वतंत्रता और समाज के हित के बीच संतुलन की समझ की आवश्यकता है। इसलिए, दोनों के बीच इस तरह के संतुलन को बनाए रखने के लिए यह विचार करना बहुत महत्वपूर्ण है कि जब तक कोई मजबूत आधार न हो जैसे कि एक अभियुक्त के न्याय से भागने की संभावना या उसके द्वारा सबूतों से छेड़छाड़ करने या मामले के गवाह या पीड़ित को धमकी देने की संभावना, किसी अभियुक्त को हिरासत में लेने से संविधान के अनुच्छेद - 21 के तहत उसे दिए गए उसके मौलिक अधिकार यानी जीवन और व्यक्तिगत स्वतंत्रता के अधिकार का उल्लंघन होगा।

4- इसके अलावा, सजा के सुधारवादी सिद्धांत का प्रयोग दंड के दो अन्य सिद्धांतों क्रमशः निवारक सिद्धांत और दंडात्मक सिद्धांत के बीच संतुलन बनाए रखने के लिए समान रूप से महत्वपूर्ण है। सुधारवादी सिद्धांत का मुख्य उद्देश्य एक अभियुक्त को सुधारना और उसे जेल में आदतन अपराधियों से दूर रखना है, जिन्हें अपराधों की विविधता माना जाता है।

5- यह सिद्धांत इस धारणा पर आधारित है कि दंड एक निवारक के बजाय अधिक उपचारात्मक होना चाहिए। इस प्रकार के

सिद्धांत के तहत किसी अपराध को एक बीमारी माना जाता है जिसे मारने से ठीक नहीं किया जा सकता है; बल्कि इस तरह के रोग को 'सुधार की प्रक्रिया' (*process of reformation*) के नाम की दवा की सहायता से ठीक किया जा सकता है।

6- इसके अलावा, सुप्रीम कोर्ट द्वारा अर्नेश कुमार बनाम बिहार राज्य (*A.I.R 1277 OF 2014*) के मामले में पारित ऐतिहासिक फैसले में, उच्चतम न्यायालय ने गिरफ्तारी से पहले और गिरफ्तारी के बाद पुलिस की शक्तियों पर कई नियंत्रण और संतुलन लगाए। माननीय उच्चतम न्यायालय ने देश भर की सभी राज्य सरकारों को निर्देश दिया कि वे पुलिस अधिकारियों को निर्देश दें कि वे मामले के सभी तथ्यों और परिस्थितियों की जांच किए बिना किसी आरोपी को गिरफ्तार न करें और गिरफ्तारी से पहले प्रारंभिक जांच करें।

7- एक सार्वभौमिक सत्य यह भी है कि गिरफ्तारी अपने साथ बहुत अपमान भी लाती है, किसी की स्वतंत्रता को कम करती है और एक अभियुक्त के चरित्र पर हमेशा के लिए एक निशान छोड़ जाती है। एक जेल में बंद अभियुक्त अपनी नौकरी/ प्रतिष्ठा खो देता है। इस तरह उसकी नजरबंदी का बोझ उसके परिवार के निर्दोष सदस्यों पर भी पड़ता है। स्थिति तब और भी खराब हो जाती है जब जेल में बंद व्यक्ति परिवार में एकमात्र कमाने वाला होता है और उसके कारावास से उसके निर्दोष आश्रितों को अनावश्यक पीड़ा होती है।

8. इस प्रकार उपरोक्त अभिमत के मद्देनजर आवेदक के विद्वान अधिवक्ता के तर्कों के परिप्रेक्ष्य में पत्रावली पर उपलब्ध

सारवान तथ्यों एवं परिस्थितियों का समग्र रूप से अवलोकन करने के बाद, सबूतों की प्रकृति और किसी भी ठोस विरोधात्मक सामग्री की अनुपस्थिति एवं उपलब्ध सामग्री से छेड़छाड़ की संभावना न होने के तथ्य को देखते हुए मेरी राय में आवेदक को जमानत पर मुक्त करने का उपयुक्त आधार है।

9. अतः वाद के गुण-दोष पर बिना कोई टिप्पणी किए हुए आवेदक को उपरोक्त वर्णित अपराध में संबंधित न्यायालय की संतुष्टि पर व्यक्तिगत बंध-पत्र एवं उसी धनराशि के दो स्थानीय प्रतिभू प्रस्तुत करने पर निम्नलिखित शर्तों के साथ जमानत पर छोड़ दिया जाय।

1. आवेदक विवेचना या परीक्षण के दौरान अभियोजन साक्ष्यों के साथ छेड़छाड़ नहीं करेगा।

2. आवेदक अभियोजन साक्षियों व पीड़िता/ शिकायतकर्ता को डरायेगा/धमकायेगा नहीं।

3. आवेदक न्यायालय के आदेशों का पालन करेगा, वह परीक्षण के दौरान बिना कोई अनावश्यक स्थगन लिए नियत तिथि पर न्यायालय में उपस्थित होगा तथा परीक्षण में ईमानदारी से सहयोग करेगा।

4. आवेदक जमानत पर रिहा होने के बाद जमानत की स्वतंत्रता का दुरुपयोग नहीं करेगा और किसी भी अपराधिक गतिविधि में लिप्त नहीं होगा न कोई अपराधिक कृत्य करेगा।

5. आवेदक प्रत्यक्ष या अप्रत्यक्ष रूप से मामले के तथ्यों से परिचित किसी भी व्यक्ति या पुलिस अधिकारियों को कोई प्रलोभन

या धमकी नहीं देगा न ही उनसे कोई वायदा करेगा, जिसके कारण उन्हें न्यायालय में तथ्यों को उजागर करने से विरत रहना पड़े।

उपरोक्त शर्तों में से किसी के उल्लंघन के मामले में, परीक्षण न्यायालय आवेदक की जमानत नियमानुसार रद्द करने को स्वतंत्र है।

10. यह बहुत ही आश्चर्यजनक है कि कथित पीड़िता दिनांक 12.01.2016को अवर न्यायालय में पक्षद्रोही हो गयी तथा अवर न्यायालय में यह वाद विगत 9 वर्षों से विचारण में चल रहा है, अभी तक सत्र परीक्षण का निस्तारण नहीं हुआ है। इस विलंब का खामियाजा आवेदक को भुगतना पड़ रहा है। जबकि न्यायिक प्रक्रिया का सिद्धांत है कि सौ अपराधी भले छूट जाय, किंतु एक निर्दोष व्यक्ति को सजा नहीं होनी चाहिए। इसलिए मामले के तथ्यों एवं परिस्थितियों को देखते हुए अवर न्यायालय को निर्देशित किया जाता है कि इस मामले से संबंधित सत्र परीक्षण का निस्तारण दिन प्रति दिन सुनवाई के आधार पर आज से 06 माह के अंदर करना सुनिश्चित किया जाय।

(2023) 5 ILRA 454
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.05.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Criminal Appeal Defective No. 124 of 2023

Sarfaraz Ali Jafri **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:
Ajeet Pratap Singh, Zia Ul Qayum

Counsel for the Respondent:
G.A.

Civil Law - National Investigation Agency Act, 2008-Section 21-Appeal filed after delay- Article 21 of the Constitution cannot be silenced under any circumstance-any statutory restriction is subservient to the mandate of part-III of the Constitution-section 21 mandates the High Court to decide every appeal filed under sub-section (1) , whereas IInd proviso appended to sub-section (5) oust the jurisdiction of the High Court beyond 90 days-two provisions had to read harmoniously.

Application for condonation of delay allowed. (E-9)

List of Cases cited:

1. National Investigation Agency through its Chief Investigating Officer, Jammu versus 3rd Additional Sessions Judge District Court Jammu & Delhi High Court in the case of Farhan Shaikh versus St.(National Investigation Agency) reported in 2019 SCC OnLine Del 9158
2. Nasir Ahmad Vs National Investigation Agency 2015 SCC Online Ker 39625
3. Sheikh Rahamtulla & ors. Vs National Investigation Agency reported in 2023 SCC Online Cal 493.
4. In Re Provision of Section 14A of SC/ST(Prevention of Atrocities Amendment Act, 2005 versus Nil along with other connected matters in Criminal Writ Public Interest Litigation No. 8 of 2018
5. St.(NIA) versus Farhan Shaikh-Special Leave Petition(Criminal) Diary No(s). 41439 of 2019 on 2.12.2019.
6. Messrs. Mela Ram & Sons Vs Commissioner of Income Tax, Punjab, 1956 SC 367 AIR
7. U.O.I. Vs K.A. Najeeb reported in (2021)3 SCC 713

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

1. Heard Mr. Ajeet Pratap Singh and Sri Zia Ul Qayum learned counsel for the appellant and learned A.G.A. for the State.

2. The delay in filing the present appeal was wrongly reported by the Stamp reporter. A fresh report on the delay was called for and as per the corrected report marked on the back of page no. 7 of the memo of appeal, the appeal is delayed by 368 days.

3. This Court on the objection of delay raised in Criminal Appeal Defective No. 214 of 2022 while disposing of the delay condonation application by order dated 4.4.2023 observed as under :-

"Learned counsel for the respondent in reply to the application for condonation of delay has pointed out that there is a statutory bar appended in the 2nd proviso to Section 21 (5) of the National Investigation Agency Act, 2008 not to entertain any appeal beyond the expiry of 90 days.

Suffice it to say that the right to life and personal liberty guaranteed under Article 21 of the Constitution of India cannot be restricted and abridged on the strength of a procedural provision which is to serve the purpose of law. Such a bar is not absolute, therefore, we are not convinced to reject the appeal on the ground of limitation particularly when the right of personal liberty is to be agitated through an appeal only as against the judgment, sentence or order".

The impugned order giving rise to the present appeal was passed on 22.3.2022, which was received on behalf of the appellant on 23.3.2022, yet the appeal has been filed after a delay of one year. The

plea that a recently filed application for correction of the impugned order was disposed of on 19.4.2023 is unconvincing as the application itself was filed beyond the period of 90 days and secondly, the correction of any typographical mistake will relate back to the date when the order was initially passed, therefore, it shall be of no help against the statutory objection raised.

4. Right to appeal for protection of a right guaranteed under Article 21 of the Constitution of India is concomitantly an essential part of right to fair trial and one of the basic structure of our Constitution. The bar contemplated under the second proviso appended to Section 21(5) of the Act, 2008, according to the State, is intended to oust the jurisdiction of this Court by the Damocles sword of delay, however the said deprivation of a fundamental right juxtaposed to law of limitation is the larger question of public importance that has surfaced before this Court in the present appeal. The precisely worded order passed by this Court on 4.4.2023, mentioned above, does not approve of the bar in absolute terms.

5. There are conflicting views on the point as is reflected in the judgment rendered by the High Court of Jammu and Kashmir in the case of **National Investigation Agency through its Chief Investigating Officer, Jammu versus 3rd Additional Sessions Judge District Court Jammu** and Delhi High Court in the case of **Farhan Shaikh versus State (National Investigation Agency) reported in 2019 SCC OnLine Del 9158** viz a viz Kerala High Court in the case of **Nasir Ahmad vs. National Investigation Agency reported in 2015 SCC Online Ker 39625** and Calcutta High Court in the case of **Sheikh**

Rahamtulla and others versus National Investigation Agency reported in 2023 SCC Online Cal 493.

6. This Court in the order extracted above passed in Criminal Appeal Defective No. 214 of 2022 has taken a view in line with the sanctity of Article 21 of the Constitution of India and keeping in view the ratio decidendi of the full Bench Judgment rendered by this Court in the case of **In Re Provision of Section 14A of SC/ST(Prevention of Atrocities Amendment Act, 2005 versus Nil along with other connected matters in Criminal Writ Public Interest Litigation No. 8 of 2018**.

7. It is to be noted that the full Bench Judgment of this Court passed in the case of **In Re Provision of Section 14A of SC/ST(Prevention of Atrocities Amendment Act, 2005 versus Nil along with other connected matters in Criminal Writ Public Interest Litigation No. 8 of 2018** does offer support to our view of reading the procedure fairly but in absence of a challenge to the statutory bar enacted under the IIInd proviso appended to Section 21(5) of the NIA Act, 2008, by any party till date, the State has reiterated its stand by laying emphasis on the judgments rendered by Calcutta and Kerala High Courts as well as the interim stay order passed by the Apex Court in the case of **State(NIA) versus Farhan Shaikh-Special Leave Petition(Criminal) Diary No(s). 41439 of 2019 on 2.12.2019**.

8. It is true that the right to life and personal liberty as embodied under Article 21 of the Constitution of India conferred to the citizenry is fundamental but the security of the State is of equal paramount significance. The former is guaranteed to

the people as fundamental, whereas, the later is an essential facet of duty which the welfare State owes to the collective peaceful existence of people within a sovereign State.

9. This Court under the changed circumstances would have relegated the matter back to the trial court for fresh consideration of bail but on a careful consideration of the legal provisions, the impugned order being a final order under the NIA Act is amenable only to the appellate jurisdiction of this Court, as the power to review/reconsider is not conferred upon the trial court. The bar akin to Section 362 Cr.P.C., therefore, operates for want of an enabling provision to review. Resorting to the recourse of remedy under Article 226/227 of the Constitution of India or inherent powers of this Court, in ordinary circumstances, is discouraged due to availability of the appellate remedy as has been well discussed in the full Bench Judgment of this Court mentioned supra. The answer to question B in the full Bench judgment makes the point clear and the same is reproduced below :-

"B. Whether in view of the provisions contained in Section 14-A of the Amending Act, a petition under the provisions of Article 226/227 of the Constitution of India or a revision under Section 397 of the Code of Criminal Procedure (in short 'Cr.P.C.') or a petition under Section 482 Cr.P.C., is maintainable. OR in other words, whether by virtue of Section 14-A of the Amending Act, the powers of High Court under Article 226/227 of the Constitution or its revisional powers or the powers under Section 482 Cr.P.C. shall stand ousted ?"

At the outset, our answer to the first part of the question is in the negative.

In other words, where an appeal under sub-section (1) and/or sub-section (2) of Section 14A of the Amending Act is maintainable against any judgment, sentence or order, not being interlocutory in nature, a petition under the provisions of Articles 226/227 of the Constitution of India or a revision under Section 397 Cr.P.C. or a petition under Section 482 Cr.P.C. would not be maintainable. We deal with this question bearing in mind our opinion on the first question. In other words, we deal with this question conscious that the powers of this Court to entertain an appeal even after expiry of the period of 180 days from the date of the judgment, sentence or order appealed from, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period are retained".

Moreover, this Court lacks concurrent jurisdiction for grant of bail under the NIA, Act like under Section 439/438 Cr.P.C. and the power is conferred to this Court through appellate jurisdiction alone. Thus, the embargo of limitation of 90 days virtually renders an aggrieved person remediless which in the matter of rights guaranteed under Article 21 of the Constitution of India cannot be weighed lightly. Deprivation of a right guaranteed under Article 21 of the Constitution of India through procedure is not the purpose of law and the right to life and personal liberty, in ordinary circumstances, cannot be irrationally barred even for a sufferer who seems indolent. The Court in this regard would hasten to take note of the Supreme Court decision reported **in 1956 SC 367 AIR(Messrs. Mela Ram & Sons versus Commissioner of Income Tax, Punjab)**. Bar on a remedy does not deprive a person of his rights is the ratio decidendi of the above judgment.

10. In a recent decision rendered by Hon'ble the Apex Court in the case of **Union of India versus K.A. Najeed reported in (2021)3 SCC 713**, it would be profitable to extract para 17 which for ready reference reads as under :-

17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of UAPA per-se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statute as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial".

The position in the case at hand is somewhat similar. Defeating the right to appeal within the scope of procedure as postulated under the second proviso appended to Section 21(5) of the NIA Act, even if it is understood that the same does not render an aggrieved party altogether remediless, due to the remedy available under Article 136 of the Constitution of India i.e. the appellate jurisdiction of the Supreme Court against a judgment or order. However, if the Hon'ble Apex Court within exercise of its appellate jurisdiction can go into the adjudication of the surviving rights protected under Article 21 of the

Constitution of India, the ouster of High Court jurisdiction due to the bar of limitation of 90 days imposed by the statute is far from fair and reasonable, especially when the Hon'ble Apex Court has held in **K.A. Najeeb case(supra)**, that the presence of statutory restriction perse does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution.

11. This Court cannot be oblivious of the fact that the law relating to limitation is procedural in nature, whereas the law relating to right of Appeal, even though remedial is substantive in nature. Section 21 of the NIA Act, 2008 is reproduced below :-

21 Appeals. - (1) *Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.*

(2) *Every appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.*

(3) *Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.*

(4) *Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.*

(5) *Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from: Provided*

that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days: Provided further that no appeal shall be entertained after the expiry of period of ninety days.

The appeal as a remedy by virtue of Section 21(1) of NIA Act, 2008 enables this Court to go into both issues of questions of fact and law. Moreover, the NIA Act, 2008 takes special care of expediency while providing for the disposal of appeals within three months from the date of admission, therefore, the intention of legislature to defeat the purpose of law and the right to personal liberty under the cloak of limitation period could not be the essence and spirit of the rule of law and the legislature would ordinarily not have intended to defeat the sanctity of Article 21 of the Constitution of India on that account. The process of law in the matter of Article 21 of the Constitution of India under any circumstances, irrespective of the form in which remedy is provided, cannot be silenced and that is how it is a part and parcel of the basic structure of the Constitution of India inclusive of fair procedure. The question of challenge to a statutory provision does not arise for it is well settled that any statutory restriction is subservient to the mandate of part-III of the Constitution of India and no part of it can be read to override the sanctity and essence of Article 21 of the Constitution of India in particular.

12. **Further**, it is also interesting to note that Section 21(2) of the NIA Act, 2008 mandates the High Court to decide 'every' appeal filed under Sub-section(1), whereas, IInd proviso appended to Sub-section(5) ousts the jurisdiction of the High

Court beyond 90 days, therefore, the two provisions have to be read harmoniously. Needless to say that every appeal brought to the High Court can only be decided on merit provided the provision of limitation is understood not to oust the power of this Court to condone the delay. Any other interpretation of the provision would not only do violence to the rights guaranteed under Part III of our Constitution, but would also be at variance with the fundamental right of personal liberty, which lies at the heart of the notion of a fair procedure guaranteed under Article 14 and 21 of our Constitution.

13. In the result, we have no hesitation to put on record that the rejection of the objection raised by the State in our order dated 4.4.2023 is nothing but a fair and harmonious reading of the proviso. The reasoning advanced and strengthened by the High Court of Jammu and Kashmir in the case of **National Investigation Agency through its Chief Investigating Officer, Jammu versus 3rd Additional Sessions Judge District Court Jammu** proceeds in furtherance of the object and sanctity of Article 21 of the Constitution of India and is harmoniously balanced between an individual right of a citizen with the interest of the State to secure law and order for its citizen.

14. In any view of the matter, the Apex Court being seized of the issue in the case of **State (NIA) versus Farhan Sheikh** would soon resolve the conflicting opinions and settle the law on the point.

15. Until an authoritative view is pronounced by the Supreme Court of India, the order passed by this Court on 4.4.2023 in our considered opinion, is the good law. Accordingly, the application for

condonation of delay is allowed. The appeal may be registered and assigned a regular number.

16. Admit.

17. Let the objection be filed within two weeks.

(2023) 5 ILRA 459
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 234 of 1981
 And
 Government Appeal No. 748 of 1981
 And
 Criminal Revision No. 261 of 1981

Ram Ratan & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

Sri S.V. Goshwami, Sri A.M. Tripathi, Sri Rajeev Goswami, Sri Sudhir Kumar Kulshrestha, Sri Suresh Chandra Tripathi

Counsel for the Respondent:

D.G.A.

A. Criminal Law - Criminal Procedure Code, 1973 - Section 374(2) - Indian Penal Code, 1860 - Sections 148 - 302/149 - Challenge to-Conviction- the autopsy report of the deceased wherein incised wounds along with punctured wounds and abrasions have been found on the body of the deceased, doctor P.W.3 has opined that the injuries to the deceased were probably caused by use of spade and spear hence, the weapon carrying by the accused was used in the commission of the crime hence, ocular version is fully

supported by the medical evidence-statement of P.W.1 that there was no enmity between the informant's side and accused but however, it has been held that the enmity or motive has no significance in a criminal case based upon the ocular version and in the present case the ocular version speaking against the co-accused and confirming his participation in the crime has been fully corroborated by the medical evidence- the deposition of the eye-witnesses so far as it relates to the non-participation of the acquitted accused persons in the crime is found correct except co-accused but in view of the non-application of the maxim, "falsus in uno, falsus in omnibus" in India, we also cannot hold that the witnesses are not reliable or credible. - this is a general law that the ocular evidence may be given priority over the medical evidence and if the witnesses of fact are reliable their evidence should not be rejected-Appellants died during the pendency of appeal and appeal qua them abated. (Para 1 to 101)

B. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno, falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in

the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (Para 98)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Bikau Pandey Vs St. of Bih. (2003) 12 SCC 616
2. Anil Rai Vs St. of Bih. (2001) 7 SCC 318
3. Deepak Verma Vs St. of H.P.(2011) 10 SCC 129
4. Sucha Singh Vs St. of Punj. (2003) 7 SCC 643
5. Bhagwan Jagannath Markad Vs St. of Mah. (2016) 10 SCC 537
6. Surinder Kumar Vs St. of Punj. (2020) 2 SCC 563
7. Ashok Kumar Chaudhary Vs St. of Bih. (2008) 12 SCC 173
8. Mukesh Vs St. (NCT of Delhi) (2017) 6 SCC 1
9. Nankaunoo Vs St. of U.P. (2016) 3 SCC 317
10. St. thru the Inspr of Police Vs Laly @ Manikandan & anr.. (2022) SCC On Line SC 142, CRLA No. 1750-1751 of 2022
11. Munna Lal Vs St. of U.P. with Shiv Lal Vs St. of U.P. (2023) SCC Online SC 80, CRLA No. 490 of 2017
12. Susanta Das Vs St. of Ori. (2016) 4 SCC 371

13. St. of Karn. Vs K. Gopalkrishna (2005) 9 SCC 291

14. Sudershan Kumar Vs St. of H.P. (2014) 15 SCC 666

15. Dilawar Singh Vs St. of Har. (2015) 1 SCC 737

16. Gangadhar Behera & ors. Vs St. of Ori. (2002) 8 SCC 381

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

1. Both these appeals and the criminal revision arise out of a common impugned judgement and order dated 13.01.1981 in Sessions Trial No. 309 of 1978, whereby 6th Additional Sessions Judge, Gorakhpur convicted accused persons Ram Ratan, Ghanshayam, Arjun, Vishram, Dayaram @ Shubh Karan under Sections 148, 302/149 I.P.C. and sentenced them to undergo imprisonment for a period of two years under section 148 I.P.C. and imprisonment for life under sections 302,149 I.P.C. and acquitted them under Sectons 307/149, 323/149, 324/149 I.P.C. and further acquitted other accused persons Narbdeswar, Duryodhan, Balgovind, Raghunath @ Bhurari of all the charges levelled against them.

2. Criminal Appeal No. 234 of 1981 has been preferred by convicted accused Ram Ratan, Ghanshayam, Arjun, Vishram, Dayaram @ Shubh Karan against their conviction, whereas Government Appeal No. 748 of 1981 has been preferred by the State against acquittal of respondent nos. 1.Ram Ratan 2. Ghanshayam 3. Duryodhan 4. Narbdeswar 5. Arjun 6. Vishram 7. Dayaram alias Shubh Karan 8. Balgovind 9. Raghunath alias Bhurai under sections 147, 148, 149, 307, 302, 323, 324 I.P.C. However, during pendency of the appeal

convicted appellants Ram Ratan, Ghanshayam and Vishram died, qua them Cr. Appeal No. 234 of 1981 abated and in the same manner Government Appeal No. 748 of 1981 and Criminal Revision No. 261 of 1981 were also abated in respect of the three above mentined respondent/ opposite parties. Now, this appeal qua the surviving appellants Arjun and Dayaram is for adjudication. Criminal Revision No. 261 of 1981 has been preferred by the informant against the acquittal of four accused persons, 1.Narbdeswar 2. Duryodhan 3. Raghunath alias Bhurai 4. Balgovind.

3. The brief facts of the case are hereunder:

Accused Ram Ratan, Ghanshayam, Arjun, Vishram, Dayaram @ Shubh Karan, Narbdeswar, Duryodhan, Balgovind, Raghunath alias Bhurai had a grudge against deceased Trimbak Prasad Mishra, the brother of the informant Shambhoo Saran Misra, on account of some land dispute. On 9.4.1978, all the accused persons abused and threatened the deceased in the evening. On 10.4.1978, Trimbak Prasad had gone to worship in Shiv Mandir of the village and when he came out of the temple about 6.00 or 6.30 A.M., all the nine accused came there, armed with spade, lathi and spear surrounded Trimbak Prasad, who shouted while running away from there. On hearing his shrieks, informant Shambhoo Saran Misra and witnesses Ram Kumar, Ram Pyare, Bari, Narbdeswar, Shivdhar Shukla and Shambhoo Saran's brother Rannath @ Vijai rushed to the spot. Accused Vishram exhorted other accused persons to finish Trimbak Prasad and then accused Vishram, Daya Ram @ Shub Karan, Ram Ratan and Arjun with spade, Balgovind and

Ghanshyam with spear and remaining accused armed with lathis, assaulted over Trimbak Prasad in the Khalihaan of Ram Kumar, who fell down but even then the accused persons continued their violent attack. Trimbak Prasad died instantaneously on spot due to the injuries received by him. When Ramnath @ Vijai tried to save him, he was also beaten by the accused persons and when the villagers came, the accused persons fled away. The FIR was lodged on the same day at 10.00 am, on the basis of the written report given by informant Shambhoo Saran Misra at Police Station Khajni, Gorakhpur. The investigation started and inquest report and autopsy report of the deceased were prepared.

4. The post mortem of the deceased was performed by Dr. K.M. Singh, who found following injuries over the body of the deceased:

(i) *Incised wound 7" x 5-1/2" x bone deep on the right and lower side of the neck (right) soft issues & vessels cut and cut of the 2nd cervical vertebra through and through. Tailing 2" long up to lower part of the right chin.*

(ii) *Incised wound 0.6" x 1-1/2" x 3rd cervical vertebra deep wound in having tailing upto 1-1/2 below & right to the adams apple.*

(iii) *Incised wound 11" x 2-1/2" bone deep, tip of the right humerus bone cut, through & through on the right side extending from upper shoulder joint to the side of the neck, right side.*

(iv) *Incised wound 4" x 2-1/2" x bone deep front of the right shoulder joint outer 1/3 of the right clavicles cut.*

(v) *Incised wound 7" x 2" x bone deep, angle of the right ear cut. Tailing just*

01" length just 2" below the right ear lobule.

(vi) *Incised wound 4-1/2" x 1-1/2" bone deep right maxilla cut through & through soft tissues and vessels cut.*

(vii) *Incised wound 8" x 1" x carnial x cavity deep right frontal bone cut just above the right upper part of the right ear. Tailing extending 1-1/2" up to the 1" above & lateral side to the right eyebrow lateral margin brain matter is coming out.*

(viii) *Incised wound 5" x 1" x brain deep on the right frontal bone lower margin is 2" below the right upper part of the right ear.*

(ix) *Incised wound 4" x 1-1/2" x muscle deep on the mid and upper part of the head, 4" above the bridge of the nose.*

(x) *Punctured wound 1" x 1/2" x 2" on the lateral and outer aspect of the lower one third of the right elbow joint. Punctured wound 2" x 1" x 4-1/2" directed medially and upwards.*

(xi) *Abrasion 2-1/2 x 1/4" long inner aspect of the left fore arm middle 4" above the left wrist joint.*

(xiii) *Abrasion 2" x 1/2" on the skin of the left front middle.*

The doctor also opined that the death was caused due to shock and haemorrhage, as a result of anti-mortem injuries one and half day prior to the post mortem and were probable to be caused by use of spade and spear. The death was probable to be occurred on 10.04.1978 at 6.30 a.m.

5. Injured Ramnath @ Vijai was also medically examined by Dr. C.B. Prasad on 10.04.1978, who found following injuries over his body.

(i) *Incised wound on right side of head 8 cm x 1 cm x bone deep placed*

obliquely 10 cm above the right eye brow. Bleeding present.

(ii) Lacerated wound on right side of head 4 cm x ½ cm x scalp deep placed 2 cm above the injury no.1. Bleeding present.

(iii) Lacerated wound on junction of root of nose with two eye brows whence is 1 cm x ½ cm skin deep. Bleeding present.

(iv) Punctured wound on back of left upper arm 1 cm x ½ cm x 1 ½ cm deep placed 7 cm above the prominence of the left elbow joint. Bleeding present.

(v) Lacerated wound on front of left leg 1 ½ cm x ½ cm x skin deep placed 12 cm below the tibial tuberosity. Bleeding present.

(vi) Lacerated wound on front of right leg 2 cm x ½ cm x skin deep placed 9 cm below the tibial tuberosity. Bleeding

(vii) Punctured wound on front of right leg 2 cm x ½ cm bone deep placed 9 cm below the injury no.6. Bleeding present.

The injuries were simple, caused by sharp, blunt and pointed weapons and injury no.4 was advised for x-ray. However, no X-ray report is on record.

6. The Investigating Officer after performing all the formalities of the investigation submitted charge sheet against all the nine accused persons.

7. The case, being exclusively triable by the Sessions Court was committed by the concerned Magistrate to the Court of Sessions.

8. The accused persons appeared before the Court, charges against accused Vishram, Dayaram @ Shubh Karan, Ram Ratan, Arjun, Balgovind, Ghanshayam were framed under Section 148 I.P.C. on 14.9.1978, against Narbadeshwar, Duryodhan, Raghunath alias Bhorai under

Section 147 I.P.C. and under Sections 302/149, 324/149, 323/149 I.P.C. against accused persons Ram Ratan, Ghanshayam, Arjun, Narbadeshwar, Duryodhan, Balgovind, Vishram, Dayaram @ Shubh Karan, Raghunath alias Bhorai and subsequently additional charge under Section 307/149 was also framed against all the accused persons.

9. To bring home the charge in oral evidence as many as 14 witnesses have been examined, who are as follows:

1.	Shambhoo Saran Misra, eye witness	PW1
2.	Ram Kumar, eye-witness	PW2
3.	Dr. K.M. Singh, Performed autopsy	PW3
4.	HC Jang Bahadur Yadav, scribe of FIR	PW4
5.	Narbadeshwar, eye-witness	PW5
6.	Kripa Shankar Dubey, witness of criminal conspiracy	PW6
7.	Vijai @ Ram Nath, eye-witness/ injured	PW7
8.	HC Hriday Nath Tiwari, Moharir Malkhana	PW8
9.	Moti Lal Singh, witness of M.L. Register	PW9
10.	Dr. Purshottam, Formal Witness	PW10
11.	Kunwar Ram Dularey Singh, Formal Witness	PW11
12.	Rama Kant Yadav, Formal Witness	PW12
13.	Dr. C.B. Prasad, Witness of Injury Report	PW13
14.	S.O. Dinesh Rai- I.O	PW14

10. To support the oral evidence following documentary evidence has been filed by the prosecution:

1.	Prescription	Ex.Ka-1
2.	Prescription	Ex.Ka-2
3.	Prescription	Ex.Ka-3
4.	Written tehrir	Ex.Ka-4
5.	Autopsy report	Ex. Ka-5
6.	FIR	Ex.Ka-6
7.	G.D.	Ex.Ka-7
8.	Injury Report	Ex.Ka-8
8.1	Inquest Report	Ex.Ka-8/1
9.	Challan nash	Ex.Ka-9
10.	Photo nash	Ex.Ka-10
11.	Report medical officer	Ex.Ka-11
12.	Report CMO	Ex.Ka-12
13.	Site plan	Ex.Ka-13
14.	NBW	Ex.Ka-14
15.	Process under Section 83 Cr.P.C.	Ex.Ka-15
16.	Process under Section 83 Cr.P.C.	Ex.Ka-16
17.	Memo of attachment	Ex.Ka-17
18.	NBW	Ex.Ka-18
19.	NBW	Ex.Ka-19
20.	Process under Section 83 Cr.P.C.	Ex.Ka-20
21.	NBW	Ex.Ka-21
22.	Process under Section 83 Cr.P.C.	Ex.Ka-22
23.	Process under Section 83 Cr.P.C.	Ex.Ka-23
24.	Receipt regarding died animal	Ex.Ka-24
25.	NBW	Ex.Ka-25

26.	Process under Section 83 Cr.P.C.	Ex.Ka-26
27.	Process under Section 83 Cr.P.C.	Ex.Ka-27
28.	NBW	Ex.Ka-28
29.	Process under Section 83 Cr.P.C.	Ex.Ka-29
30.	Process under Section 83 Cr.P.C.	Ex.Ka-30
31.	Process	Ex.Ka-31
32.	NBW	Ex.Ka-32
33.	Process under Section 83 Cr.P.C.	Ex.Ka-33
34.	Process under Section 83 Cr.P.C.	Ex.Ka-34
35.	NBW	Ex.Ka-35
36.	Process under Section 83 Cr.P.C.	Ex.Ka-36
37.	Process under Section 83 Cr.P.C.	Ex.Ka-37
38.	Memo of attachment	Ex.Ka-38
39.	NBW	Ex.Ka-39
40.	Process under Section 83 Cr.P.C.	Ex.Ka-40
41.	Process under Section 83 Cr.P.C.	Ex.Ka-41
42.	NBW	Ex.Ka-42
43.	Process under Section 83 Cr.P.C.	Ex.Ka-43
44.	Process under Section 83 Cr.P.C.	Ex.Ka-44
45.	Memo of attachment	Ex.Ka-45
46.	Charge sheet	Ex.Ka-46
47.	FSL report	Ex.Ka-47

48.	Will	Ex.Ka-48
49.	Letter to Sub Registrar Tehsil Sadar Gorakhpur	Ex.Ka-49
50.	Letter to Collector Gorakhpur	Ex.Ka-50
51.	Written Statement before Consolidation Officer	Ex.Ka-51
52.	Copy of the order sheet	Ex.Ka-52
53.	Report under section 151, 107, 116 Cr.P.C	Ex.Ka-53
54.	Application for impleadment	Ex.Ka-54
55.	Copy of Judgement of the C.O II, Sehjanwa () Gorakhpur	Ex.Ka-55
56.	Copy of the Judgement of Court C.O. Khajni	Ex.Ka-56
57.	Copy of the judgement of the Court A.S.O. (Consolidation)	Ex.Ka-57

11. The prosecution has also referred material exhibits as under:

1.	Material Ex.1	Lungi
2.	Material Ex.2	Bandi
3.	Material Ex.3	Janeu
4.	Material Ex.4	Bundle of blood stained soil
5.	Material Ex.5	Bundle of plain soil

12. The accused persons, in their statement under Section 313 Cr.P.C., on putting incriminating circumstances and evidence against them, stating all the evidence recorded against them as false, have claimed false implication due to

animosity. However, no oral evidence has been adduced by the accused persons.

13. To support the defence version, following documentary evidence has been relied upon:

1.	Copy of judgement in S.T. No. 27/1962	Ex.Kha.1
2.	Copy of judgement in S.T. No. 107/1965	Ex.Kha.2
3.	Certified copy of complaint by Baneshwar Shukla against Shiv Dhar and others dated 24.3.1975	Ex.Kha.3
4.	Copy of statement of witness Ram Gulam dated 9.7.1968	Ex.Kha.4
5.	Copy of statement of witness Ram Ratan dated 2.5.1968	Ex.Kha.5
6.	Copy of order passed by D.D.C. Gorakhpur dated 18.01.1971	Ex.Kha.6
7.	Copy of statement of Kripa Shankar Dubey dated 18.12.1969	Ex.Kha.7
8.	Copy of sale deed dated 23.12.1971 executed by Smt. Kaula	Ex.Kha.8

14. P.W.1, P.W.2, P.W.5 and P.W.7 are the witnesses of fact.

15. P.W.1 Shambhoo Saran Misra, the informant and eye-witness of the case, has narrated the prosecution story in his examination-in-chief and has deposed that deceased Triambak Mishra, his real elder brother, used to take medicine from the Kaviraj Atmaram Dubey, Vaidya, as he had some digestion problem. The prescriptions

written by the aforesaid Vaidya have been proved by P.W.1 by Ex.Ka-1, Ex.Ka-2 and Ex.Ka-3. He has also explained that late Bhagwat Pandey, who was the remote relative of the informant side and owner of a huge land and house, had executed a registered will dated 5.7.1977 in respect of his entire property in favour of the deceased. The accused persons were not happy at this and they felt animosity with the deceased and even in the mutation proceedings, they filed their objection before the Court. They had also made attempt to forcibly take possession of the house of Bhagwat Pandey and an altercation took place between both the sides and proceeding under Section 151 and 107 Cr.P.C. was initiated by the police. Further, a series of incidents has been narrated by this witness to establish the history of enmity and grudge between both the side.

16. Narrating the incident, P.W.1 further states that on 10.04.1978 at 6.30 in the morning, this witness was present in his Khalihan along with his brother Ramnath @ Vijay and the deceased was offering worship in the temple situated at the distance of 20 steps from the Khalihan. As soon as he came out of the temple accused Ram Ratan, Ghanshayam, Arjun, Narbdeswar, Duryodhan, Vishram, Dayaram @ Shubh Karan, Balgovind and Raghunath alias Bhurai chased him to kill holding spade, lathi and spear in their hands. Accused Ram Ratan, Arjun, Vishram and Dayaram @ Shubh Karan were holding spade, Balgovind and Ghanshyam spear and rest of the accused were holding lathi. When the deceased tried to escape and reached the Khalihan of Ram Kumar, all the accused persons attacked him with the aforesaid weapons. The deceased slipped in the Khalihan but

despite that the accused persons continued their assault. When Ramnath @ Vijay tried to save the deceased, the accused persons assaulted him also with the aforesaid weapons and he fell down. After several blows accused Vishram exhorting to kill the deceased made two or three blows of the spade over his neck and he died. The occurrence was witnessed by Raghunath @ Vijay, Ram Kumar, Narbdeswar, Ram Pyare, Shiv Dhar Shukla etc. The matter was reported to the police on the written report of the informant, who went to the police station along with injured Ramnath @ Vijay. The injured after primary treatment was sent to the District Hospital, Gorakhpur and remained admitted there. P.W.1 has proved his written report as Ex.Ka-4. He has also explained that the plan of murder was made by accused Ram Ratan, Vishram and Balgovind 15 days prior to the occurrence, which was heard by the villagers, Kripa Shankar Dubey and Shiv Shankar Dubey, who disclosed this to the deceased. P.W.1 also states that one day before the occurrence, the accused persons had threatened and assaulted his brother Triambak, however, no report was lodged in this connection.

17. P.W.2 Ram Kumar is said to be the eye-witness to the occurrence. He has corroborated the deposition of P.W.1 in his examination-in-chief and has clarified that, at the time of occurrence, accused persons Ram Ratan, Ghanshyam, Duryodhan, Arjun, Narbdeswar, Vishram, Dayaram @ Shubh Karan, Balgovind, Raghunath @ Bhurai had assaulted the deceased with lathi, spear and spade, which resulted into his instantaneous death and the occurrence was witnessed by Shambhoo Mishra, Ramnath @ Vijai, Narbdeswar Dubey, Ram Pyare and by him as well. He has also affirmed this fact that Ramnath @ Vijai

was also assaulted by the accused persons during the occurrence.

18. P.W.5 Narbdeswar is also the eye-witness of the occurrence, who has deposed that, at the time of the occurrence, he was present in his Khalihaan, which is about 60-70 steps far from the Shiv temple. He had seen accused persons Ram Ratan, Vishram, Arjun, Dayaram @ Shubh Karan, Balgovind, Ghanshyam, Dhuryodhan, Narbdeswar and Raghunath @ Bhurai holding lathi, spear and spade and chasing the deceased Triambak, who was running towards Khalihaan of Ram Kumar. The accused persons were threatening for life to the deceased, who fell down in the Khalihaan of Ram Kumar, while making his escape. Accused Vishram, Ram Ratan, Arjun and Dayaram @ Shubh Karan with spade, Balgovind and Ghanshyam with spear and Narbdeswar, Duryodhan and Raghunath @ Bhurai with lathi assaulted Triambak Mishra and when his brother Ramnath @ Vijai came to save him, he was also assaulted. Triambak was again inflicted several blows and accused Vishram abusing and shouting that he was still alive, made blows by spade and he died. This witness also states that the occurrence was seen by Shambu Saran, Ramnath @ Vijai, Ram Pyare, Shiv Dhar and other persons of the village and by him as well.

19. P.W.7 Vijai @ Ramnath is the injured witness. He has corroborated the version of P.W.5 as given in his examination-in-chief. He has also affirmed this fact that the murder of Triambak was caused by accused persons Ram Ratan, Arjun, Vishram, Dayaram @ Shubh Karan by use of spade, Balgovind and Ghanshyam by use of spear and Narbdeswar, Duryodhan and Raghunath alias Bhurai by

use of lathi on 10.04.1978 at 6.30 a.m. He has also affirmed this fact that when he tried to protect Triambak, he was also assaulted by Dayaram @ Shubh Karan, Balgovind and Narbdeswar by lathi, bhala and spear. Triambak died on spot and he was taken to the police station on a cot and subsequently to the hospital.

20. P.W.6 Kripa Shankar Dubey is the witness of criminal conspiracy. He has deposed before the Court that on 25.3.1978, while returning from the house of his uncle at Gram Mandory, he was sitting for a nature's call in the evening near the canal bridge situated in the south of village Budhat. In the meanwhile, accused Ram Ratan, Vishram and Balgovind came over the bridge. He has further stated that this story was narrated to Triambak by him but he expressed his faith over God. Rest of the prosecution witnesses are formal witnesses.

21. P.W.3 Dr. K.M. Singh has performed autopsy of the deceased Triambak and has proved the autopsy report as Ex.Ka-5.

22. P.W.4 H.C. Jang Bahadur Yadav, is the scribe of the FIR, who has proved Chick FIR and registration G.D. as Ex.Ka-6 and Ex.Ka-7.

23. P.W.8 Hriday Nath Tiwari, is the Malkhana Incharge, who on the basis of the relevant register has proved this fact that three sealed bundles relating to this case were sent for investigation to chemical examiner, CMO office, Gorakhpur from Sadar Mal Khana and after investigation on 21.10.2018, the sealed packets were sent back to the Mal Khana, and relevant entries were made by him in the register.

24. P.W.9 Moti Lal Singh, who is a clerk in the C.M.O. office, Gorakhpur has

been produced before the Court along with Medico Legal Register and on the basis of the aforesaid register, he has deposed that the sealed bundles along with specimen "c" were received in his office on 23.08.1978 brought by Cons. Kuwar Ram Dularey Singh, P.S. Khajni, Gorakhpur, which were sent to chemical examiner, Agra on 24.8.1978 in sealed condition.

25. P.W.10 Dr. Purshottam Tiwari has been examined as secondary witness for Dr. C.B. Prasad, Medical Officer P.H.C. Khajni, who had medically examined injured Ramnath @ Vijai on 10.04.1978. On the basis of original injury register, he has proved the injury report of injured Ramnath @Vijai as Ex.Ka-8.

26. P.W.11 Cons. Kuwar Ram Dularey Singh states, in his evidence, that on 23.8.1978, while working as Cons. Police Station Khajni, Gorakhpur, he had deposited three sealed bundles bearing specimen "c" to the sadar Malkhana from P.S. Khajni and submitted the same to the office of the C.M.O. from the Malkhana on the same date.

27. P.W.12 Cons. Ramakant Yadav has deposed that on 10.04.1978, while working as Cons. P.S. Khajni, Gorakhpur, he along with Chaukidaar, Jhinku had presented the dead body of Triambak Mishra in sealed condition along with specimen seal before the doctor at Gorakhpur for autopsy.

28. P.W.13 Dr. C.B. Prasad was subsequently examined by the prosecution, who has proved this fact on 10.04.1978, he was posted at P.H.C. Khajni as Medical Officer where he used to medically examine the injured persons and entered the injuries in the Medico Legal Register.

However, at present, the original register dated 10.04.1978 is missing. He himself had gone to P.H.C. Khajni to inquire into the aforesaid register but did not find it.

29. P.W.14 S.O. Dinesh Rai, is the I.O. of the case, who has proved the proceeding of the investigation in his evidence. As per his deposition, he had recorded the statement of the witnesses and after inspection of the place of occurrence, site plan Ex.Ka-13 was prepared by him. He also performed the inquest of the dead body of the deceased and relevant papers for post mortem were also prepared by him and the dead body was sent for post mortem. Inquest report and relevant papers prepared for post mortem have been proved as Ex.Ka-8/1 to Ex.Ka-12 by this witness. He has also proved the memo of seizure of blood stained and plain soil as Ex.Ka-14 and the bundles of the aforesaid articles as material Ex.Ka-4 and Ka-5. He has also narrated this fact that the accused persons were absconding and punitive processes were issued against them and he has proved the same as Ex.Ka-14 to Ex.Ka-45, which are under the signature and hand writing of S.I. Ram Tej Pandey, who was instructed by him for the search of the accused persons. Charge sheet Ex.Ka-46 has also been proved by this witness.

30. Learned counsel for the appellants assailed the impugned judgement on many grounds. It has been argued that the ocular evidence adduced by the prosecution is concocted and as a matter of fact, there was no eye-witness to the incident. There is ample evidence on record to show that due to enmity, accused persons/ appellants were falsely implicated in this case. The deceased himself had criminal antecedents and the possibility of his being murdered by some other persons cannot be ruled out.

The evidence of fact is unnatural and the sequence of the incidents, as narrated by the witnesses of fact, is improbable. There are material contradictions in the depositions of the witnesses of fact. The investigation is highly faulty and place of occurrence is also not certain. F.S.L report and the medical evidence does not help the prosecution at all. The learned trial Court has miserably failed to appreciate the evidence on record and it has totally discarded and misread the documentary evidence adduced by the defence. The convicts had no motive to do away with the deceased. On the basis of the aforesaid submissions and on other grounds as well, it has been prayed that the impugned judgement and order of conviction deserve to be set aside by allowing the present appeal. Further it has been submitted by the learned counsel for the opposite parties in the Revision Petition that the part of impugned judgment recording acquittal of some of the accused persons requires no interference.

31. Per contra, learned A.G.A. and learned counsels for appellants in the Government Appeal No. 748/1981 and the learned counsel for the revisionist as well have vehemently argued that present is a case based on ocular evidence and the witnesses of fact are reliable. The place of occurrence is fixed and the medical evidence is clearly in conformity with the prosecution case. The accused persons had a strong motive to kill the deceased and the F.S.L report also supports the prosecution version. There was no possibility of false implication of any of the accused persons. The learned trial Court has meticulously and carefully scrutinized the evidence adduced by the prosecution as well as by the defence and reached at a right conclusion that the convicts are guilty of

murder of the deceased. It has been further submitted that to acquit some of the accused persons was not proper and to that extent, the impugned judgement deserves to be modified and the acquitted accused persons be also convicted for the offence charged against them. On the aforesaid grounds dismissal of the present appeal and allowing of the Government Appeal and criminal revision has been prayed for.

32. At the very outset, it has to be kept in mind that charges against accused persons Vishram, Dayaram @ Shubh Karan, Ram Ratan, Arjun, Ghanshayam were framed under Sections 302/149, 148, 324/149, 323/149 and 307/149 I.P.C. After conclusion of the trial, accused persons Ram Ratan, Ghanshayam, Arjun, Vishram, Dayaram @ Shubh Karan were held guilty and convicted for the offences under Sections 302/149, 148 I.P.C. and acquitted under Sections 307/149, 323/149, 324/149 I.P.C. Rest of the accused persons, namely, Narbadeshwar, Duryodhan, Balgovind, Raghunath @ Bhurari were acquitted of all offences for which, they were charged. It means that the trial court reached to the conclusion that no injury was caused to the injured in the said incident and the main offence of murder was found proved against five of the total nine accused persons.

33. This is the specific case of the prosecution that accused persons, forming an unlawful assembly equipped with dangerous weapons like lathi, spade and spear, came to the spot and with an intention to kill the deceased gave several blows to him resulting into his death.

34. It was specifically stated by P.W.1, the eye-witness, that after bitterly assaulting the deceased, accused Vishram,

exhorting the other accused persons, inflicted 2 or 3 more injuries of spade upon the neck of the deceased, which resulted into his instantaneous death. In his cross examination, he has made some specific statements and states that when the deceased fell down on the ground after sustaining injuries, the left portion of his body was on the down side and right portion was on the upper side and all the injuries of lathi, spear and spade which he sustained after falling on the ground, were over the right portion of his body. His brother Ram Nath @ Vijai also sustained injuries by use of the aforesaid weapons in the said occurrence.

35. P.W.2, the other eye-witness also deposes that at the time of the incident, when accused persons were chasing the deceased after making assault upon him, he slipped and fell down and even then accused Vishram exhorted the other accused persons and himself made two or three spade blows over the neck of the deceased. In his cross examination, he has clarified that when the accused persons were chasing the deceased, they were making assault upon him and the blows were inflicted over the sides of the body and the back portion also, although he could not see as to on which parts of the body he sustained injuries. When the accused persons fled away, he found the injuries over the right side of the neck of the deceased and also over the sides and back of body. He has also affirmed this fact that when the deceased fell down on the ground the left part of his body was downward.

36. P.W.5 Narbadeshwar and P.W.7 Vijay @ Ram Nath are also eye-witnesses of the incident and they have narrated the

story in the same manner as P.W.1 and P.W.2 depose.

37. In view of the specific ocular evidence about the manner and use of weapons in the occurrence, the medical evidence is to be examined. Dr. S.S. Srivastava who performed the autopsy of the deceased, has been examined as P.W.3 and has proved the autopsy report as Exhibit-Ka-5. The doctor has found as many as 13 injuries over the body of the deceased out of which 9 injuries were incised wounds over the right portion of the body of the deceased. Injuries on the face and skull were also found, two stab wounds and two injuries of abrasion were also there. Significantly, the doctor has found clotted blood beneath the skin of the neck and opined that due to excessive haemorrhage and shock, the deceased died and that was caused due to ante mortem injuries. The expert, corroborating the prosecution version, has also stated that injury nos. 1 to 9 might be caused by use of spade, injury nos. 10 and 11 by use of spear and if a person falls on the ground, abrasion may be caused. This is also significant to note that P.W.3 had made a specific statement that if a person falls with left side downwards and is assaulted in that position, all the aforesaid injuries are possible to be caused. He has also stated in his cross-examination that it appears from the perusal of the injuries that the deceased was assaulted forcibly and it is quite possible that injuries might be inflicted when he was lying or was in a position with his left portion downwards. However, he has also stated that if the deceased dies only after one or two blows and he is continuously being beaten even after his death, it is not possible to differentiate between ante mortem and post mortem injuries.

38. A lot has been argued on the point of motive by the learned counsel for the appellants. At the very outset on the point of motive, the documents adduced by way of defence evidence have been impressed upon. It has been argued on behalf of the appellants that on account of old animosity between the parties all the accused persons have been falsely implicated.

39. The arguments on the point of motive and animosity take us to the documents adduced by the defence, which are on record as Ex.Kha-1 to Ex.Kha-8.

40. Ex.Kha-1 is the certified copy of the judgement passed by Sessions Judge, Gorakhpur on 24.5.1962, who, thereby convicting the accused persons Triambak Prasad Mishra, Shiv Murti and Ram Ratan u/s 302 and 302/34 I.P.C., has given benefit of doubt to one of the accused Shambhoo Saran Misra.

41. In the same manner Ex.Kha-2 is the certified copy of the judgement passed by Sessions Judge, Gorakhpur in Sessions Trial No. 107 of 1965, wherein the accused persons, five in numbers, including the deceased Triambak Prasad Mishra, were acquitted vide judgement and order dated 31.3.1966.

42. From the perusal of Ex.Kha-3, we find that one Vaneshwar Shukla filed a criminal complaint dated 24.3.1975 before the Court of Munsif Magistrate, Bansaon, Gorakhpur, wherein 14 accused were alleged to take away the crop from the Khaliha of the complainant and deceased Triambak Prasad Mishra and some police personnel were named as accused. It was argued that this document shows that the deceased was a muscle man and he had friendly terms with the police personnel.

We do not think that the present document has any impact upon the merits of the present case because this document shows nothing against the I.O. or any police official related to the present case.

43. Ex.Kha-4 is a certified copy of the statement of witness Ram Gulam before the Court of C.O., which was recorded on 9.7.1968.

44. Ex.Kha-5 is the statement of witness Ram Ratan before the Court of C.O. IInd Sadar, Gorakhpur in the case of Ram Samuj and ors. vs. Triambak Prasad Mishra and that statement was recorded on 2.5.1968.

45. Ex.Kha-6 is a copy of judgment delivered by Deputy Director of Consolidation, Gorakhpur in a consolidation case filed by Gajraj, father of the present appellant Ram Ratan, against Vishram and Ram Gulam. It appears from the perusal of the aforesaid document that the said case was decided on 18.01.1971, whereas the incident in the present case was occurred on 10.04.1978, i.e almost 7 years after the aforesaid judgment.

46. Likewise, Ex.Kha-7 is the copy of statement of D.W.2 Kripa Shankar Dubey dated 18.12.1969 in consolidation case between Triambak Prasad Mishra and others Vs. Bhawani and ors.

47. Ex.Kha-8 is the copy of sale deed, which was executed by Smt. Kaula, widow of Raja Ram, in favour of deceased Triambak Prasad Mishra on 24.12.1971, which relates to the time much before the date of present occurrence.

48. By way of the aforesaid defence evidence, an attempt was made to show

that the parties had been on inimical terms for long, and several litigations had been pending between them. It was also tried to show that the deceased had a criminal history and even in a case of murder, he was awarded life sentence by the Sessions Court of Gorakhpur prior to the present occurrence.

49. Anxious consideration to the evidence on record has been given by the learned trial Court in respect of enmity between the parties and also to the criminal antecedents of the deceased. On the basis of the evidence adduced by the defence side if taken as it is, it can be said that the parties had been on inimical terms but the genuine question arises whether only on the basis of the old enmity between the parties, it was probable and justified for the informant side to falsely implicate the accused persons and thereby to spare the actual assailants.

50. The relationship of the witness of fact with the deceased has been vehemently impressed upon. It is also highlighted by the appellants that since the occurrence happened in the day light at a public place, in all the probabilities, persons from the public must have been present at the time of incident but the independent witnesses were concealed by the prosecution in the case in hand.

51. The contention arose by the learned counsel for the appellants find its answer in *State of Andhra Pradesh Vs. S. Rayappa and Ors.* (2006) 4 SCC 512 wherein the Hon'ble Supreme Court examined several aspects of a criminal trial and this fact was also taken into account as to why independent witnesses ignore to depose in favour of the prosecution and in what circumstances the probability of false

implication may be ruled out. It was also clarified as to why the prosecution in so many cases is bound to rely upon the witnesses, who happen to be the relative of the deceased (victim). It was held in para 6 and 7 -

"6.....By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

7. On the contrary it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination. In such a situation, the only natural witness available to the prosecution would be the relative witness. The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously. The High Court has brushed aside the testimony of PW 1 and PW 2 on the sole ground that they are interested witnesses being relatives of the deceased.

52. The trial Court has discussed various aspects of motive and enmity existing between the parties in the present case. Reliance has been placed upon **Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616** by the learned state counsel wherein it has been held that when the direct evidence establishes the crime, motive is of no significance and pales into insignificance.

53. In **Anil Rai Vs. State of Bihar (2001) 7 SCC 318** it has been held that enmity is a double edged weapon, which can be a motive for the crime as also the ground for false implication of the accused persons.

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

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

55. However, in this case a motive has been assigned in the FIR to the effect that the parties have been on inimical terms, as they have some land and litigation disputes since long. Enmity between the parties is no doubt a double edged weapon. If on account of enmity, accused can be falsely implicated by the complainant party, at the same time due to that very enmity the accused may commit crime also against the complainant party.

56. The witnesses of fact have been cross examined on the point of previous litigation and enmity between the parties

and we have no hesitation to note that enmity is an admitted fact in the present case and the prosecution witnesses nowhere make any attempt to conceal the factum of animosity, which has already been alleged in the FIR and in respect of which evidence has been adduced by both the sides.

57. We have earlier scrutinized the evidence of fact adduced by the prosecution and we find that there is no material contradiction in the testimonies of the witnesses of fact. It is true that some minor discrepancies have been rightly pointed out by the appellants in the deposition of P.W.1, P.W.2, P.W.5 and P.W.7, but we have convinced to hold that on all the material points e.g. date, time and place of occurrence, and the manner of assault etc, there is no such contradiction, which may be taken as material contradiction or which may falsify the prosecution case.

58. One specific point has been raised by the learned counsel for the appellants that P.W.1 has admitted that one day before the incident the accused persons had beaten and threatened the deceased but however, this incident was not complained of anywhere. It is further argued that P.W.1 is a teacher in the primary school and on the date of occurrence he was on leave. His school opens at 6.30 in the morning and the leave was taken one day before the date of occurrence. It is argued that it was not natural that P.W.1, who ought to be present in his school as the board examinations were going on, had suddenly took leave from the school as if it was known to him what was going to happen and this is an improbable and unnatural circumstance. We do not find any force in this argument as it is not the statement of P.W.1 that he suddenly took leave on the date of

occurrence rather he had already applied for leave on Saturday whereas the incident happened on Monday.

59. It is vehemently argued by the learned counsel for the appellants that P.W.1, P.W.2, P.W.5 and P.W.7 did not make any attempt to save the deceased from the assault of the accused persons, which was again an unnatural conduct of their part but if we sift the statements of the aforesaid witnesses, we find that the witnesses were stunned as the incident happened all of a sudden. P.W.1 makes specific statement on this point that during course of occurrence, he was shouting for help, some villagers were also present there, who witnessed the occurrence but they made their protest only up to a limited extent. It was further argued that P.W.5 also states that no villager made any attempt to save the victim and almost similar statements are found in the testimonies of P.W.2 and P.W.7.

60. We have made a meticulous scrutiny of the evidence of aforesaid witnesses on this point also and find that the conduct of the witnesses was not unnatural as no one can preplan for a specific reaction, if a crime takes place staggering him. In such a situation, one may run away from the place of incident or may request the accused to leave the victim or may stand stunned without making any protest in a state of fear etc.

61. In **Sucha Singh Vs. State Of Punjab, (2003) 7 SCC 643**, it was found that the witnesses did not come to rescue of the deceased and in the facts and circumstances it was held by the Hon'ble Apex Court that a particular reaction conduct and behaviour of the witnesses cannot be a ground to discard their

evidence when they are unarmed and the accused are armed with deadly weapons.

62. The relevant point is that whatsoever their reaction may be, there is a consistency in their deposition, which makes as countenanced in material aspects and minor contradictions occurred in their testimonies are not sufficient to falsify their entire testimony.

63. One specific point has been raised in respect of the testimony of P.W.5 to show that his presence at the place of occurrence was doubtful. P.W.5 is also a teacher in the primary school and he states that on the date of occurrence, he did not go to school and leave application was sent by him on the ground of some urgent work in the very morning of the date of occurrence itself.

64. We do not find anything unnatural in the deposition of P.W.5. He narrates the story of the occurrence in the same manner as other witnesses of fact depose. He may be on leave on the date of occurrence on account of some work in his field as he states and this is not sufficient to make his testimony unreliable or to falsify his presence at the place of occurrence at the time of incident.

65. The learned trial Court has made a detailed scrutiny of the evidence of fact on record. It emerges out from the perusal of the impugned judgement and the record that eye-witnesses were known to the appellants and no neutral witness was examined but this factor is never sufficient to exonerate the appellants. Hence, the evidence of witnesses of fact is reliable and trustworthy having no contradiction on material point, which might hit the very root of the prosecution case and on the

basis of the aforesaid evidence, the conclusion we reach at, is obvious that it is not a case of false implication due to the old enmity between the parties rather it is well proved from the evidence that due to the enmity the present crime has been committed and the issue of enmity goes against the appellants and in the same manner the issue of the witnesses of fact being related to the deceased also does not go in favour of the appellants.

66. Reliance has been placed upon **Bhagwan Jagannath Markad Vs. State of Maharashtra (2016) 10 SCC 537** wherein it has been held that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case, Court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of the testimony of such related witness.

67. Emphasis has been laid down on **Surinder Kumar Vs. State of Punjab (2020) 2 SCC 563** by the learned A.G.A. wherein it has been reiterated that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated.

68. The place of occurrence is always an important factor, which may falsify or strengthen the prosecution case and if the place of occurrence is not certain, definitely the prosecution case falls within the cloud of suspicion. If we examine the present case in this purview, we note that in the FIR itself, it has been mentioned that when the deceased came out of Shiv temple after

offering worship, he was surrounded by accused persons carrying weapons and when he tried to escape, he was assaulted by them in the khalihan of Ram Kumar. P.W.1, P.W.2, P.W.5 and P.W.7 narrate the same story and place of occurrence as per their deposition, is found to be the same.

69. P.W.14, the I.O. has explained the proceedings of the investigation in his deposition and in the site plan Ex.Ka-13 prepared by him, khalihan of Ram Kumar has been mentioned as the place where the deceased was murdered. The Shiv temple has also been shown in the site plan and in the west of Shiv temple, the main place of occurrence is shown. We find specific statement in the testimony of P.W.1 that when the deceased was surrounded by the accused persons after coming out of the Shiv temple, he ran away towards the west and reached the khalihan of Ram Kumar, where he was assaulted. It is notable that the place of occurrence has been shown in the west of the Shiv temple in the site plan of Ex.Ka-13. The I.O. has specifically shown the whole topography of the crime scene by different signs, the place from where the witnesses saw the occurrence, the trees on spot and fields of different persons existing there have been specifically mentioned in Ex.Ka-13. The witnesses of fact have also been cross examined on the point of the place of occurrence and the topography of the area and whatsoever they have stated we find the same in the site plan Ex.Ka-13 and on the basis of that we have no hesitation to hold that the place of occurrence, the khalihan of Ram Kumar, where the deceased was murdered is a fixed and definite place which is well proved by cogent evidence of the witnesses of fact and by P.W.14, the I.O. himself. Indeed some minor discrepancies over the issue

occur in the testimonies of aforesaid witness but the same is not material and is not capable to fluctuate the place of occurrence, which is established by reliable evidence.

70. In **Ashok Kumar Chaudhary v. State of Bihar, (2008) 12 SCC 173**, it was held that if the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then the testimony of an eye witness has to be accepted and acted upon. Distinctions between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

71. Further it was held in **Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1** that non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution

72. The I.O. has found blood on wheat pair in the khalihan of Ram Kumar and P.W.4 states that he found the dead

body in the khalihan of Ram Kumar in the wheat pair and the body was sent for inquest. He has also taken blood stained and plain husk and soil from that very place he found the dead body and prepared the memo Ex.Ka-14.

73. This fact is not disputed by the prosecution that the deceased had a criminal history and defence evidence in this respect is also on record. P.W.1 also admits and find support of P.W. 7 over the issue that his brother Triambak was an accused in the case of murder of Ram Raj and he himself along with the deceased and other persons had been accused in another case of Vaneshwar Shukla. We do not find it a convinced argument that since the deceased was the man of criminal antecedents and had been an accused in a murder case, he might have been killed by some other persons and the reason behind it is that in the present case, the reliable ocular evidence capable of proving the participation of convicts is on record and it is explicit on the basis thereof that it was the appellants who were the author of the crime.

74. Learned counsel for the appellants has further argued that no murder weapon has been recovered during the course of investigation, nor it was brought before the Court, which is a dent in the prosecution case. We are unable to accept this plea as the recovery of murder weapon is never a sine qua non to rely upon the prosecution case. There are catena of decisions, wherein it has been held by the Hon'ble Apex court that non recovery of murder weapon is never fatal to the prosecution case. The important aspect is that the weapons said to be used in the occurrence have been specifically named in the testimony of the eye-witnesses. The

medical evidence corroborates the fact that the injuries found on the body of the deceased may be caused by the use of spade, spear and rubbing. We also find that in the inquest report Ex.Ka-8, the Panchas have found that the injuries are on the right side of the body of the deceased, several blows have been inflicted upon his body and their opinion is also in consonance with the prosecution case.

75. Learned counsel for the State has argued that after the incident the accused persons absconded and several punitive process were issued against them under the authority of the Court and in this respect the documents filed as Ex.Ka-14 to Ex.Ka-45 have been impressed upon. It is further submitted that since the accused persons had been absconding, the murder weapon could not be retrieved by the I.O.

76. It was so defined in **Nankaunoo Vs. State of U.P. 2016 (3) SCC 317** that when there is ample unimpeachable ocular evidence corroborated by medical evidence, mere non-recovery of weapon from the accused does not affect the prosecution case relating to murder. In the peculiar circumstances of the present case and in the light of the aforesaid legal position non recovery of murder weapon is not fatal to the prosecution case.

77. Recently in **State through the Inspector of Police Vs. Laly @ Manikandan and Anr. 2022 SCC On Line SC 1424 (Criminal Appeal no. 1750-1751 of 2022)**, Hon'ble Apex Court has held that "20.....Similarly, assuming that the recovery of the weapon used is not established or proved also cannot be a ground to acquit the accused when there is a direct evidence of the eye witness. Recovery of the weapon used in the

commission of the offence is not a sine qua non to convict the accused. If there is a direct evidence in the form of eye witness, even in the absence of recovery of weapon, the accused can be convicted".

78. The investigation of the case has been assailed on the clunky ground that it is faulty and several acts of negligence and omissions have been caused by the I.O. It is submitted that in reply to some questions during the course of examination the I.O. P.W.14 avoids to answer and simply says that he does not remember that. He has not mentioned anything in respect of recovery of brass or copper lota or wet rice in the temple, which could be indicative of the fact that the deceased had gone to the Shiv temple to offer worship just before the incident. He has also not mentioned in the site plan as to from whose khalihan the witnesses had seen the occurrence. He has also admitted that in the case diary, there is a cutting in the name of the district where the autopsy of the deceased was conducted.

79. We have taken note of the points raised by the learned counsel for the appellants in respect of the negligence and omissions on the part of the I.O. and we find without any hesitation that the I.O. in the investigation of the present case has not made any significant omission or negligence, which could affect the prosecution case adversely. The omissions and negligence are minor in nature and it is a settled law that mere negligence or omission on the party of the I.O. is not sufficient to falsify the prosecution case, which is otherwise proved by reliable and cogent eye-witnesses again.

80. In a catena of decisions like: (i) **Khem Ram Vs. State of Himachal Pradesh, (2018) 1 SCC 202**, (ii) **State of Karnataka**

Vs. Suvarnamma, (2015) 1 SCC 323, (iii) Hema Vs. State, 2013 (81) ACC 1 (SC) (Three-Judge Bench), (iv) C. Muniappan Vs. State of TN, 2010 (6) SCJ 822, (v) Acharaparambath Pradeepan Vs. State of Kerala, 2007(57) ACC 293 (SC), (vi) State of Punjab Vs. Hakam Singh, (2005) 7 SCC 408, the legal theory on the point of negligence/ omission on the part of I.O. affecting the prosecution case has been promulgated and the principle we find is that any irregularity or deficiency in investigation by I.O. need not necessarily lead to rejection of the case of prosecution when it is otherwise proved, the only requirement is use of extra caution in evaluating of evidence; a defective investigation cannot be fatal to prosecution where ocular testimony is found cogent and reliable.

81. Likewise, in another recent pronouncement in **Munna Lal Vs. State of U.P. with with Shiv Lal Vs. State of U.P.** 2023 SCC Online SC 80 (Criminal Appeal No. 490 of 2017), it was re-iterated that, a defective investigation is not always fatal to the prosecution where ocular testimony is found credible and cogent while in such a case the Court has to be circumspect in evaluating the evidence. A faulty investigation cannot in all cases be a determinative factor to throw out a credible prosecution version.

82. So far as the criminal history of the deceased is concerned, no doubt he was a man of criminal antecedents as per evidence on record but the plea raised by the learned counsel for the applicants that due to enmity with so many persons he could have done away with by some other persons is not sustainable in the factual scenario of the present case. The witnesses of fact have categorically stated the role of

the present appellants in the occurrence and since they are related to the deceased it was not probable for them to falsely implicate the appellants merely on account of animosity with them and thereby leaving away the actual culprits.

83. Thus, we find that the learned trial Court has not committed any illegality in convicting the present appellants under Section 148, 302/149 I.P.C. The murder of the deceased caused by the appellants is proved beyond reasonable doubt since the appellants after forming an unlawful assembly armed with deadly weapons, which if used as a weapon of an offence were likely to cause death, used violence, they were rightly found guilty of rioting and since the offence was caused in the prosecution of the common object of unlawful assembly formed by the appellants, they were rightly held guilty with the aid of Section 149 I.P.C.

84. In **Susanta Das Vs. State of Orissa**, (2016) 4 SCC 371, the Hon'ble Apex Court elaborating the legal dictum in respect of offence under Section 149 I.P.C. held that "When once, participation of each member of an unlawful assembly of five or more persons is shown, who indulge in an offence as a member of such an unlawful assembly, for the purposes of invoking Section 149, it is not necessary that there must be specific overt act played by each of the member of such an unlawful assembly in the commission of an offence. What is required to be shown is the participation as a member in pursuance of a common object of the assembly or being a member of that assembly, such person knew as to what is likely to be committed in prosecution of any such common object. In the event of the proof of showing of either of the above conduct of a member of an unlawful

assembly, the offence, as stipulated in Section 149 IPC, will stand proved."

85. At the same time, we have also taken into account the Government Appeal filed by the State against the accused persons and also Criminal Revision filed by the original informant against the acquitted accused persons Narbadeshwar, Duryodhan, Balgovind, Raghunath alias Bhorai.

86. It has been submitted by the learned State counsel and learned counsel for the informant that the impugned judgement and order passed by the lower Court so far as it relates to the acquittal of accused persons Narbadeshwar, Duryodhan, Balgovind, Raghunath alias Bhorai is perverse and against the fact and evidence on record. It is very strange that the learned trial Court on the same set of evidence has convicted some of the accused persons but acquitted the four accused persons whereas sufficient evidence against them also was on record. The learned trial Court has completely erred in holding that there was no lathi injury on the body of the deceased and, therefore, accused persons Narbadeshwar, Duryodhan, Raghunath alias Bhorai, who are said to have lathi in their hands by the witnesses of fact cannot be held liable for the offences charged. The learned trial Court ought to have relied upon the ocular evidence, which was trustworthy but he relied upon the medical evidence, which was an incorrect view. It is further argued that the learned trial Court completely failed to consider that accused Balgovind was also equally responsible for the offences charged with and he had active participation in the offence and ample evidence in this regard was available on record but illegally rejected by the trial Court. It is further argued that despite there being sufficient evidence on record to

convict all the accused persons under Sections 307/149, 323/149, 324/149 I.P.C., the learned trial Court failed to appreciate the same and acquitted all the accused persons for the aforesaid offence, which was also not legally sustainable. On the basis of the aforesaid grounds it has been submitted that alike the convicted appellants, co-accused persons Narbadeshwar, Duryodhan, Raghunath alias Bhorai and Balgovind also ought to be convicted for the offences charged with.

87. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Supreme Court that if two views of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the trial Court. In the matter of **State of Karnataka vs. K. Gopalkrishna, reported in (2005) 9 SCC 291**, the Supreme Court, while dealing with an appeal against acquittal, observed as under:

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

88. In **Sudershan Kumar v. State of Himachal**, reported in (2014) 15 SCC 666 the Supreme Court observed thus:-

"31. It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled *Dhanapal v. State* which is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under: -

"37. In *Chandrappa v. State of Karnataka*, this Court held: (SCC p. 432 para 42),

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

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

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere

with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

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

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

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para hereunder:

"39. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re- appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court

is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

89. In **Dilawar Singh v. State of Haryana, (2015) 1 SCC 737**, the Supreme Court reiterated the same in paragraphs 36 and 37 as under :

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record.

36. In *Chandrappa v. State of Karnataka*, the scope of power of appellate court dealing with an appeal against acquittal has been considered and this Court held as under: (SCC p.432 para 42)

"42....(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of

law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

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

Unless there are substantial and compelling reasons, the order of acquittal is not required to be reversed in appeal. It has been so stated in State of Rajasthan v. Shera Ram."

90. In the aforesaid legal scenario, if we examine the evidence on record and the view taken by the learned trial Court, we find that in the autopsy report as many as 13 injuries are shown to be inflicted on the body of the deceased out of which injury nos.1 to 9 are incised wounds, injury nos. 10 and 11 are punctured wound and injury nos. 12 and 13 abrasions. The witnesses of fact have narrated that for causing the injuries to the deceased, lathi, spear and spade were used by the accused persons. There is specific evidence on record that accused Narbadeshwar, Duryodhan and Raghunath alias Bhorai were attacking with lathies, which they were having and other accused persons were attacking with spade and spear. Dr. K.M. Singh, P.W.3, who performed autopsy of the deceased, has stated in his evidence that the cause of death was excessive haemorrhage and shock caused by the anti mortem injuries. He has specifically stated that injury no. 1 to 9 are possible to be inflicted with the aid of spade, injury no. 10 and 11 by spear and injury no.12 and 13 may be caused by rubbing and if any person falls upon husk etc. then in that event also injury no.12 and 13 may be caused. It is significant that the medical evidence nowhere suggests that

any of the injuries to the deceased may be caused by blow of lathi. P.W.3 even in his examination-in-chief does not state that injury no. 12 and 13 may be caused by lathi blow and on being cross-examined he has stated that if a person is rubbed by any blunt object such as ground or stone, injury no.12 and 13 may possibly be caused. If a person falls on husk, which has some hook, even then injury no. 12 and 13 may be caused and if the husk is only lying on ground, it may be create abrasion. Hence, the medical evidence completely ruled out the use of lathi in the occurrence and a definite conclusion comes out on the basis of appreciation of the medical evidence that the deceased did not sustain injuries by blow of lathi.

91. So far as the injured Vishram is concerned, the learned trial Court has emphasised over the point that charges under Sections 307/149, 323/149, 324/149 I.P.C. were framed in respect of injuries but surprisingly there is no medical report of the injured on record. In the impugned judgement, the statement of P.W. 10 and P.W.13 has been analysed in this regard and the learned trial Court reached the conclusion that from the prosecution evidence it is not satisfactorily established as to by use of which weapon injured Ram Nath @ Vijai has received the injuries. The learned trial Court also found that Ram Nath @ Vijai was injured in the incident but it is not satisfactorily proved as to what were the injuries, as the original register is not traceable and the compounder, who actually prepared the copy of injury report Ex.Ka-8 on 24.10.1978 has not been examined. P.W. 10, the subsequent Medical officer at Khajui, states that according to original injury register, injured Ram Nath alias Vijai was medically examined by Dr. C.B Prasad but significantly P.W.13 Dr.

C.B. Prasad does not depose that he had examined the injured Ram Nath @ Vijai. P.W. 14 Dinesh Prasad, the I.O. has not made any copy of the injury report in his case diary and even the weapons by use of which the injuries were caused were not noted by the I.O. in the case diary. The nature of injuries has also not been ascertained though Ex.Ka-7 shows entry of the injuries by the word "khoon alooda" but papers relating to District Hospital Gorakhpur wherein the injured is said to be admitted have also not been produced. Also, no X-ray or supplementary report of the aforesaid injured is available on record.

92. So far as the acquittal of the accused Balgovind is concerned, the learned trial Court has proceeded to examine the circumstances of the case and also the aspect of animosity between the parties, particularly, in respect of accused Balgovind. On the basis of the evidence on record, the learned trial Court has given a categorical finding that if there was some animosity, it was not in between the deceased and the accused Balgovind, rather the deceased had some chakbandi litigation with other accused persons except accused Balgovind and Raghunath, who were real brothers. P.W.1 Shambhoo Saran Misra deposed in para 29 in his statement that his enmity with Ram Ratan and others was prior to 1962 and that he had no enmity with Balgovind and Rahunath at that time. P.W.1 has also stated that accused Balgovind belonged to the group of Ram Ratan and there is no other connection between them. He also deposed that his enmity with Balgovind and Raghunath started in 1967-68 and revision has been decided 3 or 4 months before 29.10.1980. Since it is said that the chakbandi case was closed on 10.04.1978 for evidence, according to Ex.Ka-52, the learned trial

Court held that accused Balgovind had nothing to do with the case of Ex.Ka-52.

93. On the basis of the aforesaid analysis, the trial Court found that a reasonable doubt regarding the participation of accused Balgovind in the occurrence is also created and that is why he was given benefit of doubt.

94. We have given our thoughtful consideration to the observation of the learned trial Court in respect of acquittal of the accused Balgovind. The ocular version of the prosecution case is explicit on the point that at the time of the incident accused Balgovind was having spear, which he used in the occurrence and the same role has been assigned to co-accused Vishram also.

95. In the earlier part of the judgement, we have analysed the autopsy report of the deceased wherein incised wounds along with punctured wounds and abrasions have been found on the body of the deceased and the doctor, who has performed the autopsy and has been examined as P.W.3 has opined that the injuries to the deceased were probably caused by use of spade and spear hence, the weapon carrying by the accused Balgovind was used in the commission of the crime and at this juncture ocular version is fully supported by the medical evidence. Learned trial Court has referred the statement of P.W.1 Shambu Saran Mishra and found that there was no enmity between the informant's side and accused Balgovind but however, it has been held that the enmity or motive has no significance in a criminal case based upon the ocular version and we have no hesitation to say that in the present case the ocular version speaking against the accused

Balgovind and confirming his participation in the crime has been fully corroborated by the medical evidence and at this juncture we do not find ourselves in agreement with the observations made by the learned trial Court and reasons assigned in the impugned judgement in respect of acquittal of accused Balgovind and in our considered view accused Balgovind is also equally liable for the crime in similar fasion as the appellants of the case are.

96. At this stage, we also take into account the statement of P.W.6 for whom it is said that he had heard the accused persons making a conspiracy for murder of the deceased. He has deposed that when he heard accused Ram Ratan, Vishram and Balgovind conspiring about murder of the deceased, no other person was present there. He has further stated that the accused persons were not talking loudly and he was present near the pulliya to ease himself in the evening of 25.3.1978. He further deposed that he had told this to Triambak Mishra after two days since it was a conspiracy for murder the deceased Triambak Mishra. It was not a natural and probable conduct of P.W.6 who remained silent for two days. He also states that except the deceased he did not tell this to any one within two days and even after the murder of the deceased he did not tell this fact to any one, which is highly un-natural. The learned trial Court has scrutinized the evidence of P.W.6 and he has found that Ex.Kha-7 shows that witness Kripa Shankar stood as witness in chakbanki Court from the side of the deceased on 18.12.1969. The learned trial Court finding that this witness is interested witness discarded his evidence and in the facts and circumstances, we are also of the same view that P.W.6 is not reliable witness.

97. The aforesaid observations and findings of the learned trial Court take as to the question of reliability of witnesses of fact and also to consider this aspect that whether to pass a test of reliability and credibility, it is necessary for a witnesses to depose in toto in favour of the prosecution or some inconsistencies, exaggeration, embellishment and dependencies may also occur in his deposition without adversely affecting the trustworthiness of such witness.

98. Learned A.G.A. has submitted that this is a general law that the ocular evidence may be given priority over the medical evidence and if the witnesses of fact are reliable their evidence should not be rejected. We though finding ourselves in agreement with the submissions made by the learned State counsel also take it as a duty of the Court to find out as to which part of the statement of witness is correct and which is not. We can safely rely upon the Apex Court judgement in **Gangadhar Behera And Others v. State of Orissa, (2002) 8 SCC 381** wherein it has been held as under:

"Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno, falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be

called "a mandatory rule of evidence". (See Nisar Ali v. State of U.P. [AIR 1957 SC 366 : 1957 Cri LJ 550]) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See Gurcharan Singh v. State of Punjab [AIR 1956 SC 460 : 1956 Cri LJ 827]). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. [(1972) 3 SCC 751 : 1972 SCC (Cri) 819] and Ugar Ahir v. State of Bihar [AIR 1965 SC 277 : (1965) 1 Cri LJ 256] .) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of

separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of M.P. [(1952) 2 SCC 560 : AIR 1954 SC 15 : 1954 Cri LJ 230] and Balaka Singh v. State of Punjab [(1975) 4 SCC 511 : 1975 SCC (Cri) 601 : AIR 1975 SC 1962] .) "

99. In view of that, we reach the conclusion that the deposition of the eye-witnesses so far as it relates to the non-participation of the acquitted accused persons in the crime is found correct except accused Balgovind but in view of the non-application of the maxim, "*falsus in uno, falsus in omnibus*" in India, we also cannot hold that the witnesses are not reliable or credible. The learned trial Court's view with regard to the acquittal of four accused persons for murder of the deceased, except accused Balgovind and also for the acquittal of all the accused persons in respect of the offence in respect of causing injuries to the witness Ram Nath @ Vijai, is in accordance with the evidence available on record, which we upheld.

100. Considering the above legal position and the factual aspects of the case, we are of the view that the learned trial Judge was fully justified in acquitting the accused-respondents/ opposite parties except accused Balgovind for the offence under section 148, 302/149 I.P.C.

101. Resultantly, Criminal Appeal No. 234 of 1981 of surviving appellant nos. 3. Arjun and 5. Dayaram, is **dismissed**. Appellants nos. 1. Ram Ratan, 2. Ghanshaym and 3. Vishram died during the pendency of appeal and appeal qua them abated. At the same time Government Appeal No. 748 of 1981 and Criminal Revision No. 261 of 1981 also deserve to be **partly allowed** in the light of the observations made

above in respect of accused Balgovind and Raghunath alias Bhorai. Accordingly, the order of acquittal of accused Raghunath alias Bhorai for all the offences charged against him is hereby confirmed and the order of acquittal of accused Balgovind for the offences under section 148, 302/149 I.P.C in Session Trial No. 309 of 1978 is hereby reversed and he is held guilty for the offences above mentioned and is sentenced to undergo imprisonment for a period of two years under section 148 I.P.C. and imprisonment for life under section 302,149 I.P.C. Accused Balgovind be taken into custody forthwith for serving the sentence.

102. The conviction and sentences under Section 148, 302/149 I.P.C. in Criminal Appeal No. 234 of 1981 (Sessions Trial No. 309/1978) of surviving appellant nos. 3. Arjun and 5. Dayaram, is hereby confirmed and Government Appeal No. 748 of 1981/ Criminal Revision No.261 of 1981 in respect of accused Balgovind are **partly allowed** as mentioned herein above.

103. Record and proceedings be sent back to the Court below forthwith for necessary compliance

(2023) 5 ILRA 485
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.04.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 620 of 1986

Ravindra Kumar & Ors.

...Appellants (In Jail)

Versus

State of U.P.

...Respondent

Counsel for the Appellants:

Sri G.S. Hajela, Sri A.N. Mishra, Sri Anshul Tiwari, Sri N.L. Tripathi, Sri Rajeev Nayan Singh, Sri V.P. Srivastava (Sr. Advocate)

Counsel for the Respondent:

A.G.A., Sri Abhishek Kumar Srivastava, Sri Pradeep Kumar Srivastava, Sri Zaheer Asgar, Sri SFA Naqvi (Sr. Advocate)

A. Criminal Law - Criminal Procedure Code, 1860 - Section 374(2) - Indian Penal Code, 1860-Sections 302/201 of IPC r/w Section 3/4 of the Dowry Prohibition Act-Challenge to-Conviction-the case is based on circumstantial evidence- the chain to prove that the crime was committed by the accused was not complete- the F.I.R. version was very different from the version which was taken by the P.W. 1 and the P.W.- 2 i.e. the first informant and his son-The P.W.-1 only to bring in a definite witness who had seen the deceased going with the accused had introduced, the P.W. - 2 i.e. his own son who had, as per the first informant, seen the accused taking the deceased with him- the prosecution has not been able to show with any certainty as to whether witness had accompanied the deceased- Firstly, his name was not found in the First Information Report and secondly the witness himself, when he came to the witness box gives contradictory statements. -the recovery was a sham recovery- the motive to commit the crime has not been clearly established- the prosecution had come with a case that there were certain demands of dowry since the burden is on the prosecution to prove to the hilt that the accused were guilty and since they have not been able to prove the accused guilty to the hilt, we find that the prosecution case has no substance and the Appeal deserves to be allowed.(Para 1 to 28)

B. According to Sharad Brij Chand Sharda Case, The following five essential ingredients to complete the chain to hold the accused guilty were not there:

- 1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.**
- 2. The fact so established should be consistent only with the hypothesis of the guilt of the accused.**
- 3. The circumstances should be of conclusive nature and tendency.**
- 4. They should exclude every possible hypothesis except one to be proved.**
- 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (Para19)**

The appeal is allowed. (E-6)

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Mah. (1984) AIR SC 1622
2. Ramanand @ Nandlal Bharti Vs St. of U.P. (2022) AIR SC 5273
3. Subramanya Vs St. of Karn. (2022) AIR SC 5110
4. Rishi Kesh Singh & ors.. Vs The St. (1970) AIR All 51(FB)

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Upon the lodging of a First Information Report dated 17.10.1984, investigation had followed and thereafter the police had submitted its charge sheet and had implicated the appellants, namely, Ravindra Kumar, Mahendra Kumar, Naresh Kumar and their father Hukum Chandra Jain Shashtri. The Court thereafter framed charges against the appellants and charged them under Sections 302/201 of IPC read with Section 3/4 of the Dowry Prohibition Act. Trial was undergone whereby 18 prosecution witnesses were

examined and cross-examined and from the side of the defence two defence witnesses were also produced.

2. The accused were given an opportunity to give their statements under Section 313 Cr.P.C. wherein they denied the commission of any crime. However after the trial when the appellants were convicted under Section 302 read with Section 201 of the IPC, the instant Criminal Appeal was filed by them.

3. During the pendency of the Appeal Hukum Chandra Jain Shashtri had died on 6.4.2009 and, therefore, this Court vide order dated 13.3.2023 had abated the appeal vis-a-vis the appellant no. 4, Hukum Chandra Jain Shashtri.

4. The case of the prosecution in the First Information Report was that the daughter of the first informant Surekha Jain, aged about 20 years, post marriage on 9.5.1984 with the appellant - Ravindra Kumar son of Hukum Chandra Jain Shashtri, had after some efforts on 10.10.1984 come to her Maika. From her Maika, she was taken on 15.10.1984 by her husband for a cinema show and she, after informing her friends and the family members, had gone to the cinema show. The F.I.R. version is that on 16.10.1984, Mahendra Kumar, the Jeth of the deceased along with the husband of the deceased had come to the house of the first informant (the maika of the deceased) and had alleged that the first informant had hidden the deceased in his house and it has been averred in the First Information Report that they also searched the house of the first informant. However, only on 17.10.1984, the dead body of the deceased was found in the well near the Jal Nigam. Since the first informant had apprehended that his

daughter had been killed by her in-laws because of the lack of dowry, he lodged the First Information Report. When the First Information Report was lodged and after the punchnama was prepared the body was sent for post mortem. The first informant Chakreshwar Kumar Jain had alleged that the in-laws of the deceased were moneyed people and, therefore, the post-mortem was got done by a team of Doctors. Thereafter, the accused were arrested on 21.10.1984 and on the pointing of the accused-Ravindra Kumar, the cane(danda) by which it was alleged that the accused Ravindra Kumar had inflicted injuries on the private parts of the deceased and, thereafter, had caused her death was found. Also certain broken bangles were also recovered. It has been alleged that the recovery was done in the presence of two independence witnesses Sri Gopi Krishan Tiwari son of Sri Krishna Ji Tiwari and Sri Chandra Bhan son of Sri Chela Ram.

5. The post-mortem of the body of the deceased was conducted on 18.10.1984 and the cause of death was found to be asphyxia as a result of throttling. The post-mortem had indicated of the ante-mortem injuries. After the charges were framed, the following prosecution witnesses were examined and cross-examined. They were as follows:-

- P.W. -1. Chakreshwar Kumar,
- P.W. -2. Rupesh Kumar Jain,
- P.W. -3. Shyama,
- P.W. - 4. Smt. Anjana,
- P.W. - 5 Janki Prasad,
- P.W.- 6 Smt. Kamla,
- P.W. -7. Dr. V.P. Shukla,
- P.W. - 8. Chhote Lal,
- P.W. - 9. Chandra Bhan,
- P.W. -10. Kanchhedi Lal,
- P.W. -11. Gopi Krishan Tiwari,

P.W. - 12 Pyare,
 P.W. - 13. Jagdish Narain
 Vaidya,
 P.W. -14. Ashok Kumar Singhai,
 P.W. -15. Uttam Chandra Rakesh,
 P.W. -16. Durga Prasad,
 P.W. -17. Har Prasad and;
 P.W. -18. Shiv Mangal Singh.

6. P.W.-1 is the father of the deceased and also the first informant. He has alleged in the examination-in-chief that the marriage of his daughter had taken place with Ravindra Kumar on 9.5.1984. In the marriage he had given around Rs. 40,000/- as dowry which was earlier fixed between the parties. From Rs.40,000/- he had alleged that he had given gold of Rs.5,000/- and Rs. 25,000/- cash and the remaining amount was spent on other expenses and that despite the fact that he had spent such a lot of money, the groom's side was not satisfied and they were asking for more money all the time. In the month of May itself after 15 days of marriage, the son of the first informant Rupesh had gone to fetch Surekha but the in-laws had refused to send Surekha to her Maika and had insisted that till such time Rs. 2,000/-, a dressing table with mirror and Godrej Almirah was not given they would not send Surekha to her Maika and, therefore, it has been mentioned that Rupesh came back empty handed. He had also stated that for the happiness of her child, he had given ultimately Rs. 2,000/- and a steel Almirah and, thereafter, he had gone to the house of the in-laws. The daughter thereafter had come to her maika but only after a very short stay Naresh Kumar, the dewar of Surekha, again came back to her in-laws' place. He has stated that when he had refused to sent Surekha it had angered the dewar and he had threatened him with dire consequences. Again it has been stated that

when the month of Sawan came, the first informant had gone again to the house and had requested that they may send Surekha for the Raksha Bandhan but they had outrightly asked if the first informant had brought the money and the dressing table. When the first informant told that he could not arrange the amount demanded and the dressing table which was being asked for, the in-laws had said that they would not send Surekha with the first informant and, therefore, the first informant went back home. He, however, again stated that on Raksha Bandhan he had sent his son Rupesh to bring Surekha with an assurance that the demand of the in-laws would be met and on the assurance Surekha was sent to her Maika. After coming on Raksha Bandhan, Surekha had stayed only for three days when her Dewar again came to take her back and also insisted for Rs. 1,500/- and the dressing table. On the request of the Dewar, the first informant had sent Surekha to her in-laws' house. On 8.10.1984, Hukum Chandra Jain Shashtri again came and told the grand father of Surekha that they could take their daughter home. This news was conveyed by the grand father to the first informant. He showed concern as to what was it that had brought the change in the attitude of the in-laws.

7. Upon the insistence of in-laws that the first informant may take Surekha home on 10.10.1984, the first informant had brought Surekha home. It has been narrated in the examination-in-chief by the first informant that after coming home Surekha cried a lot and said that because of her bad fate she was suffering. She also informed that she was being tortured in her in-laws house. She was being beaten and also abused. All this she came and told her mother and aunt and also her bua Smt. Anjana. To Smt. Anjana she also told that

she was being called "kalooti". By this she meant that they were not liking the colour of her skin. Upon coming to her Maika, she also told the women of the house that her husband had taken a promise from her that she would go for a cinema show on 15th October. He has also stated in his examination-in-chief that when he came to know that the husband of his daughter was taking her for cinema show then he said that if the husband was actually coming to fetch her then she could go. He further stated that around quarter to seven on 15.10.1984, Ravindra Kumar came and remained standing outside and took Surekha with him and along with them Rupesh his son had also gone. However, Rupesh was sent back saying that the couple intended to see the night show. However, when Surekha and her husband did not come on 16.10.1984 at around 3:00pm, the first informant sent Rupesh to her in-laws house to get Surekha back. There upon at 4:00pm Mahendra Kumar, the Jeth, and Ravindra Kumar the husband came to the house of the first informant and said that Ravindra Kumar had sent Surekha in the night. Being surprised the first informant asked Ravindra Kumar whether he had dropped Surekha to her Maika. To which, Ravindra Kumar said that he had, in fact, left Surekha at her Maika. Thereupon the first informant informed Ravindra Kumar that Surekha had never reached her Maika. Thereupon it has been stated by the first informant that Ravindra Kumar and his brothers were very angry with regard to the fact that Surekha was not to be found. Thereupon the first informant said that since Surekha was their daughter-in-law and she was also the daughter of the first informant it would be in the fitness of things that everybody searched for her together. To this, the in-laws said that she was not their daughter-in-law and the first

informant may do whatever he wished. Consequently, it has been informed by the first informant that he went out to search for her. On 17.10.1984, the dead body of the deceased was found in the well. The first informant thereafter proved the first information report and also proved the documents by which he had insisted that the postmortem be done by a panel of doctors.

8. In the cross-examination, he stood firm on what he had stated in the examination-in-chief. Since he had not stated in the First Information Report the fact that Rupesh had also gone on 15.10.1984 to see the movie, he expressed a concern as to why his statement under Section 161 Cr.P.C. wherein he had stated that Rupesh had also gone with the couple was not recorded by the investigating officer. He insisted that on 16.10.1984 at around 4:00pm Mahendra Kumar, Ravindra Kumar had come searching for Surekha.

9. The P.W. -2 Rupesh who was 14 years of age at the time of giving his statement on 28.8.1985 on oath stated that on demand being made for cash, dressing table and Almirah the wife's side had given the cash, dressing table and almirah. He has also stated that he had accompanied his sisters and Ravindra Kumar for the film but he was made to go back from the Ghantaghar as the couple had insisted that they would see the night show and he also stated that her sister had not returned in the night. He has given a vivid description of what his sister was wearing namely bangles, nose pin, payal bichchiya and sari and blouse of baigani colour. He also stated that on the next date when the sister had not returned he had gone to the house of in-laws of her sister then he was informed that his sister had, in fact, gone with Ravindra

Kumar and the door was closed on his face. He has also stated that on 16.10.1984 in the morning at around 9:30 am Naresh and Mahendra had come to the house of the first informant and had searched the house. They were trying to search out Surekha. He has also very categorically stated that when Surekha had gone with her husband then the father of Surekha the First Informant, was not at his residence.

10. The P.W. -3 Shyama who was the neighbour of the deceased lived in the neighbourhood of the Maika. She has been produced to show that she had also seen the deceased going with Ravindra Kumar for the movie. It has been stated by her that she had specifically asked Surekha that with whom she was going to see the movie then Surekha had said that she was going with her husband and her younger brother.

11. The P.W.-4, Smt. Anjana who was the cousin bua of the deceased was also produced to give the evidence that she had also seen the couple going to see the movie. She had also wondered why in her statements under Section 161 Cr.P.C. it was not mentioned that the younger brother of the deceased had accompanied the couple.

12. The P.W.-5 is the grand father of the deceased. He had also tried to establish the fact that because the accused wanted dowry they had killed Surekha.

13. The P.W.-6 is one Kamla who is the cousin grand mother of the deceased and she has also stated that she had seen the deceased going with her husband to see the movie.

14. The P.W. -7 is the Doctor who had conducted the post mortem and has proved the post mortem.

15. The P.W. -8 Chhotelal who was witness in whose possession the recovery of torch was done but he had turned hostile.

16. The P.W.-9 Chandrabhan who had accompanied Ravindra Kumar during the recovery of Danda and the bangles, in the Court gave his statement and tried to prove the recovery. However, when he was asked if he recognized Ravindra Kumar then he placed his hand on Naresh to say that he was Ravindra Kumar.

17. The P.W. -10 is the shop keeper who had been produced to prove that the articles which were given in the dowry were bought from his shop.

18. The P.W. 11, Gopi Krishna Tiwari who was the witness of recovery has been declared hostile. Similarly, the P.W. 12 who had stated that he had seen something being dropped in the well has been declared hostile. Similarly P.W.-13 who was the Editor of the Journal (Weekly) has been declared hostile. The P.W.-14 Ashok Kumar Singhai, the maternal uncle of Surekha, was also declared hostile. The P.W-15 is the witness of the punchnama and the P.W. -16, the P.W. - 17 and P.W. - 18 are formal witnesses.

19. Learned counsel for the appellant has made the following arguments:

I. He submits that if the first information report is perused then it becomes clear that there was no mention at all of the fact that the deceased was accompanied by her brother Rupesh Kumar yet the P.W. - 1 and the P.W. - 2 in their examination-in-chief during the trial have tried to carve out a case that Rupesh Kumar had accompanied the deceased. In fact, learned counsel for the appellants has

argued that Rupesh Kumar had never accompanied the deceased and only to make him witness who had seen the deceased for the last time going with accused a fresh case was being carved out. In this regard learned counsel for the appellants also had submitted that the P.W. 3, 4 and 6, namely, Shyama, Smt. Anjan & Kamla respectively were also sought to be made the witnesses who had seen the appellant Ravindra Kumar going with the deceased for seeing the movie. It has been argued that they have been made to give their evidence in a most unnatural manner. So far as the P.W.-3 is concerned, it has been stated that she was a neighbour, namely, Shyama and she had stated that she had put a question to the effect that who exactly was going with Surekha. If she was a neighbour and she was knowing the deceased then she should have at least known that the younger brother Rupesh was going with her. For a moment, it can be taken that she was not recognizing the husband Ravindra Kumar but she definitely should have recognized the brother and, therefore, for her to ask as to with whom Surekha was going to the movie was a very unnatural question. Further the P.W. - 4 and 6 who were also produced as witnesses who had seen the deceased going with the accused Ravindra Kumar for the last time, if their evidence is perused, it seems strange that they were remembering very strange things like the colour of the sari & blouse and whether she was bearing bichhua, bangles and payal and, therefore, learned counsel submits that they were all brought up witnesses and they had actually not seen the deceased going with the accused Ravindra Kumar.

II. It has been submitted that the whole crime had no eye-witness and, therefore, the case was based on circumstantial evidence. Learned counsel

for the appellant relied upon **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in **AIR 1984 SC 1622**, and submitted that the following had to be there to see whether the chain of evidence was complete to hold the accused guilty. The following five essential ingredients to complete the chain to hold the accused guilty were not there:

"1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.

2. The fact so established should be consistent only with the hypothesis of the guilt of the accused.

3. The circumstances should be of conclusive nature and tendency.

4. They should exclude every possible hypothesis except one to be proved.

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

III. Learned counsel for the appellants further submits that if the statements of the P.W. - 3, 4 and 6 are perused then it becomes clear that the evidence which they were coming up with was too good an evidence to be believed. They were remembering every small details of the deceased and this makes the evidence doubtful.

IV. Learned counsel for the appellants submits that the evidence as was brought forth on record had various contradictions. The P.W.-1 says that the accused when had gone with his daughter Surekha he was there in the house but the P.W.-2 the brother whom the P.W.-1 had said had accompanied the couple says that the father (P.W.-1) was not present at the

time when the accused and his sister (the deceased) were going to see the movie. Further it has been stated that the P.W. -1 gives a different time on the 16th of October 1984 when in-laws had come to search for the deceased. He says that they had come in the evening to search for the deceased in the Maika. However, P.W.-2 states that the in-laws had come in the morning of 16.10.1984 to search for the deceased.

V. Learned counsel for the appellants further submits that the recovery as has been sought to be made under Section 27 of the Evidence Act was no recovery in the eyes of law as per the law laid down in **Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh** reported in AIR 2022 SC 5273 and in **Subramanya vs. State of Karnataka** reported in AIR 2022 SC 5110.

Learned counsel for the appellants submits that there are two parts to recovery under Section 27 of the Evidence Act. The first is that when the police takes the accused in his custody then he has to record a statement in the presence of two independence witnesses as to what recovery was intended. Thereafter, when the police along with the accused and the two independent witnesses reaches the spot where the author of the concealed articles takes the Police party and the Police party discovers the concealed articles then a recovery memo has to be again prepared. In the present case, learned counsel for the appellants states that the first step was missing. There was no statement recorded of the accused in the presence of 2 independent witnesses as to what was the recovery he was intending to get made.

Further, learned counsel for the appellants states that if the statement of the independent witness Chandrabhan is perused then it becomes clear that in the

Court he had not even been able to recognize Ravindra Kumar and, in fact, placed his hand on Naresh Kumar. He, therefore, states that the recovery was a bogus recovery. He further states that in the Panchanama the dead body was found to be having the bangles in the hands of the deceased and, therefore, he submits that the broken bangles which were sought to be recovered were in fact planted. He has also submitted that the Danda was also planted only to match it with the ante-mortem injuries on the private parts of the deceased.

VI. Learned counsel for the appellants further submits that the demand of dowry was also not established and, therefore, there was no motive. In fact, he submits that vide exhibit ka(4), the prosecution had apprehended that the accused side was very rich and, therefore, they had moved an application for getting the post mortem conducted by a panel of doctors. He has also submitted that when the prosecution had come up with a case that the appellants were demanding Rs. 2,000/- a dressing table and an almirah and had thereafter found that this demand might appear to be very insufficient for, the accused persons who were very rich, they had come up with another case that the accused were not liking the colour of the skin of the deceased and, therefore, they had come up of with the case that the in laws were calling her "Kalooti".

20. Learned A.G.A. Sri J.K. Upadhyay for the State, however, has submitted that since the accused had gone with the deceased to see the movie, the burden, in fact, to prove that the accused were innocent had shifted on them in view of Section 106 of the Evidence Act.

21. Learned AGA further submits that post-mortem was conducted only after

three days and, therefore, the ante-mortem injuries as were found in the post mortem spoke volumes. Still further learned AGA submitted that upon coming to know about the fact that the deceased was not to be found on 16.10.1984 conduct of the appellants made it apparently clear that they were the perpetrators of the crime.

22. Having heard Shri V.P. Srivastava, learned Senior Counsel assisted by Sri N.L. Tripathi and Sri Rajeew Nayan Singh, learned counsel for the appellants and Sri J.K. Upadhyay, learned AGA for the State, we are of the view that the appellants were innocent and the Appeal deserves to be allowed. In the first case, the case is based on circumstantial evidence. Definitely the chain to prove that the crime was committed by the accused was not complete. In the first instance, we find that the F.I.R. version was very different from the version which was taken by the P.W. 1 and the P.W.- 2 i.e. the first informant and his son. The P.W.-1 only to bring in a definite witness who had seen the deceased going with the accused Ravindra Kumar had introduced, the P.W. - 2 i.e. his own son Rupesh Kumar who had, as per the first informant, seen the accused taking the deceased with him. The Court finds that the prosecution has not been able to show with any certainty as to whether Rupesh had accompanied the deceased. In the first place, his name was not found in the First Information Report and secondly the witness Rupesh himself, when he came to the witness box gives contradictory statements. He has, in fact, stated that the father of the deceased at the time when the deceased had gone with Ravindra Kumar was not at home. All these factors create a doubt in the mind of the Court.

23. Secondly, we find that since the recovery had not been done as per the law laid down in **Ramanand @ Nandlal**

Bharti vs. State of Uttar Pradesh reported in **AIR 2022 SC 5273** and in **Subramanya vs. State of Karnataka** reported in **AIR 2022 SC 5110**, the recovery was a sham recovery. Also we find that the motive to commit the crime has not been clearly established. To begin with, the prosecution had come with a case that there were certain demands of dowry. However, even the demands as have been brought forth by the father were found to be very different from the demands which were brought forth by the son. At one place they say that in addition to the money, dressing table was demanded and another place they say that in addition to the money an almirah was demanded. The father and son duo upon coming to realise that the accused side were rich had tried to give colour to the case by saying that the deceased had also mentioned that the colour of the skin of the deceased was not liked by the in-laws.

24. As per the law laid down in **Rishi Kesh Singh & Ors. vs. The State** reported in **AIR 1970 Allahabad 51(FB)**, since the burden is on the prosecution to prove to the hilt that the accused were guilty and since they have not been able to prove the accused guilty to the hilt, we find that the prosecution case has no substance and the Appeal deserves to be allowed.

25. The first information report, we are definitely aware, is not an encyclopedia of facts. However, the fact that the first informant missed to inform in the first information report that the son of the first informant had accompanied the deceased and her husband is a vital omission. Howsoever much in the statements of the various prosecution witnesses the presence of P.W.-2 Rupesh Kumar Jain has been brought in, the prosecution witnesses have

miserably failed to prove that the P.W.-2 Rupesh Kumar Jain had accompanied the deceased and her husband when they had gone to see the cinema. Furthermore, if the various contradictions and the statements of the other prosecution witnesses are examined then the only inevitable conclusion is that the prosecution was trying to bring in P.W.-2, Rupesh Kumar Jain as a witness who had seen the deceased and her husband going together for the last time.

26. The prosecution must prove its case beyond all reasonable doubt as has been held by a Full Bench judgement of this Court in **Rishi Kesh Singh & Ors. vs. The State** reported in **AIR 1970 Allahabad 51(FB)**. The operative portion of the judgement is reproduced here as under:-

"177. In accordance with the majority opinion, our answer to the question referred to this Full Bench is as follows: -

The majority decision in 1941 All LJ 619 = AIR 1941 All 402 (FB) is still good law. The accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused."

27. The prosecution definitely failed to prove the case which was taken by it beyond all reasonable doubt.

28. Under such circumstances, the appeal is allowed. The judgement and order dated 22.2.1986 passed by Additional Sessions Judge, Lalitpur, in S.T. No. 4 of 1985 is set aside.

(2023) 5 ILRA 494

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 05.04.2023

BEFORE

**THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.**

Criminal Appeal No. 1248 of 1985

Ballu Mal **...Appellant (In Jail)**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:

Sri Viresh Misra, Sri Radheshyam Yadav
(Amicus Curiae)

Counsel for the Respondent:

A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Essential Commodities Act, 1955 - Sections-3/7-Challenge to-Conviction-
Appellant shop was raided, it was found that accused had taken delivery of 30 quintals of rice, instead of distributing the same he disposed of the same otherwise, besides 2 quintals 40 kg Ata Flour mill was found deficient at his shop than that shown in the stock register-He violated Clause 4 and 23 of U.P. Food grains and other Essential Articles Distribution Order, 1977 and of Clause 8 of U.P. Foodgrains Dealers (Licensing and Restriction on Hoarding) Order, 1976 by violating Condition No. 3(1)(b) and (c) of the Licence of Form 'D' issued to him and thus render himself liable under section 3/7 of the Essential Commodities Act-In the instant case, alleged incident took place about 40 years ago and appellant is not a previous convict-accused has remained in custody-appellant alone cannot be held responsible for long delay in disposal of this appeal-Hence, conviction of appellant is upheld but sentence of three months

awarded by the trial court is set aside and accused-appellant is sentenced to the period already undergone by him along with fine of Rs. 5,000/- (Para 1 to 36)

B. It is well settled principle that sentence must be just but simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside-The principle of just punishment is the bedrock of sentencing in respect of a criminal offence-A punishment should not be disproportionately excessive. (Para 32)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Accused 'X' Vs St. of Mah. (2019) 7 SCC 1
2. St. of M.P. Vs Udham & ors. (2019) 10 SCC 300
3. St. of M.P. Vs Vikram Das (2019) 4 SCC 125
4. Md. Giasuddin Vs St. of A.P. (1977) AIR SC 1926
5. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257
6. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166
7. Jameel Vs St. of U.P. (2010) 12 SCC 532
8. Guru Basavraj Vs St. of Karn. (2012) 8 SCC 734
9. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323
10. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441
11. Raj Bala Vs St. of Har. (2016) 1 SCC 463
12. Gopal Singh Vs St. of U.K. (2013) 7 SCC 55

(Delivered by Hon'ble Mohd. Azhar
Husain Idrisi, J.)

1. Heard Sri Radheyshyam Yadav, Amicus Curiae, appearing for the appellant-accused, learned AGA for the State and perused the record.

2. The instant appeal arises out of impugned judgement and order dated 24.07.1985 passed by learned Special Judge (E.C. Act), Kanpur, in Case No. 09 of 1983 (State vs. Ballumal), under Section 3/7 of Essential Commodities Act, 1955 (hereinafter referred to as 'E.C. Act'), police station Chamanganj, District Kanpur, whereby accused-appellant Ballumal has been convicted under Section 3/7 of E.C. Act and sentenced to three months rigorous imprisonment and fine of Rs. 2000/.

3. The factual matrix, unfolded in prosecution case in brief is, that on 16.01.1983, appellant's shop was raided by Regional Enforcement Squad along with S.M.I., M.A. Siddiqui, Marketing Inspector Ashok Kumar Bajpai, S.K. Pal, Sanad Kumar Srivastava and Ravi Narain Srivastava. At the time of inspection it was found that the said shop the accused had taken delivery of 30 quintals of rice on 11.01.1983 as per the order of Chhatriya Khadya Adhikari Anwaranj for R.F.C. Godown Marey Company Kanpur. Instead of bringing such rice to the shop and distributing the same to the card holders he disposed of the same otherwise as there was no entry of the receipt and disposal of such rice in the registers of the accused. Besides, 2 quintals 40 Kg Ata Flour Mill was found deficient at his shop than that shown in the stock register. In this view of the matter he allegedly violated Clauses 4 and 23 of U.P. Foodgrains and other Essential Articles Distribution Order, 1977 and of Clause 8 of U.P. Foodgrains Dealers (Licensing and Restriction on Hoarding) Order, 1976 by violating Condition No. 3

(1) (b) and (c) of the Licence of Form 'D' issued to him and thus render himself liable under Section 3/7 of the Essential Commodities Act.

4. On same day a criminal case was registered against accused-appellant on the basis of the complaint of the complainant Krishna Pal, Marketing Inspector. An FIR was registered against the appellant and enteries were made in chik FIR and Kaimi G.D., the carbon copy of the same was also prepared in the same process with original. The investigation was entrusted to S.I. Jagdamba Bukhsh Singh.

5. Investigating Officer, has investigated the matter. Prepared site plan and recorded the statement of the witnesses. He also took and had taken into possession Sale Register (Ext.II and III), Stock Register (Ext. IV) from the possession of the accused appellant. Ext. Ka-11, recovery memo was prepared by him in this behalf and also recorded the statements of the members of the Enforcement Squad. Sanction of prosecution was obtained from District Magistrate Exhibit Ka-14. After due investigation, getting credible and clinching evidence against the accused/ appellant charge sheet Exhibit Ka-13. was submitted in the court concerned.

6. The learned trial judge framed charges under Section 3/7 E.C. Act, which were read over and explained to the appellant. The appellant abjured the charges. He did not plead guilty and claimed to be tried.

7. To substantiate the proseuction has examined the following ocular evidence:-

S.I. No.	Particulars of the	Nos.

	witness	
1	Ashok Kumar Bajpai (marketing inspector)	Pw- 1
2	Damodar Lohani (ARO)	Pw- 2
3	Sukhdeo Prashad (marketing inspector)	Pw- 3
4	S.I. Krishna Pal (marketing inspector)	Pw- 4
5	Maqsood Ali (Public witness)	Pw- 5
6	Mukhtar Ahmad (Constable)	Pw- 6
7	S.I. J.B. Singh (I.O.)	Pw- 7
8	Siya Ram Gupta (handwriting expert)	Pw- 8

8. Apart from the abovestated ocular evidence, prosecution has adduced the following documentary evidence also:-

S.L.	Particulars	Ext. Nos.	Proved By
1	Aata weightment with sample of Aata	Ext.- 1	Pw- 1
2	Sale Registers	Ext. 2 &3	Pw- 2
3	treasury chalan Register	Ext. 4	Pw- 4
4	Relese order for 30q. rice	Ext. 5	Pw- 2
5	Takpatti of weightment	Ext. 6	Pw- 2
6	Relese orders- II	Ext.Ka-5A	Pw- 2
7	Supurdgi	Ext.Ka-7	Pw- 1

	Nama		
8	Recovery Memo	Ext. Ka- 8	Pw- 4
9	Sale Registers- II & III	Ext. 2 & 3	Pw- 5
10	stock Registers- IV	Ext. Ka- 11	Pw- 4
11	Prosecution Sanction	Ext. Ka- 14	Pw- 7
12	Chik FIR	Ext. Ka- 9	Pw- 6
13	Handwriting expert report	Ext. Ka- 16 & 17	Pw- 8
14	Charge-sheet	Ext. Ka- 13	Pw- 7
15	Copy of kaimi G.D.	Ext. Ka- 10	Pw- 7

9. After completion of the prosecution evidence accused/ appellant was examined under Section 313 Cr.P.C. in which the accused/ appellant stated that he is falsely implicated. He denied the prosecution evidence.

10. The appellant adduced following defence witnesses as ocular evidence:-

S.I. No.	Particulars of the witness	Nos.
1	Kushal Das	Dw- 1
2	Abdul Hakim	Dw- 2
3	Rajendra Prashad (handwriting expert)	Dw- 3

11. After hearing and analysing evidence on record, accused/ appellant was convicted by the trial court under Section 3/7 of E.C. Act and sentenced as stated above. Being aggrieved by the impugned judgement and order dated 24.07.1985, accused-appellant has preferred the present appeal.

12. A careful scrutiny of evidence of both the parties show that PW-1 Ashok Kumar Bajpai, Marketing Inspector and P.W. 4 Sri Krishna Pal, Marketing Inspector have deposed in clear and categorical terms that on 16.01.1983 they along with other members of squad had conducted inspection and at the time of inspection on 16.01.1983, the stock of Aata wholesale Mill at the shop of the accused as per the stock register was 14 Quintals 25 Kgs., but on physical verification it was found to be 7 quintals 50 Kgs. On 16.01.1983 he made a sale of 4 quintals 35 Kgs. Ata and as such the Ata was found to be deficient on physical checking to the extent of 2 quintals 40 Kgs. Certain other stocks of sugar and wheat were also there but the mention of the same is not necessary. The accused has taken delivery of 30 quintals of rice on 11.01.1983 from the Government Godown for being sold to be card holders but he did not make any entry regarding it in his stock register. *Takpatti* of the weighment of the Ata whole Mill prepared at the time of inspection is Ext. Ka-1. P.W. 1 Ashok Kumar Bajpai denied that some Ata which had got moisture was kept in the cabin of the accused which the Enforcement Squad did not take into account. Ext. Ka-7 is the *Supurdigi Nama* through which the stock of the shop of the accused had been given in the custody of Mool Chand Hans Raj, which has been proved by P.W. 4 Sri Krishan Pal. Ext. Ka-8 is the Fard of recovery prepared at the spot by P.W.4.

13. P.W. 2 A.R.O. Damodar Lohani, has stated in his statement that the accused has come to his office and had filled a demand memo (Registration Memo) for 30 quintals rice. He has proved the same which is Ext. Ka-3. It contains the signature of the accused and he has also admitted his

signatures on it. This witness has also proved the photocopy of the Treasure Challan of Rs. 6,120/- deposited by the accused for getting such rice, which is Ext. Ka-4. This witness prepared the release order for Marey Company government Godown for releasing 30 qntrs rice to the accused. He has proved the release order Ext. Ka-5. It is also contains the signature of the appellant-accused Ballu Mal which had been attested by this witness.

14. P.W.3 Sukhdeo Prasad has stated in his statement on that date i.e. on 11.01.1983, he was on duty at Marey Company Government Godown, the appellant-accused Bulla Mal had brought to him the release order Ext. Ka-5 for the release of 30 quintals. rice and after obtaining the signature of the appellant-accused on the release order and after comparing the same with his signature attested by the A.R.O. Sri Lohani, he issued 30 quintals rice to the appellant-accused. A *Takpattin* of the weightment of the rie released to the accused had been prepared and the same is Ext. Ka-7.

15. P.W. 5 Maqsood Ali is a public witness who has come to say that his ration card was attached to the shop of the accused but he did not take any ration since 13.01.1983 from the shop of the appellant-accused. He has further stated that the entry dated 13.01.1983 in the sale register (Ext. II) of the appellant/ accused at serial no. 26 neither bears his signature, nor of his son.

16. P.W. 6 Constable Mukhtar Alam is a formal witness who has proved the Chik F.I.R. Ext. Ka-9 written in the police station on the basis of the Fard of recovery filed by Marketing Inspector Sri Krishan Pal on 16.01.2023, which has been marked Ext. Ka-9. This witness has also been

lodged the FIR on 16.01.1983 at 10:45 hours and entry has been made in G.D. No. 32 (Ext. Ka-10).

17. P.W.7 Jagdamba Bukhsh Singh is the Investigating Officer of this case, he had recorded the statements of the members of the Enforcement Squad and had taken in possession Sale Register (Ext.- II and III) and Stock Register (Ext-IV).

18. P.W. 8 Siya Ram Gupta, who is the Hand Writing Expert has got compared the disputed two signatures of the appellant-accused on the front of release order Ext. Ka-5 and Ext. Ka 5A. He has opined that all the disputed signatures of the appellant-accused tally with his specimen signature and that they have been made by one and the same person. He also proved the photos taken in this behalf Ext Ka-16 and his report Ext. Ka-17.

19. The defence of accused-appellant was rightly negated by the trial court. It is clear from evidence that act of accused-appellant has violated provisions of clause 4 of U.P. Foodgrain and other Essential Articles Distribution Order, 1977. Learned trial court has discussed entire evidence and found that act of accused-appellant contravenes provisions of Clause 4 of U.P. Food grains and other Essential Articles Distribution Order, 1977 Act and thus, liable to be convicted under Section 3/7 of E.C. Act. After considering entire evidence on record, it is apparent that conviction of accused-appellant is based on evidence and suffers no factual, illegality.

20. Learned Amicus Curiae for the appellant has not disputed the findings rendered by learned trial court regarding conviction of accused-appellant and confined his arguments only regarding

sentence. However, I have gone through the entire evidence carefully.

21. So far as question of sentence is concerned, it was argued by learned counsel for accused-appellant that alleged incident occurred on 11.01.1983 and since then a period of 40 years has passed. Accused-appellant has no criminal history and that he has faced the sword of proceedings of this case for about 40 years. It was submitted that in view of above stated facts and circumstances, it would not be appropriate to send the accused-appellant in judicial custody at this stage.

22. Learned A.G.A. has opposed and argued that keeping in view that a period of 40 years has passed since the incident, appropriate sentence may be awarded.

23. In historical backdrop, Indian parliament has not laid down any sentencing policy, though **Malimath Committee (2003)** and **Madhava Menon Committee (2008)** has asserted the need of sentencing policy in changing circumstances of the society. So, the Courts are dependant on the precedent laid down by the Supreme Court.

24. Principle of sentencing has been an issue of concern before the Supreme Court in many cases and tried to provide clarity on the issue. Apex Court has time and again cautioned against the cavalier manner considering the way sentencing is dealt with High Courts and Trial Courts.

In Accused 'X' vs. State of Maharashtra (2019) 7 SCC 1 "the Apex Court has held that" It is established that sentencing is a socio-legal process, wherein a Judge finds an appropriate punishment for the accused considering

factual circumstances and equities. In light of the fact that the legislature peroxided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner."

"12. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

13. In **State of Madhya Pradesh vs. Udham and others (2019) 10 SCC 300** the Apex Court has held" we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material support of amenity; (iii) extent of humiliation; and (iv) privacy breach."

25. It is also notable that in **State of Madhya Pradesh vs. Vikram Das (2019) 4 SCC 125**".... where minimum sentence is provided for, the Court cannot impose less than minimum sentence."

26. In **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]**, explaining rehabilitary & reformatory aspects in

sentencing it has been observed by the Supreme Court:

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

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

28. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, the Supreme

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

sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

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

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

30. Accused-appellant Ballu Mal has been convicted under Section 3/7 of E.C. Act. Section 7 of E.C. Act which reads as under:-

[(1) If any person contravenes any order made under Section 3,—

(a) he shall be punishable,—

(i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with

imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three months;

(b) any property in respect of which the order has been contravened shall be forfeited to the Government;

(c) any package, covering or receptacle in which the property is found and any animal, vehicle, vessel or other conveyance used in carrying the property shall, if the court so orders, be forfeited to the Government.

(2) If any person to whom a direction is given under clause (b) of sub-section(4) of section 3 fails to comply with the direction, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three months.

(2A) If any person convicted of an offence under sub-clause (ii) of clause (a) of sub-section (1) or under sub-section (2) is again convicted of an offence under the same provision, he shall be punishable with imprisonment for the second and for every subsequent offence for a term which shall not be less than six months but which may extend to seven years and shall also be liable to fine:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.

(2B) For the purposes of sub-sections (1), (2) and (2A), the fact that an offence under sub-clause (ii) of clause (a) of sub-section (1) or under sub-section (2) has caused no substantial harm to the general public or to any individual shall be an adequate and special reason for awarding a sentence of imprisonment for a term of less than three months or six months, as the case may be.

[(3) Where a person having been convicted of an offence under sub-section (1) is again convicted of an offence under that sub-section for contravention of an order in respect of an essential commodity, the court by which such person is convicted shall, in addition to any penalty which may be imposed on him under that sub-section, by order, direct that that person shall not carry on any business in that essential commodity for such period, not being less than six months, as may be specified by the Court in the Order.]

32. It is well settled principle that sentence must be just but simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the court but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of

his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value based social mainstream may be the guiding factors. Needless to emphasize, these are certain illustrative aspects put forth in a condensed manner.

33. It has also been observed by the Apex Court that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment. In **Gopal Singh v. State of Uttarakhand (2013) 7 SCC 545**, the Apex Court elaborating the sentencing that, while imposing sentence, has to keep in view the various complex matters in mind. In respect of certain offences, sentence can be reduced by giving adequate special reasons but the

special reasons have to rest on real special circumstances.

34. In the instant case, alleged incident took place about 40 years ago and appellant is not a previous convict and that accused-appellant alone cannot be held responsible for long delay in disposal of this appeal. It was stated for some days, accused-appellant has remained in custody. Considering all aspects of the matter, no useful purpose would be served by sending accused-appellant in to judicial custody to suffer imprisonment of three months at this stage, rather it appears that ends of justice would met it the sentence of three months imprisonment awarded by the trial court be set aside and accused-appellant be sentenced to the period already undergone by him along with fine of Rs. 5,000/-.

35. Accordingly, conviction of accused-appellant Ballu Mal is upheld, but sentence of three months awarded by the trial court is set aside and accused-appellant is sentenced to the period already undergone by him along with fine of Rs. 5,000/- Accused-appellant is directed to deposit fine of Rs. 5,000/- within forty five days from today. In default of payment of fine, accused-appellant shall undergo three months imprisonment.

36. Resultantly, the instant appeal is **party allowed** with following directions:-

(i) The judgment of conviction dated 27.04.1985 is confirmed though the sentence awarded of three months Rigorous Imprisonment is modified to the period already undergone by appellant.

(ii) The amount of fine of Rs.2,000/- is increased to Rs.7,000/- which shall be paid by appellant within six weeks from the date of judgment. In default,

thereof, appellant has to undergo an additional simple imprisonment of two months.

(iii) A copy of judgment be sent to Court concerned for necessary information and compliance.

(iv) Trial court's recod be remitted back forthwith.

37. The Court appreciate the assistance rendered by Sri Radheyshyam Yadav, learned Amicus Curiae. The State Government is directed to pay Rs.5000/- as remuneration to Sri Radheyshyam Yadav at the earliest.

(2023) 5 ILRA 503

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 25.04.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Appeal No. 1399 of 2010

Raje @ Rajesh @ Santosh Kumar
...Appellant (In Jail)
Versus

State of U.P. **...Respondent**

Counsel for the Appellant:

Sri Dharmendra Pratap Singh, Sri Sushil Tiwari, Sri Shyam Sunder Mishra

Counsel for the Respondent:

G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Sections 376, 342 & 506 - Challenge to-Conviction-Statement of the victim (PW-1) corresponds with the site plan as shown where the victim allegedly raped at the tubewell of the accused person in which the cot is marked-delay is self-explanatory as the

victim got missing due to fear when her brother searched her and apprised with the incident the FIR was lodged-Although witnesses named in FIR are not produced in evidence due to fear as they were not willing to speak the truth in the court yet from the statement of PW-1 and PW-2, this fact is proved that victim was rescued by two witnesses-Even in cross-examination nothing emerged which could make this fact suspicious that the victim was not rescued by these witnesses-Even where no external or internal marks of injury on the private part of the victim of rape was found in medical examination, the testimony of the prosecutrix that she was raped cannot be discarded-testimony of prosecutrix stands at par with that of an injured witness-an accused can be convicted on the basis of sole testimony of prosecutrix without any further corroboration provided the evidence of the prosecutrix inspires confidence and appears to be natural and truthful-Thus, the judgment of conviction and sentence passed by learned trial court is affirmed. (Para 1 to 26)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Raja Vs St. of Karn. (2016) 10 SCC 506
2. St. of U.P. Vs Chhoteylal (2011) AIR SC 697
3. Moti Lal Vs State of M.P., 2009 (67) ACC 570 (SC), Wahid Khan Vs State of M.P., 2009 (7) Supreme 584, Om Prakash Vs State of State of U.P. 2006 (55) ACC 556 (SC).
4. St. of U.P. Vs Chhotey Lal (2011) AIR SC 697
5. Modan Gopal Kakkad Vs Naval Dubey (1992) 3 SCC 204

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard Sri Shyam Sundar Mishra, learned counsel for the appellant and Sri

Ashish Mani Tripathi, learned A.G.A. assisted by Sri Raj Kumar Mishra, State Law Officer.

2. Instant Crl. Appeal has been preferred by the accused appellant against judgment and order dated 16.1.2010 passed by Additional Sessions Judge, Fatehpur. By the impugned judgment, learned trial court has convicted the accused appellant for charge under Section 376, 342 and 506 IPC in S.T. No. 50 of 2002 (State of U.P. Vs. Chunni Lal Sharma and another) and sentenced him to ten years of rigorous imprisonment for charge under Section 376 IPC and Rs. 5,000/- fine with default stipulation, six months rigorous imprisonment for charge under Section 342 IPC and one year rigorous imprisonment for charge under Section 506 IPC. All the sentences were directed to run concurrently.

3. Co-accused Chunni Lal died during pendency of trial and trial against him abated vide order dated 9.11.2004 by the order of learned trial court.

4. Brief facts of the case relevant for present appeal are that according to prosecution version, informant Keshav Dutt Tiwari R/o Village Fatehpur Tikari, lodged an F.I.R. with P.S. concerned on 2.11.2001 at 6:30 pm, under Section 342, 376, 506 IPC at P.S. Khaga, District Fatehpur, with averment that his minor sister aged about 15 years had gone to ease herself towards agricultural field on 2.11.2001 at around 6:30 hours in the morning. After ease herself when she was returning to home, accused Raje @ Rajesh @ Santosh Kumar Shukla and Chunni Lal Sharma confronted her and took her in the room lying in nearby tubewell in the field and committed bad act with her. On next day i.e.

3.11.2001, his co-villagers Raghunandan and Ashok Kumar heard cries of his sister from the room of tubewell when they had gone to ease themselves and they opened the lock of the door and brought his sister from the room and stated about this incident to him. The accused had locked his sister in the room in the evening and went elsewhere. The investigating officer took the lower garment (salwar) worn by the victim on the date of incident in his possession in presence of local witnesses Rajjan Tiwari and Ram Saran which is marked as Ext. Ka-5. The medico legal examination of the victim was conducted on 4.11.2001 at District women hospital, Fatehpur by doctor Suriya Jabi, which is marked as Ext. Ka-8. Dr. Suriya Jabi stated that no injury was seen on any part of the body of victim on the date of her examination on 4.11.2001. In internal examination, "vagina dilated and admits two finger easily, hymen old torn with healed edges, bleeding from O.S. present (menstrual bleed). No injury is seen on and around private parts. Vaginal smears taken and sent for examination of alive or dead human spermatozoa and referred to District Hospital, Fatehpur, for X-ray wrist, elbow and knee joint for age. In supplementary report Ext. Ka-9 the doctor stated that according to report of radiologist, radiological age of the girl is about 18 years. No opinion about rape can be given. There is no evidence of any living or dead spermatozoa in the vaginal smear slikes. The investigating officer recorded statement of informant and victim under Section 161 Cr.P.C. who stated on 3.11.2001, on the date of lodging of F.I.R, that the victim stated that in the morning of 2.11.2001 she had gone to ease herself towards field lying in the west side of her village and after easing herself when she was returning to her home, accused Raje @

Rajesh @ Santosh Kumar Shukla met her who was hiding in the neighboring Arhar field of Jagdish and threatened her by pointing a country-made pistol towards her that if she cried, he would kill her and dragged her towards field of Jwar and Arhar and took her towards tubewell and locked her in the room of tubewell from inside and dashed her on a cot and thereafter opened sting of her Salwar and committed rape on her by hurling threat of life to her. She lied on cot, thereafter his companion Chunni Lal Sharma appeared in the night and accused Raje @ Rajesh @ Santosh Kumar Shukla called him inside the room who also committed bad act with her against her will and both of them had left her in the room by locking its door. In the morning, she was rescued by Raghvendra and Ashok Kumar, her co-villagers, in the morning when they heard her cries. They opened the door and took her out of the room and took her to her home. Her lower garment (salwar) was got stained with blood which was entrusted to police. The investigating officer got the statement of victim recorded before the magistrate under Section 164 Cr.P.C. in which she supported her version recorded under Section 161 Cr.P.C. The investigating officer after completing the investigation, submitted charge sheet against accused persons Raje @ Rajesh @ Santosh Kumar Shukla and Chunni Lal and for their prosecution, learned C.J.M. took cognizance of the offence on charge sheet filed by the investigating officer and committed the case for trial to the court of session on 18.1.2001.

5. Charge sheet was filed against Rajesh @ Raje @ Santosh Kumar Shukla in his abscondence subsequently accused Rajesh @ Raje @ Santosh Kumar Shukla appeared and he was sent to jail. The

accused Chunni Lal was enlarged on bail by the order of Hon'ble Court and present appellant faced trial as most of the time as under trial prisoner. Charges were framed against accused persons by learned Additional Sessions Judge, Court No. 4, Fatehpur on 20.7.2002 under Section 342, 506 and 376 IPC against accused Rajesh @ Raje @ Santosh Kumar Shukla and Chunni Lal Sharma. During prosecution evidence, learned trial court recorded statements of PW-1 Prosecutrix, PW-2 Keshav Dutt Tiwari (informant), PW-3 S.I. Dinesh Bajpayee, the then Head Mohrrir and author of chick F.I.R. (Ext. Ka-2) and extracts of G.D. No. 22, time 12:10 hours, dated 3.11.2001 (Ext. Ka-3), PW-4 Subeer Kumar, PW- 5, S.S.I. Madhusudan Singh, investigating officer, who proved the inventory of salwar worn by the victim at the time of incident as Ext. Ka-5, site plan of the place of incident as Ext. Ka-6, charge sheet filed against accused persons as Ext. Ka-7. He also produced Salwar of the victim which was taken into possession after the incident by producing before the court as material Ext. 1. and its wrappers as material Exts. 1, 2 and 3. PW-6 Dr. Suriya proved medico examination report of the victim as Ext. Ka-8 and supplementary report as Ext. Ka-9, as the same being prepared and signed by her. PW-7, K.P. Singh, then Senior Radiologist, who proved X-ray report of the victim as Ext. Ka-10 and X-ray plates as material Ext. 4.

6. Statement of accused was recorded under Section 313 Cr.P.C. after conclusion of prosecution evidence in which he has stated that case was filed against him due to enmity, he only admitted the fact that co-accused Chunni Sharma died during pendency of trial. He also stated that victim and informant had given false evidence against him and took the stand that

prosecutrix and co-accused Chunni Lal Sharma were having intimate relationship and victim had eloped with him. She was caught near Khaga as Chunni Lal was *bataidar* of his field. She had implicated him also with Chunni Lal due to fear of social ignominee. No defense has been adduced by the accused.

7. Learned trial court after appreciating the evidence on record and hearing statements of learned counsel for the parties observe that on the basis of evidence of PW-1 and PW-2, victim and informant, this fact is proved perfectly that on the date of incident accused Rajesh and co-accused Chunni Lal dragged the victim (PW-1) to the room of tubewell and committed rape on her. He also considered the statements of defense that independent witnesses Raghunandan and Ashok Kumar, who are said to have rescued the victim from the room in which she was detained by accused persons in the next morning of the date of incident, were produced before the court and observed that learned A.D.G.C. (Criminal) had submitted that these witnesses were not ready to appear before the Court and tell the truth and for that reason they were not produced before the court. Learned court below also observed in view of authoritative pronouncement of Hon'ble Apex Court and High Court, the corroboration of statement of prosecutrix by independent witness is not necessary in every case. It depends on facts and circumstances of the case as to whether corroboration is required or not. The requirement of corroboration is not rule of law but a rule of caution. He cited certain judicial decisions in support of his submissions. Learned court below further observed that there is no occasion to look at the evidence of victim of sexual offence like rape with suspicion. Victim and his

brother had no reason to falsely implicate the accused persons for committing the offence like rape. Learned trial court also observed that no adverse inference can be drawn against the version of the prosecutrix only due to reason that no external or internal injury was found on her person in her medico legal examination report. She was unmarried and it cannot be imagined that victim and her brother would falsely implicate the appellant and co-accused only due to certain enmity by keeping their honour and social respect on stake. The victim has given reliable account of sequence of events which cannot be burst aside. This fact also gathers no mass that the victim had chosen agricultural field lying some what distant from her home near Arhar field and her conduct cannot be seen with doubt as she had chosen a field near the tube-well of accused to ease herself. He has also observed that in rural area people shall choose distant agricultural fields to ease themselves in morning hours. Learned court below after giving thoughtful considerations to submission of learned counsel for the parties and evidence on record, recorded verdict of guilt against appellant and sentenced for charge under Section 376, 342, 506 IPC and sentenced him as aforesaid.

8. Feeling aggrieved by the impugned judgment and order, the accused appellant has filed present criminal appeal under Section 374 of Code of Criminal Procedure.

9. Learned counsel for the appellant submitted that learned court below has convicted and sentenced the appellant without considering the evidence adduced during trial in proper perspective and in meticulous manner. The appellant was enlarged on bail by the orders of this Court

dated 17.7.2002, however, he became absent and afterwards he was again sent to jail by the orders of trial court on 27.7.2007. F.I.R. in present case was lodged after two days of the incident and there is no explanation of delay in lodging the F.I.R. in prosecution version. Learned Additional Session Judge ignored the infirmities pointed out by accused side in statement of prosecution witnesses. The independent witnesses of prosecution who are named in the F.I.R. were not produced during trial which creates doubt regarding authenticity of the F.I.R. version. The prosecution version and statement of the victim does not find corroboration from medico legal examination report of the prosecutrix. The doctor who conducted medico legal examination of the prosecutrix has categorically stated in her report that victim was habitual for sexual intercourse and no opinion can be given regarding rape.

10. Per contra, learned A.G.A. submitted that prosecution version introduced in F.I.R. lodged at the instance of brother of the victim (PW-1) is proved by the evidence of witnesses of fact PW-1 (prosecutrix) and PW-2, informant, and finds corroboration by the evidence of formal witnesses. No adverse inference should be drawn against statement of prosecutrix who should be treated as injured witnesses only due to fact that witnesses named in F.I.R. Raghvendra and Ashok Kumar could not be produced by prosecution before the trial court and no fault can be found on the part of the learned trial court while convicting and sentenced the accused-appellant. Appeal deserves dismissal. During course of trial, report was received from C.J.M. concerned dated 18.5.2022 wherein he stated that on conducting the enquiry regarding live status

of the accused-appellant it is reported by S.H.O. concerned that he is presently residing at the place of his in-laws in Kanpur Nagar who drives e-rickshaw.

11. In letter dated 24.6.2022 learned C.J.M., Fatehpur, informed this Court that District Superintendent of Jail, Fatehpur has informed that prisoner Raje @ Rajesh @ Santosh Kumar Shukla, has been released from jail on 5.10.2022 after completing his punishment of imprisonment as well as after the depositing of amount of fine of Rs. 5,000/- in the court and presently he is detained in jail.

12. In present case accused was charged for offence under Section 342, 506 and 376 IPC by learned Trial Judge, on 2.7.2002. In order to prove the charge prosecution examined PW-1, prosecutrix, and PW-2 (father of prosecutrix) Keshav Dutt Tiwari as witnesses of act.

13. PW-1, prosecutrix, has stated in her sworn testimony before the court that she is acquainted with accused from before the incident. Accused Chunni Lal Sharma has died. The incident occurred seven years two months ago from her evidence (recorded on 16.1.2009). At around 6:30 hours in the morning she had gone to West of her village to ease herself and when she was coming towards home after ease herself, accused Raje @ Rajesh @ Santosh Kumar Shukla who was hiding in Arhar field of Jagadish, emerged from there and brandished a country made pistol towards her and threatened her to shoot her if she cried and dragged her towards room of tubewell and flinged her on cot and forcefully untied her lower garment (salwar) and committed rape on her. She kept crying on the cot throughout the day

and accused was also present there and kept on threatening her. In night he also called co-accused Chunni Lal who also committed rape on her and thereafter both of them went outside the room and locked it from outside. She kept on crying and weeping throughout in the night. In the morning, her co-villager Raghunandan and Shiv and Ashok Kumar came there and rescued her by opening the door. She apprised her brother and mother about the incident and thereafter her brother took her to P.S. and lodged report. The doctor conducted her medico legal examination at Government hospital, Fatehpur. Her lower garment worn at the time of incident was taken at P.S. which was blood stained. She was around 15 years of age at the time of incident. The investigating officer recorded her statement. She knows meaning of rape which implies insertion of male organ in the place meant for urinating on person of female.

14. In cross-examination, she stated that she had told her age as 15 years to S.I. as well as in the court. If the S.I. has not stated her age as 15 years in her statement, she cannot divulge its reason. Prior to this incident, her private parts were not interfered. No injury was caused therein. She was virgin. The doctor had inspected her private parts. The field in which she had gone to ease herself is not connected with pathway. The tubewell is lying 5-6 fields away from the pathway. That tubewell is situated in the West side of her village. Her home is towards North of village. At that time, Arhar was sown in the fields lying in North and East of her home. Accused had dragged her. At the time of incident, she suffered scratches on her thighs in the process and her clothes were also torn. She was wearing Salwar-Suit. She had not taken any food in the day or

night on that date. She had not taken even water. The accused left the room of tubewell on next morning at around 4:00 am and he did not come back. She was acquainted with Chuni Lal prior to the incident. Chunni Lal was residing in tubewell of Rajesh. The villagers had rescued her at 8 to 9: 00 hours from the tubewell after hearing her cries. She denied defense suggestion that prior to the incident she eloped with accused Chunni Lal and caught with him.

15. PW-2, Keshav Dutt Tiwari, who is brother of the victim, has supported the F.I.R. version and proved the written report Ext. Ka-1 filed by him at P.S. which found basis of F.I.R.. He also stated that investigating officer has recorded his statement.

16. In cross-examination he clarified that he has not seen the incident. He has also not seen Raghvendra and Ashok Kumar rescuing the victim from tubewell. He has lodged the F.I.R. on being apprised about the incident by these witnesses. The witnesses had brought her sister in the morning at around 9/10:00 hours. He had searched his sister after she went missing but he did not search her towards the tubewell. Accused Rajesh was married and having children prior to the incident. He refused defense suggestion that prior to the incident his sister eloped with son of Shanti Singh, his co-villager.

17. PW-3, S.I., Dinesh Bajpayee, has proved Ext. Ka-3, extracts of G.D. of registration of case Report No. 22, time 12:10 hours, dated 3.11.2001 and chick F.I.R. as Ext. Ka-4.

18. PW-4, Subeer Kumar, has testified that he has examined vaginal

smeear sliques of victim on 5.11.2001 wherein no live or dead spermatozoa was detected. He proved this report as Ext. Ka-4

19. PW-5, Madhusoodan Singh, the then S.S.I., has proved the inventory of taking in possession the Salwar of the victim as Ext. Ka-5. Site plan of the place of incident as Ext. Ka-6, charge sheet as Ext. Ka-7 and also produced Salwar of the victim before the court on which ME-1, ME-2 and ME-3 were marked.

20. PW-6, Dr. Suriya, proved medico legal examination report and supplementary report of the victim as Ext. Ka-8 and Ka-9 and stated that no external or internal injury was found on person of the victim. Her age was around 18 years. No opinion regarding rape could be given.

21. PW-7, Dr. K.P. Singh, proved X-ray report of victim regarding fusion of her bones for determining her age and stated that according to X-ray, she was around 18 years of age. He also proved X-ray plates as ME-4.

22. The accused did not adduce any defense evidence. His stand is that of denial. He stated that in his statement under Section 313 Cr.P.C. the informant and prosecutrix has given false statement against hi. There was love affair between prosecutrix and co-accused Chunni Lal and she had eloped with him and was recovered farther to Khaga. Chunni Lal was his bataidar.

23. The place of occurrence as stated in statement of PW-1, victim, corresponds with site plan (Ext. Ka-6) prepared by the investing officer in which place of occurrence is shown as room at the tubewell in which the cot is marked where

the victim was allegedly raped by accused persons. F.I.R. in present case was lodged on 3.11.2021 at 12:10 hours by Keshav Dutt, brother of the victim, which is found on record as Ext. Ka-2. The delay in lodging the F.I.R. is self explanatory in the F.I.R. itself, therein it is stated that victim got missing on 2.11.2001 and the informant (her brother) was searching for her and on next date, she was rescued by witnesses from the room of tubewell which belonged to accused appellant and thereafter he was apprised of the facts and he lodged the F.I.R. at P.S. concerned by filing written report. The distance between P.S. and the place of incident is 6 km, therefore, in my considered opinion there is no delay in lodging of F.I.R. that too in a case like rape. Although witnesses named in F.I.R. are not produced in evidence due to fact that according to prosecution they were not willing to speak the truth in the court yet from statement of PW-1 and PW-2, this fact is proved that victim was rescued by Raghvendra and Ashok Kumar. They were not produced by defense to rebut this version of prosecutrix and informant. Even in cross-examination of PW-1 and PW-2, nothing emerged which could make this fact suspicious that victim was not rescued by these witnesses. There is nothing to disbelieve the sequence of events stated by PW-1 and PW-2.

24. In catena of decisions like **Raja Vs. State of Karnataka, (2016) 10 SCC 506**, **State of U.P. Vs. Chhoteylal, AIR 2011 SC 697**, **Moti Lal Vs. State of M.P., 2009 (67) ACC 570 (SC)**, **Wahid Khan Vs. State of M.P., 2009 (7) Supreme 584**, **Om Prakash Vs. State of State of U.P., 2006 (55) ACC 556 (SC)**, Hon'ble Apex Court held that in a case of rape, testimony of prosecutrix stands at par with that of an injured witness. It is really not necessary to

insist for corroboration if the evidence of prosecutrix inspires confidence and appears to be credible. An accused can be convicted on the basis of sole testimony of prosecutrix without any further corroboration provided the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. Women or girl raped is not accomplice and to insist for corroboration of the testimony amounts to insult to womanhood. The evidence of a victim of sex-offence is entitled to great weight, absence of corroboration notwithstanding, therefore, there is no force in the arguments of learned counsel for the appellant that sole testimony of prosecutrix is not corroborated by any other evidence.

25. In so far as defence argument is concerned, this defence argument that no injury was found by the doctor on the person of the victim is concerned Hon'ble Apex Court in **State of U.P. Vs. Chhotey Lal, AIR 2011 SC 697 and Madan Gopal Kakkad Vs. Naval Dubey, (1992) 3 SCC 204** and other cases, clarified that even where no external or internal marks of injury on the private part of the victim of rape was found in medical examination, the testimony of the prosecutrix that she was raped by the accused cannot be discarded, therefore in the light of foregoing discussions and authorities cited above, this Court is of considered opinion that learned trial court has convicted no misappreciation of evidence on record as alleged in present appeal nor there is any legal error in application of law and no factual or legal error is found on the part of the learned trial court while recording conviction of the appellant and or awarding sentence against him as aforesaid.

26. Appeal is devoid of merit and is liable to be dismissed. Appeal stands

dismissed with above observations. The judgment of conviction and sentence passed by learned trial court is affirmed. As the fact has already brought on record that appellant has completed full sentence awarded in impugned judgment, he need not surrender to suffer the sentence anymore.

27. Let a copy of this judgment along with lower court record be sent to court concerned for necessary information and compliance.

(2023) 5 ILRA 511
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.04.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, C.J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1752 of 2012

Amar Singh & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

Sri Jitendra Kumar Mishra, Sri Anjani Kumar Dubey, Sri S.S. Yadav, Sri Vijay Singh

Counsel for the Opposite Party:

Sri Amit Sinha, A.G.A., Ms. Mayuri Mehrotra, State Counsel, Sri Ram Nath, Sri S.K. Tripathi

A. Criminal Law - Criminal Procedure Code, 1973 - Section 378 - Indian Penal Code, 1860-Sections 302, 307, 394, 323-Challenge to-Conviction-Variations found in statements of eye-witnesses-FIR was lodged promptly-However, witnesses were examined after lapse of time but if the eye-witnesses are cogent and trustworthy and prevails over medical evidence in all aspects where autopsy

report is found in conflict with that of ocular evidence-Conviction and sentence upheld.(Para 1 to 74)

B. So far as charge under Section 307 IPC is concerned, the settled law is that it is not necessary that injury, capable of causing death, should have been inflicted. What is material to attract the provisions of Section 307 of IPC is the intention or knowledge with which the all was done, irrespective of its result. The intention and knowledge are the matters of inference from totality of circumstances and cannot be measured merely from the results. In fact the important thing to bear in mind for determining the question as to whether the offence under Section 307 IPC is made out, is the intention and not the injury, even if it may be simple or minor. Question of intention to kill or knowledge of death is always a question of fact and not of law. the intention or knowledge of the accused must be such as is necessary to constitute murder. Section 307 IPC does not require that injury should be on vital part of the body. Merely causing hurt with intention or knowledge of causing death is sufficient to attract Section 307 IPC.(Para 71)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Chacko Vs St. of Ker. (2004) 12 SCC 269
2. Raj Narain Singh Vs St. of U.P. (2010) AIR SCW 521
3. Dharnidhar Vs St. of U.P. (2010) 6 SCJ 662
4. Ramesh Vs St. of U.P. (2009) 15 SCC 513
5. Ravi Kumar Vs St. of Punj. (2005) 9 SCC 315
6. Premsagar Manocha Vs St. (NCT Delhi) (2016) 4 SCC 571
7. St. of A.P. Vs S. Rayappa & ors. (2006) 4 SCC 512
8. Bikau Pandey Vs St. of Bih. (2003) 12 SCC 616

9. Anil Rai Vs St. of Bih. (2001) 7 SCC 318
10. Deepak Verma Vs St. of H.P. (2011) 10 SCC 129
11. Bhagwan Jagannath Markad Vs St. of Mah.(2016) 10 SCC 537
12. Surinder Kumar Vs St. of Punj.(2020) 2 SCC 563
13. Ashok Kumar Chaudhary Vs St. of Bih. (2008) 12 SCC 173
14. Mukesh v. St. (NCT of Delhi) (2017) 6 SCC 1
15. Maqsoodan Vs St. of U.P. (1983) 1 SCC 218
16. Sat Kumar Vs St. of Har. (1974) 3 SCC 643
17. C. Muniappan Vs St. of T.N. (2010) 6 SCJ 822
18. Hari Kishan & St. of Har. Vs Sukhbir Singh (1988) AIR SC 2127
19. St. of M.P. Vs Harjeet Singh & anr. (2019) AIR SC 1120

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

1. Present criminal appeal has been preferred by appellants Amar Singh and Panjabi against the judgement and order dated 6.4.2012 passed by Additional District & Sessions Judge, Court No.1, Kannauj in Sessions Trial No.181 of 2011 (State vs. Amar Singh and another) convicting the appellants for the offence punishable under Sections 302, 394 and 307 IPC and sentencing them to undergo rigorous life imprisonment and a fine of Rs. 10,000/-, ten years rigorous imprisonment and a fine of Rs. 5,000/- and seven years rigorous imprisonment and a fine of Rs. 4,000, respectively, with stipulation of default clause. All the sentences were directed to run concurrently.

2. Brief facts of the case, as culled out from the record, are that informant Mijaji Lal son of Ramadin Yadav, resident of village Mansukhpurwa, Majra Bahosi, Police Station Indergarh, District Farrukhabad gave a verbal information on 28.12.1989 at about 20.30 hours at Police Station Indergarh that on 28.12.1989, his brothers Mewa Lal and Prahlad and nephew Veer Singh had gone to sow wheat in barren land. Mewa Lal and Veer Singh had returned to home, but Prahlad Singh was digging and weeding grass with spade. Amar Singh, resident of the same village, had grudge for about 10-12 years because of the said barren land. When Amar Singh came to know that wheat has been sown in the field, he armed with 'farsa', Panjabi armed with 'sword', Chaubey armed with Tawal and Nanhu with lathi reached at the field at about 4.00 p.m. and started abusing and beating Prahlad. On his shrieks, Pappi, daughter of Mewaram, who was cutting grass nearby, rushed to the house and informed about the incident. Thereafter, informant armed with licensee gun No. 55380 with belt and eight cartridges alongwith his both sons, namely, Mahendra and Surendra reached the spot. The accused persons left Prahlad Singh and started beating Mewa Lal, Veer Singh and Mahendra Singh and caused injury to every one. Amar Singh snatched the gun with belt and cartridges and ran away towards Majhila. Incident was witnessed by the informant, Pappi, Narendra, Surendra and all other villagers. Condition of Prahlad Singh, Mewalal and Veer Singh was serious.

3. On the basis of the information aforesaid, chik F.I.R. (Ext. Ka-1) was registered at Police Station concerned on 28.12.1989 at 08.30 p.m. under Sections 307, 394 and 324 IPC. G.D. entry was also made at the same time, which is Ext. Ka-6.

4. Investigation of the case proceeded. Injured were sent for medical examination and on the way, Prahlad Singh succumbed to his injuries. The Investigating Officer recorded the statement of witnesses. He inspected the spot and prepared site plan (Ext. ka-8). He also prepared the inquest report (Ext. ka-3) of the deceased and papers relating to post mortem. The Investigating Officer also took the specimen of plain and bloodstained soil from the place of occurrence and prepared the memo (Ext. ka-9).

5. Post mortem of the dead body of the deceased was performed and autopsy report (Ext. ka-2) was prepared by Dr. O.P. Gangwar on 30.12.1989 at 1.10 p.m. On examination of the dead body of the deceased, following ante-mortem injuries were found:

"(1) Lacerated wound 3.5 cm X 1 cm scalp deep left side head 11 cm above left ear.

(2) Abraded contusion 10 cm X 4 cm over left side face involving middle of nose underlying nasal bone and left maxilla fractured.

(3) Lacerated wound 1.5 cm X .5 cm X muscle deep over left side upper lip.

(4) Incised wound 2 cm X .3 cm X bone deep over angle of lower jaw on the left side margin clear cut both angle of sharp.

(5) Incised wound 4 cm X 1 cm X bone deep left side chin , margin clear cut both angle sharp obliquely placed underlying bone cut fracture.

(6) Incised wound 9 cm X 2 cm X muscle deep posterior lateral aspect Rt side upper part neck margin clear cut, both angle sharp.

(7) Incised wound 8 cm X 3 cm X bone deep over front of Rt wrist region

margin clear cut, both angle sharp underlying Bone cut.

(8) Incised wound 7 cm X 2 cm X Bone deep dorsum of Rt hand involving wrist margin clear cut both angle sharp, underlying Bone cut.

(9) Incised wound 6 cm X 1.5 cm X Bone outer side Rt knee margin clear cut, both angle sharp underlying Bone cut partially.

(10) Incised wound 2.5 cm X .5 cm X muscle deep back of left wrist, margin clear cut, both angle sharp.

(11) Lacerated wound 14 X .5 cm X muscle deep outer side left ankle."

6. In the opinion of the doctor, death was caused due to shock and haemorrhage as a result of ante mortem injuries.

7. Injured Veer Singh was medically examined on 28.12.1989 at 10.30 p.m. and during his examination, following injuries were found :

"(1). A lacerated wound 2" x 1/2" x 1 and 1/4 present on the right eye brow, bleeding present.

(ii) Haematoma of R cheek & eye lids present 4" x 4".

(iii) Haematoma with lacerated wound of upper lip 1" x 1/2" X 1/2" present.

(iv) A incised wound 4" x 1" x 1 and 1/2" present on the left lateral malleolus, incising malleolus and adjoining bones, bleeding present. "

8. In the opinion of the doctor, all the injuries were fresh and simple except injury no. (iv), which was grievous and caused by sharp weapon, whereas others were caused by some blunt weapon. Injury report (Ext. ka-4) was prepared.

9. Injured Mewalal was medically examined on 28.12.1989 at 10.45 p.m. and during his examination, following injuries were found :

"(1). A lacerated wound 1/2" x 1/2" x 1/4" present on the left parietal eminence of scalp.

(ii) A lacerated wound present on the right cheek near right tragus 1/4" x 1/2" x 1/4".

(iii) A lacerated wound 1" x 1/2" x 1/4" present on the left eye brow.

(iv) Fracture of left maxilla present haematoma of lids of left eye and left cheek 4" x 4". "

10. In the opinion of the doctor, all the injuries were fresh and simple except injury no. (iv), which was grievous. Injury report Ext. ka-5 was prepared.

11. After completing the investigation, charge-sheet (Ext. ka-10) against the four accused persons was filed. Concerned Magistrate took the cognizance. The case being exclusively triable by the Sessions Court, was committed to the Court of sessions.

12. Accused persons appeared before the trial court and charges under Sections 394, 307, 302, 324 and 325 of IPC were framed against them. They denied the charges and claimed trial.

13. Trial proceeded and during trial accused Nanhu son of Amar Singh and Arvind @ Chaubey were declared juvenile in conflict with law and their cases were separated and sent to Juvenile Justice Board for trial

14. In order to bring home the charges against the accused persons, prosecution

has examined seven witnesses, who are as follows:

1	Mija Ji	PW-1 (informant / eye witness)
2	Mewa Lal	PW-2 (injured / eye witness)
3	Veer Singh	PW-3 (injured / eye witness)
4	Dr. O.P. Gangwar	PW-4 (who conducted post mortem of the deceased)
5	Ishwar Dayal	PW-5 (witness of inquest)
6	R.S. Kamal (pharmacist)	PW-6 (who proved the injury reports of the injured)
7	S.I. Munnu Lal Katiyar	PW-7 (scribe of the F.I.R. and secondary witness for I.O.)

15. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Chik F.I.R.	Ext. A-1
2	Post Mortem Report	Ext. A-2
3	Inquest report	Ext. A-3
4	Injury report	Ext. A-4
5	Injury report	Ext. A-5
6	Copy of G.D. Entry	Ext. A-6
7	Tarmimi G.D.	Ext. A-7
8	Site plan	Ext. A-8
9	Memo of plain and blood stained soil	Ext. A-9

10	Charge sheet	Ext. A-10

16. After conclusion of evidence, statements of accused persons were recorded under Section 313 of Cr.P.C., in which they pleaded their false implication due to enmity and party-bandi.

17. PW-1, PW-2 and PW-3 are the witnesses of fact.

18. P.W-1, namely, Mijaji Lal (informant), in his oral testimony, has supported the F.I.R. version. He has proved his T.I. over chik F.I.R. (Ext. A-1). He has explained the whole occurrence and the role of all the accused persons in the commission of crime in his testimony.

19. P.W.-2 Mewalal is the injured witness. He has also corroborated the F.I.R. version and supported the testimony of PW-1.

20. PW-3 Veer Singh is also the injured witness. He has also corroborated the F.I.R. version and supported the testimonies of PW-1 and PW-2.

21. PW-4, PW-6 and PW-7 are formal witnesses.

22. PW-4 - Dr. O.P. Gangwar has performed the autopsy of the deceased and prepared the Autopsy Report (Ext. ka-2).

23. PW-5 - Ishwar Dayal is the witness of inquest and has proved the inquest report Ext. ka-3.

24. PW-6 - R.S. Kamal, Pharmacist at Vinod Dixit Hospital, Kannauj has proved the injury reports of injured Mewa Lal and Veer Singh as (Ext. ka-4), (Ext. ka-5) respectively and also the signature of Dr.

B.N. Agrawal, who examined the said injured as secondary witness, as Dr. B.N. Agrawal has expired .

25. PW-7 - S.I. Munnu Lal Katiyar, who was posted as C. Mhr. at Police Station Indergarh, in his deposition has proved his signature over chik F.I.R. (Ext. ka-1), registration G.D (Ext. ka-6), (Amending) Termimi G.D. (Ext. ka-7) and the proceeding of investigation, as Ganga Ram, who was the Investigating Officer has expired. As secondary witness for I.O. he has proved site plan (Ext. ka-8), Memo (Ext. ka-9) and charge sheet (Ext. ka-10).

26. On the basis of aforesaid oral and documentary evidence, learned trial court recorded the conviction of the appellants and sentenced them, as mentioned herein-above.

27. The impugned judgment and order of the trial court has been assailed by the learned counsel for the appellants on various grounds.

28. Heard Shri Jitendra Kumar Mishra, learned counsel for the appellants, Shri Amit Sinha, learned AGA and Ms. Mayuri Mehrotra, learned State Counsel for the State and perused the entire record.

29. In a criminal trial, the prosecution has a bounden duty to prove its case beyond reasonable doubt on the basis of cogent and reliable evidence and not on the weaknesses of the defence. If the prosecution case rests upon eyewitness account, the ocular evidence must be reliable and free from all infirmities and the eye witness must fall into the category of "sterling witness" and if such ocular evidence is also supported and corroborated with the medical evidence, in all

probabilities, the prosecution may succeed in proving its case beyond reasonable doubt.

30. Present is a case which rests upon eyewitness account and two, out of the three, witnesses of fact are injured witnesses.

31. PW-2 Mewalal and PW-3 Veer Singh are the injured witnesses and from the perusal of their entire testimony, we find that they have made almost similar statements regarding the role of accused persons in commission of the crime, place of occurrence, weapons used in crime and other relating factors. They have sustained injuries in the said occurrence and on account of being injured witnesses their evidence stand on a different and distinguished footing and deserves to be seen as a cogent and reliable piece of evidence.

32. PW-2 and PW-3 both have clearly stated that at the time of the incident when after having informed by Km. Pappi regarding the assault on Prahlad Singh by four accused persons, they rushed to the place of occurrence to save him. PW-2 has made a specific statement supported by PW-1 and PW-3 as well that when he rushed to the field to save Prahlad Singh, he also took his single barrel gun alongwith eight cartridges, Veer Singh, Mahendra and Surendra also accompanied him and this statement is also corroborated by PW-3.

(i) PW-3, who is the son of the deceased, has stated that when they reached the site of occurrence, accused persons left his father and caused injuries to him and his uncle Mewalal (PW-2). He sustained grievous injuries upon his eye, leg and face

and his uncle Mewalal, father Prahlad Singh also sustained grievous injuries.

(ii) PW-1, PW-2 and PW-3 stated in a single voice that accused Amar Singh snatched the gun and belt of cartridges from Mewalal and flew away. They have also made identical statements on the point that during the incident accused Amar Singh caused injuries to the deceased and injured persons by use of farsa, Panjabi by sword, Chaubey by tawal and Nanhu by lathi.

33. A primary objection has been raised by the learned counsel for the appellants in respect of non-production of Km. Pappi as prosecution witness. It has been argued that statement of deceased Prahlad Singh, while he was alive, was not recorded by the police under Section 161 CrPC, hence it was incumbent upon the prosecution to produce Km. Pappi as witness, who was the best person to tell as to how occurrence started. This plea was vehemently opposed by the learned State counsel and the learned counsel for the informant.

34. From the perusal of the record, we find that in charge sheet (Ext. ka-10), name of Km. Pappi has been shown as witness, which reveals that her statement under Section 161 CrPC was recorded by the Investigating Officer. The question arises as to whether non-production of Km. Pappi, as witness, makes any adverse effect upon the prosecution version and the answer we find in negative. It is always the prerogative of the prosecution to decide as to how many and which of the witnesses have to be examined by it before the Court. The law, as provided under Section 134 of the Evidence Act, is that "no particular number of witnesses shall in any case be required for the proof of any fact."

35. We rely upon **Chacko vs. State of Kerala, (2004) 12 SCC 269** wherein it has been held that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of a single witness, if he is wholly reliable. Corroboration may be necessary when he is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained.

36. Reference can also be placed on the Hon'ble Apex Court decision in **Raj Narain Singh Vs. State of U.P. 2010 AIR SCW 521** wherein it has been held that it is not necessary that all those persons, who were present at spot, must be examined. It is the quality of evidence, which is required to be taken note of by Courts and not the quantity.

37. We can very well remind here that PW-1, PW-2 and PW-3 are the eye witnesses. PW-1 in his deposition has stated that Pappi has told that all the four accused persons are bitterly assaulting Prahlad Singh by farsa, taval, sword and lathi and when he along with PW-2 and PW-3 reached the field, Prahlad Singh was lying unconscious there in injured condition and at the same time they caused injuries to Mewalal and Veer Singh with the aforesaid weapons and ran away. He has also stated that all the three injured were taken to hospital by the police. The police taking into account the serious condition of the injured persons immediately sent them for medical treatment and Prahlad Singh died on the way.

38. PW-2 also corroborated this story and stated that when they reached the place of occurrence, he saw all the four persons

from a distance of 20-25 meters causing injuries to Prahlad Singh and as soon as he reached near the Nali, the accused persons left Prahlad Singh and attacked over him and his gun was also snatched. In the same fashion, PW-3 also states that when they reached the field, accused persons leaving his father Prahlad Singh attacked over him and his uncle Mewalal. He further states that when he reached the field alongwith Mewalal, all the accused persons were assaulting Prahlad Singh and when the accused persons made assault upon him and Mewalal, Prahlad Singh was lying on the ground. This witness also clarifies that his statement given to the Investigating Officer to the extent that when he reached the spot, accused persons had already caused injuries to his father Prahlad Singh, was correct.

39. Learned counsel for the appellants have pointed out that there are contradictions in the statements of the aforesaid witnesses on the point that when they reached the spot, any incident was carrying on or not and their ocular version at this juncture is highly doubtful.

40. The aforesaid plea draws our attention to a glaring fact that the incident in the present matter happened on 28.12.1989 and the statement of PW-1 was recorded in the year 2007, PW-2 in the year 2008 and PW-3 in the year 2011, hence, the evidence of witnesses of fact has been recorded after 18 - 22 years of the incident. No normal man can be expected to have a computerized and calculated memory of any incident which occurred before him 15 or 20 years back. When the Court evaluates the veracity of deposition of any witness of fact, it should always take into account as to after a gap of how much time the evidence of such witness has been

recorded. The human memory has its own limitations and it is natural to be faded into a gap of long span of time. It is not possible for a normal person to describe in verbatim and in the same fashion the whole incident, which was witnessed by him before 15-20 years and what he had stated before the Investigating Officer at that time. The contradictions, if any, found in the testimonies of PW-1, PW-2 and PW-3 should be considered with this prospect also. The view of this Court finds support from **Dharnidhar vs. State of U.P., 2010 (6) SCJ 662** wherein it has been held that when the witnesses are examined in the Court after a considerable lapse of time, it is neither unnatural nor unexpected that there can be some minor variations in the statements of the prosecution witnesses and in fact, as held in **Ramesh vs. State of U.P., (2009) 15 SCC 513**, minor contradictions in the testimonies of the prosecution witness are bound to be there and in fact they go to support the truthfulness of the witnesses. We have meticulously scrutinized the entire testimony of PW-1, PW-2 and PW-3 and we find no material contradictions in their depositions.

41. In this backdrop, we are of the opinion that non-production of Km. Pappi, as witness, was not fatal for the prosecution and also that PW-1, PW-2 and PW-3 are the reliable and trustworthy witnesses having consistency in their statements and as such they fall into the category of "sterling witnesses".

42. We consider it apposite to examine the prosecution witnesses from the angle of medical evidence also. The statement of PW-4, who performed the autopsy of the deceased, reveals that as many as 11 injuries were found on the body

of the deceased, which were in the form of lacerated wounds, abrasion, and incised wounds inflicted upon various parts of the body, such as skull, face, neck, hand, etc.. The autopsy report shows that cause of death was shock and haemorrhage as a result of ante mortem injuries. PW-4 has opined that death of the deceased might be caused by injuries inflicted by the sharp weapon on 28.12.1989 at about 4.00 p.m.. The witnesses of fact clearly state that farsa, sword, taval and lathi were the weapons used in the occurrence. No doubt they stated about the use of some blunt objects also in the commission of crime. Nature of injury nos. 1,2,3,4 and 11 shows that these injuries might be inflicted by use of hard and blunt object. We find that overall, there is no major contradiction between the ocular and medical evidence. It has been pointed out by the learned counsel for the appellants that PW-4, the doctor, in his deposition has opined that death of the deceased might have been caused by injuries inflicted by use of sharp edged weapons but if the argument is even taken to be correct, we find that the medical evidence nowhere rules out the use of hard and blunt object to inflict injuries to the deceased. Hence, there is no material contradiction between ocular and medical evidence and even if it is pointed out, in a catena of decisions it has been held that if the ocular evidence is found trustworthy and credible, the medical evidence based on the probabilities only cannot prevail over the ocular evidence.

43. In **Ravi Kumar vs. State of Punjab, (2005) 9 SCC 315**, it has been held that when ocular evidence is cogent and reliable, medical evidence to the contrary cannot corrode the evidentiary value of the former.

44. Likewise, in **Premasagar Manocha vs. State (NCT Delhi), (2016) 4 SCC 571**, it was held that being based on his knowledge, expert opinion may be subject to change on coming across any authentic material subsequently. Opinion of expert witness is different from testimony of witness of fact. Duty of expert is to render his opinion along with reason and relevant material. It would then be for the Court to see correctness of opinion and reach its conclusion accordingly.

45. In the light of the aforesaid established legal position, we conclude that the evidence of PW-1, PW-2 and PW-3, as eyewitnesses of the occurrence, is cogent and trustworthy and prevails over the medical evidence in all aspects wherever the autopsy report is found in conflict with that of the ocular evidence.

46. From a perusal of the record, it reveals that Dr. B.N. Agrawal, who medically examined both the injured persons Veer Singh and Mewalal, had expired in a road accident and PW-6 in the form of secondary evidence deposes for him and proves the injury reports of injured Veer Singh and Mewalal as Ext. ka-4 and Ext. ka-5 respectively, on the basis of original medico legal register. He states that both the injured persons were examined on 28.12.1989 by Dr. B.N. Agrawal at 10.30 p.m. and 10.45 p.m., respectively. Perusal of the injury report (Ext. ka-4) of injured Veer Singh clearly indicates that he has sustained a lacerated wound present on the right eye brow, incised wound present on the left lateral malleolus incising malleolus and adjoining bones and haematoma of right chest and eye side and on lacerated wound of upper lip. Injury no. (iv) incised wound was found grievous caused by sharp weapon

and x-ray was advised, whereas other injuries were caused by some other blunt object. In the same manner, (Ext. ka-5), injury report of injured Mewalal clearly indicates that he has sustained lacerated wounds present on the left parietal eminence of scalp, present on the right cheek near right tragus, present on the left eye brow and fracture of left maxilla. All the injuries were found simple. Injury no. (iv) was grievous, x-ray was advised. Nature of injuries caused to both the injured persons are indicative of fact that all the injuries were caused by PW-2 and PW-3. It is true that there is no x-ray report or supplementary report on record but the medical reports of both injured persons, which are on record, have been proved by secondary evidence of PW-6, which was admissible in law as the original doctor expired before recording evidence in the Court. In that fashion, testimonies of PW-1, PW-2 and PW-3 prove the prosecution case and gets full corroboration from the medical evidence in material aspects.

47. It is pointed out by the learned counsel for the appellants that all the fact witnesses rendered by the prosecution are the witnesses related to the deceased and as such they are interested witness as well and in the same manner it has also been submitted that the prosecution witnesses and the informant had strong motive to implicate the appellants in a false case. It is further pointed out that since the occurrence happened in day light at a public place, in all probabilities persons from public must have been present at the time of incident, but independent witnesses were concealed by the prosecution in this case and were not examined. Learned AGA, per contra, vehemently opposing the aforesaid contention, has argued that relationship is not a factor to discard the

testimony of any witness of fact, if the same inspires confidence of the Court. It has been further argued that since it is a case of ocular evidence, motive has no significance in this matter.

48. While dealing with the aforesaid issue, this fact cannot be lost sight that in the present matter out of the three witnesses of fact, PW-2 Mewalal and PW-3 Veer Singh are the injured witnesses. It will be pertinent to mention here that witness of fact if himself sustains injuries in the same incident and deposes accordingly before the Court, his evidence stands on a different footing and the credibility of his evidence cannot be doubted only because he is related to the deceased and as such is an interested witness.

49. It is true that in the F.I.R. itself, it has been mentioned that many villagers had seen the occurrence apart from the witnesses of fact, who have been examined before the Court. PW-2 the injured states that on their shrieks, Mija Ji, Bharat and several persons of the village reached the spot. PW-1 also states that many village persons came to the spot at the time of occurrence and similar statement is found in the testimony of PW-3 also. We have also sifted the charge sheet (Ext. ka-10) submitted in this matter by the Investigating Officer and from a perusal of the same it is apparent that Km. Pappi, Mahendra Singh and Surendra Singh are also named as eye witnesses of the case. The point to be dealt with is whether the prosecution case is adversely affected if the witnesses of fact named in the charge sheet, who are said to be independent witnesses, are not adduced before the Court and at the same place it is also to be examined whether witnesses of fact, who are said to be related / interested

witnesses, are credible and reliable witnesses or not.

50. The testimonies of PW-1, PW-2 and PW-3 have been scrutinized meticulously by the learned trial court and also examined by us and we have no hesitation to hold that after a careful scrutiny the evidence of aforesaid witnesses has been found credible and reliable. In view of that, in our considered view, the prosecution was not required to adduce any other witness just to show that it was going to prove its case by some independent witness also.

51. There is another practical aspect of the matter, which cannot be ignored by any Court of law that independent persons of public often avoid to stand as witness for prosecution in any criminal trial for so many reasons. In **State of Andhra Pradesh vs. S. Rayappa and others, (2006) 4 SCC 512**, the Hon'ble Supreme Court examined several aspects of a criminal trial and this aspect was also taken into account as to why independent witnesses ignore to depose in favour of the prosecution and in what circumstances the probability of false implication may be ruled out. It was also clarified as to why the prosecution in so many cases is bound to rely upon the witnesses, who happen to be the relative to the deceased (victim). It was held in paras 6 and 7 as under :

"6.....By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested

postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons.

7. On the contrary it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination. In such a situation, the only natural witness available to the prosecution would be the relative witness. The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously. The High Court has brushed aside the testimony of PW 1 and PW 2 on the sole ground that they are interested witnesses being relatives of the deceased."

52. The trial Court has discussed the various aspects of motive and enmity existing between the parties in the present case. Reliance has been placed upon **Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616** by the learned state counsel wherein it has been held that when the direct evidence establishes the crime, motive is of no significance and pales into insignificance.

53. In **Anil Rai Vs. State of Bihar (2001) 7 SCC 318** it has been held that enmity is a double edged weapon which

can be a motive for the crime as also the ground for false implication of the accused persons.

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

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

55. However, in the present case a specific cause of animosity has been assigned between the parties and that was in respect of some barren field and this fact of animosity finds place in the testimony of witnesses of fact. PW-1, in his examination-in-chief, states that the informant side and the accused persons were having animosity on account of the barren field. Further, he has been cross-examined in respect of some will and he has denied that his Dau Kamta Prasad has executed any will in favour of Lilawati, who was the sister of his uncle Bhaiyalal. He has further denied that the land of Lilawati was ploughed by deceased Prahlad and Mewalal till the present occurrence happened and due to that reason Lilawati and her family members had some enmity with deceased - Prahlad and injured-Mewalal. He has further admitted that Amar Singh, the accused in this case, and other person Panjabi were prosecuted in the case of murder of his uncle Brijwasi and Pyare Lal wherein they were acquitted. He has further admitted that the accused persons belong to his own family and also states that the accused persons had no

enmity with deceased Prahlad and other injured persons prior to this occurrence. PW-2 has also been cross-examined on the aforesaid points. PW-3 also states that no litigation in connection with any land or property took place between him and his father and accused Amar Singh.

56. Learned counsel for the appellants has made an attempt to show from the aforesaid statements of PW-1, PW-2 and PW-3 that they are trying to conceal the actual facts relating to the murder of the deceased and in fact the appellants were not the actual assailants, who have committed the crime. In our opinion, in view of the credible ocular version rendered by PW-1, PW-2 and PW-3, no other person comes into light as an assailant except the present appellants who have committed the offence. Further more, it has been clarified above that in a case based on eye witness account the question of motive loses its significance.

57. The trial court has meticulously scrutinized the evidence of fact adduced by the prosecution and from a careful scrutiny of the same, we also find that there are no material contradictions in the testimonies of witnesses of fact. Albeit, some minor discrepancies have rightly been pointed out by the appellants in the deposition of PW-1, PW-2 and PW-3, but they do not go to the root of the prosecution case and never affects the prosecution case adversely. In view of the legal position, as enumerated earlier, the prosecution was not obliged to examine the independent witnesses of fact whose names have been mentioned in the charge sheet (Ext. ka-10). Section 134 of the Evidence Act is explicit on this issue which, as mentioned above, provides that no particular number of witnesses shall, in any case, be required for the proof of any

fact. In **Chacko case** (supra), the Hon'ble Apex Court has held that Section 134 of the Evidence Act clearly states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of a single witness, if he is wholly reliable. Corroboration may be necessary when he is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the court is satisfied that the witness was speaking the truth, then on his evidence alone conviction can be maintained.

58. This fact is also not doubted by either of the parties that eye witnesses of the case were known to the appellants. Hence, we find that there was no need of identification of the appellants and the trial court, while appreciating the various aspects of the case, has correctly found that it is not a case of false implication due to old enmity between the parties, rather it is well proved from the evidence on record that due to enmity, the present crime has been committed by the accused persons / appellants and the factor of enmity goes against the appellants and in the same manner the issue of witnesses of fact being related to the deceased also does not go in favour of the appellants.

59. Reliance has been placed upon **Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537** wherein it has been held that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case, Court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of the testimony of such related witness.

60. Emphasis has been laid down on **Surinder Kumar Vs. State of Punjab (2020) 2 SCC 563** by the learned A.G.A., wherein it has been reiterated that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated.

61. In **Ashok Kumar Chaudhary v. State of Bihar, (2008) 12 SCC 173**, it was held that if the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then the testimony of an eye witness has to be accepted and acted upon. Distinctions between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

62. Further, it was held in **Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1** that non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution.

63. To falsify or strengthen the prosecution case, one important factor, which is always looked into, is the place of occurrence which, if not certain and fixed, is capable of putting the prosecution case within the cloud of suspicion, but if the place of occurrence is definite, it, no doubt, strengthens the truthfulness of the prosecution story. In the present case, the place of occurrence is the barren field, which had been a cause of enmity between the parties. PW-1, PW-2 and PW-3 all the witnesses of fact make specific statement that occurrence happened in that very field where the deceased was present. These witnesses have been cross-examined by the defence during trial and the boundaries and detail of place of occurrence have been pointed out by them. The learned counsel for the appellants have tried to take some benefit of contradictions occurred in the statements of the aforesaid witnesses in this regard. When we sift the evidence at this very point we also find some minor contradictions so far as boundary of the place of occurrence is concerned. The learned trial court has also taken into account the fact as to which was the accurate place where the deceased was assaulted. PW-3 Veer Singh states that the incident took place in northern side of field no. 3049, which was in the southern direction of the road. In the site plan, (Ext. ka-8), the same position has been shown, although the number of the field has not been mentioned therein. PW-1 states that he had pointed out the place of occurrence to the Investigating Officer and had also shown, the place from where he himself alongwith his family members witnessed the occurrence. The aforesaid place has also been pointed out in site plan, Ext. ka-8. The topography shown in Ext.ka-8 also finds support from the statement of PW-2. PW-1 and PW-2 make specific statement

that after causing the occurrence, the accused persons fled away in the eastern direction and the same has been shown in the site plan Ext. ka-8. PW-7, appearing as secondary witness for the Investigating Officer, has stated that the Investigating Officer had taken bloodstained and plain soil from the place of occurrence and memo, Ext. ka-9, was prepared by him. This is another factor, which denotes that this is the same place wherefrom the bloodstained and plain soil was taken by the Investigating Officer, as shown in the site plan (Ext. ka-8).

64. The learned AGA has submitted that PW-2 and PW-3 being injured witnesses are of distinguished character of witnesses and their evidence cannot be doubted upon. Earlier in this judgment, we have analysed the medical report and the injuries of the injured persons, which are in conformity with each other. We also find that the injured witnesses give consistent version of the incident, which also makes their deposition credible. In fact, the presence of injured witnesses at the time and place of occurrence cannot be doubted as they had received injuries during the course of incident and they should normally be not disbelieved, as held in **Bhagwan Jagannath Markad case** (supra) and **Maqsoodan vs. State of U.P., (1983) 1 SCC 218.**

65. The relevant witnesses have also been cross-examined in respect of inquest report and the learned trial court has applied its judicial mind to the genuineness of the same. We have also perused the inquest report (Ext. ka-3) and found that case crime number and sections are clearly mentioned in the inquest report, which means that the inquest was performed after lodging the F.I.R. Panchas have also opined

that the death of the deceased was caused due to ante mortem injuries. The argument raised by the learned counsel for the appellants that no chitthi majrubi (letter by police for medical examination) relating to the deceased Prahald Singh, when he was in injured condition, was prepared by the police. The learned trial court has also analyzed this point and also rightly concluded that Prahald Singh died on the way to the hospital and his inquest was also performed in the hospital itself and in these circumstances, if chitthi majrubi relating to him is not on record, it does not falsify the prosecution case, particularly in a situation where chitthi majrubi of two injured persons was prepared, as PW-7 states.

66. To avoid the blame of false implication, a prompt registration of F.I.R. is normally must in any criminal case. In the case in hand the incident occurred on 28.12.1989 at about 4.00 p.m. and the F.I.R. has been lodged about four and half hours thereafter on the same day, as is evident from the chik F.I.R. Ext. ka-1. The registration G.D. (Ext. ka-6) was also prepared at the same time and after the death of injured Prahald, a termimi G.D. (amending G.D.) (Ext. ka-7) was also prepared and proved by PW-7. Hence, it is discernible that F.I.R. in this case is a genuine document. It has been registered on the basis of oral information given by the informant Mija Ji, as he himself deposes and finds support from the version of PW-7 and prompt registration of F.I.R. rules out any possibility of false implication of accused persons / appellants. In **Sat Kumar vs. State of Haryana, (1974) 3 SCC 643**, the Hon'ble Apex Court held that the fact that the informant had lodged the F.I.R. within half an hour at a place twelve miles away from the place of occurrence travelling in trucks leaves no

possibility for concoction of a false case against any of the accused persons.

67. Defective investigation is very often a part of the prosecution case, which is targeted by the defence in order to avail the benefit on account of laches, omission and negligence committed by the Investigating Officer during investigation. In the case in hand, as assailed by the learned counsel for the appellants, the licensee gun allegedly snatched by its licensee Mewalal by the accused persons has not been recovered by the Investigating Officer. It is also submitted that the bloodstained cloth of injured persons were not seized by the Investigating Officer and bloodstained and plain soil was also not sent alongwith any bloodstained cloth for forensic test. It is true that above omissions are found in the investigation conducted by the Investigating Officer but in the light of the reliable ocular evidence, we do not find it any significant or strong omission on the part of the Investigating Officer, which may adversely affect the prosecution case. In a catena of decisions, it has been settled that for certain defects in the investigation, the accused cannot be acquitted if the prosecution case is proved by other cogent evidence. In **C. Muniappan vs. State of T.N., 2010 (6) SCJ 822**, it has been held that :

"55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the

faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

68. We have observed that the appellants have also been charged for the offence under Sections 307, 324 and 325 IPC as well for inflicting injuries to the injured persons Mewalal and Veer Singh, but they have been acquitted by the trial court for the offence under Sections 324 and 325 of IPC and have been convicted under Section 307 IPC keeping in view the fact that they had assaulted upon both injured persons with intention to kill them. The number and nature of injuries caused to both the injured persons, as appears from the injury reports (Ext. ka-4 and (Ext. ka-5, respectively) and the manner of assault, as has been deposed by PW-2 and PW-3 in their depositions, is connotative to the fact that after giving fatal blows to Prahlad Singh, the accused persons were adamant to kill both injured persons also and with the intention to kill them, they made several blows upon them. The learned trial court considered this aspect in the impugned judgment and has drawn a right conclusion, which we concur with. Further, there is clinching evidence on record that the licensee gun alongwith belt of

cartridges was robbed by the appellants and in committing the aforesaid robbery they also voluntarily caused hurt to them and on that basis offence under Section 394 IPC is also proved against them. We would like to emphasise that deceased Prahlad Singh was assaulted by the accused persons with intention to kill him with the aid of dangerous weapons and ultimately they succeeded and Prahlad Singh died subsequently.

69. Section 394 IPC provides as under :

"394. Voluntarily causing hurt in committing robbery.--If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

70. In the case in hand, we find on the basis of the evidence on record that the aforesaid ingredients of Section 394 IPC are completely made out against the appellants because it is apparent from the evidence on record that when the injured Mewalal reached the place of occurrence, the accused persons also made assault upon him and voluntarily, causing hurt to him, committed robbery by snatching the gun with belt and cartridges from him. This fact has been properly proved in evidence.

71. So far as charge under Section 307 IPC is concerned, the settled law is that it is not necessary that injury, capable of causing death, should have been inflicted. What is material to attract the provisions of

Section 307 of IPC is the intention or knowledge with which the all was done, irrespective of its result. The intention and knowledge are the matters of inference from totality of circumstances and cannot be measured merely from the results. In fact the important thing to bear in mind for determining the question as to whether the offence under Section 307 IPC is made out, is the intention and not the injury, even if it may be simple or minor. Question of intention to kill or knowledge of death is always a question of fact and not of law. The Hon'ble Supreme Court in ***Hari Kishan and State of Haryana vs. Sukhbir Singh, AIR 1988 SC 2127*** has held that the intention or knowledge of the accused must be such as is necessary to constitute murder. In ***State of Madhya Pradesh vs. Harjeet Singh and another, AIR 2019 SC 1120***, it was reiterated that Section 307 IPC does not require that injury should be on vital part of the body. Merely causing hurt with intention or knowledge of causing death is sufficient to attract Section 307 IPC.

72. The aforesaid legal principle, if examined in the context of the facts and circumstances of the present case, is totally applicable and we find that offence under Section 307 IPC is made out against the accused-appellants.

73. Upon careful analysis and consideration of the settled legal position in the backdrop of the facts and circumstances of the the present case, we are of the opinion that the conclusion given by the learned trial court in the impugned judgment and order is in accordance with law and the evidence available on record. The judgment is the result of the thoughtful consideration and cautious scrutiny of the evidence on record, oral as well as

documentary. Thus, this Court is of the view that the prosecution has been able to establish the guilt of the accused appellants under Sections 302, 394 and 307 IPC beyond reasonable doubt and to the satisfaction of the judicial conscience of the Court.

74. The impugned judgment of conviction and sentence, which has been sought to be assailed, is well thought and well discussed and the same, warranting no interference, is liable to be upheld and appeal having no force is liable to be dismissed. Accordingly, the impugned judgment and order is upheld and the appeal is **dismissed**.

75. Appellant Panjabi is in jail. However, appellant Amar Singh is on bail. His bail bonds are cancelled and sureties are discharged. He be taken into custody forthwith for serving the remaining sentence.

76. Let a copy of this judgment along with trial court record be sent to the Court concerned, Kannauj for necessary compliance.

(2023) 5 ILRA 527

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 28.04.2023

BEFORE

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

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 1907 of 2019

**Vinod Chaudhari ...Applicant (In Jail)
Versus**

State of U.P. ...Respondent

Counsel for the Appellant:

Sri Arvind Kumar Kushwaha, Ms. Pooja, Ms. Shweta Kesarwani

Counsel for the Respondent:

G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Section 302-Challenge to-Conviction- In the instant case the deceased was the wife, the entire case was based on circumstantial evidence as there was no eyewitness to the alleged incident-injuries on the dead body were ante mortem in the nature-no incriminating articles were recovered during the investigation and no attempt was made to collect any evidence much less cogent evidence to connect the accused with the alleged crime- when the appellant came to the house after taking dinner at the house of his brother in law at 9 :00 P.M., he found that his wife deceased had been killed by splitting her throat-He has also written in the complaint that this information was given by him belatedly-No children of the deceased or any neighborer has supported the prosecution version that soon before the death of the deceased, the accused was present in the house -The circumstances howsoever strong can not take place of proof and guilt of accused have to be proved by prosecution beyond reasonable doubt-Prosecution had miserably been failed in proving the entire chain of circumstances that the alleged act was committed by the accused only and none else-Hence the order of conviction and sentencing passed by session court is quashed was quashed and the accused is acquitted.(Para 1 to 11)

B. Insofar as the "last seen theory" is concerned, there is no doubt that the appellant being none other than the wife of the deceased and staying under the same roof, was the last person the deceased was seen with. However, such companionship of the deceased and the appellant, by itself, does not mean that a

presumption of guilt of the appellant is to be drawn. The Trial Court and the High Court have proceeded on the assumption that Section 106 of the Indian Evidence Act¹¹ directly operates against the appellant. In our view, such an approach has also not been free from error where it was omitted to be considered that Section 106 of the Indian Evidence Act does not absolve the prosecution of its primary burden. (Para 9)

The appeal is allowed. (E-6)

List of Cases cited:

1. Anter Singh Vs St. of Raj. (2004) 10 SCC 657,
2. Tirmukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681
3. Ganeshlal Vs St. of Mah.(1992) 3 SCC 106
4. Bhaskar Rao & ors. Vs St. of Mah. (2018) 6 SCC 591
5. Ujjagar Singh Vs St. of Punj.(2007) 13 SCC 90
6. Shivaji Chintappa Patil Vs St. of Mah. (2021) 0 SCC 121
7. Kulwinder Singh Vs St. of Punj. (2007) AIR SC 2868
8. Ganpat Singh Vs St. of M.P. (2018) 2 SCC (Cri) 159
9. P. Mani Vs St. of T.N. (2006) AIR SC 1319
10. Kailash Chandra Vs St. of Raj. (2017) 11 SCC 268
11. Smt. Gargi Vs St. of Har. (2019) 0 SCC 1042
12. Satye Singh & anr. Vs St. of UK (2022) 0 (SC) 143
13. Devilal, Babulal Vs St. of Raj. (2019) Law Suit (SC) 36

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

1. Heard Shri Arvind Kumar Kushwaha, Ms. Pooja and Shweta Kesarwani, learned counsel for the sole appellant and Shri N.K Srivastava, learned AGA for the state.

2. This appeal has been preferred by accused Vinod Chaudhari, husband of deceased, Sangeeta, against the judgment and order dated 13.2.2019 of conviction and sentencing in S.T. No. 10 of 2015 (State of UP Vs Vinod Chaudhari) arising out of crime No. 869 of 2014 u/s 302 IPC, Police Station Chopan, District Sonbhadra by ASJ II Sonbhadra.

3. In brief, facts of the case are that informant Lallu Chaudhary, elder brother of the appellant, on being informed by the appellant in the night of 30-9-2014 that his wife has been found dead inside the room, occupied by them rushed to the place of occurrence and saw the dead body of the deceased laying on the bed with spitted throat. The informant (PW 1) moved the complaint (Ex A13) on 1-10-2014 at 5:15 a.m against unknown miscreants. A chik FIR was prepared and police visited the place of occurrence thereafter and performed the punchanama, sent dead body for post-mortem. As per I.O., during the course of investigation the appellant confessed the guilt and on his pointing blood stained axe alleged to be used in commission of crime was recovered from the heap of woods nearby the place of occurrence. After recording evidence of the concerned witnesses I.O., R.B Maurya (PW-10) submitted charge sheet (Ex Ka 12) against the appellant u/s 302 IPC.

4. On 14-5-2015 the appellant was charged u/s 302 IPC to which he pleaded not guilty and claimed to be tried.

5. Following witnesses were examined by the prosecution to prove the guilt of the accused:

PW-1	Lallu Chaudhari, the informant
PW-2	Krishna Chaudhari
PW-3	Nandu Chaudhari, the witness of inquest
PW-4	Shyam Charan Giri , witness of the recovery of the axe.
PW-5	Jai Ram Chaudhari, brother in law of the accused
PW-6	Manoj Chaudhari, brother in law of the accused
PW-7	Bharat, witness of taking sample of plain and blood stained
PW-8	Radhe Shyam Chaudhari
PW-9	Dr. Kranti Kumar, Doctor of autopsy
PW-10	R.B Maurya, I.O.

6. Following material exhibits were relied on by the prosecution:

Ex. Ka.-1	Written report
Ex. Ka.-2,	Panchanama
Ex. Ka.-3,	Recovery memo of weapon of offence
Ex. Ka.-4,	Recovery memo of blood stained soil and simple soil
Ex. Ka-5	Sample of seal
Ex. Ka.-6	Form no.13
Ex. Ka.-7	Form no. 379
Ex. Ka.-8	Report P.S. Chopan
Ex.Ka.-9,	Letter to CMO
Ex. Ka.-10,	Site plan of the place of occurrence
Ex. Ka.-11,	Site plan of place of recovery of weapon of offence

Ex. Ka.-12 and	Charge sheet
Ex. Ka.-13	Chik FIR
Material Ex.-1	Weapon of offence axe.

7. After closer of prosecution evidence the statement of the accused u/s 313 Cr.P.C was recorded wherein he outrightly denied all the charges and incriminating evidence against him and claimed to be innocent.

8. In this case all the witnesses of fact and recovery have been declared hostile and they have not supported the prosecution version. The learned trial court has accepted that the witnesses have not supported the prosecution version, the chain of circumstances is not complete, the motive has not been proved, yet relying on the citations ***Anter Singh Vs. State of Rajasthan (2004) 10 SCC 657***, ***Tirmukh Maroti Kirkan Vs. State of Maharashtra (2006) 10 SCC 681*** and ***Ganeshlal Vs. State of Maharashtra, 1992 (3) SCC 106***, convicted the accused with the help of section 106 of the Indian Evidence Act. The appellant has challenged the impugned judgment on the grounds that it is incorrect, illegal, arbitrary, severe excessive and against the weight of evidence on record. The appellant has been convicted without considering the facts and evidence on record. The offence was committed by the unknown person. The prosecution story has not been supported by the hostile witnesses but this aspect has not been considered by the trial Court, there was no strong motive to the appellant to commit such offence. The trial Court has ignored the material, oral and documentary evidence and has illegally convicted the appellant. Hence the impugned judgment and order be set aside.

9. From the above facts and evidence it is clear that it is not a case of direct evidence but it is based on circumstantial evidence in which if the chain of the circumstances is complete only then an accused can be convicted. In such a case motive, last seen, recovery, extra judicial confession like necessary elements are also considered. It has to be seen as to whether the aforesaid ingredients necessary for the conviction of an accused have been sufficiently established and proved by the prosecution or not. These necessary ingredients are being discussed herein below in the light of facts of the case and evidence available on record.

(a) **Motive** : In written complaint no motive has been assigned to the appellant even none of the witness even the I.O. has not deposed a single word about the motive behind the crime. Generally such brutal crimes are caused due to some motive available to the accused. P.W. 3 Nandu Chaudhary has deposed that the relation between the deceased and the accused were cordial. Though P.W. 7 has been cross-examined by the public prosecutor and the witness was contradicted under Section 145 of the Evidence Act from his previous statement under Section 161 Cr.P.C. in which he denied any illicit relation between the deceased and Guddu Chadudhari alias Shashi Kant and also that the deceased had gone with him for three days and when returned, she was pardoned by the appellant.

P.W. 2 Radheshaym Chaudhary has also denied any estrangement between the deceased and the appellant. Thus neither any motive has been taken by the prosecution nor it has been proved .

In *Bhaskar Rao and Others Vs. State of Maharashtra*, (2018) 6 SCC 591,

Ujjagar Singh Vs. State of Punjab, (2007) 13 SCC 90, it has been held that the motive has significance in cases based on circumstantial evidence.

In *Shivaji Chintappa Patil Vs. State of Maharashtra*, 2021 0 Supreme (SC) 121, it has been held that in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. If motive could not be proved the chain of circumstances would not be said to be completed.

The above citations apply in favour of the appellant and it is concluded that there was no motive to the appellant to kill the deceased.

(b) **Alibi and last seen**: As per F.I.R., it is case of the prosecution that when the appellant came to the house after taking dinner at the house of his brother in law at 9 :00 P.M., he found that his wife deceased Sangeeta had been killed by splitting her throat. He has also written in the complaint that this information was given by him belatedly. No children of the deceased or any neighborer has supported the prosecution version that soon before the death of the deceased, the accused was present in the house. As per F.I.R., the accused had gone at the house of his brother in law for dinner and he was not present on the spot at the time of occurrence. When he came to his house, he found his wife was killed. In this regard no witness of fact has deposed that at the time of occurrence or soon before death of the deceased, the accused was present on the spot. Informant P.W. 1 Lallu has deposed that the accused was very fond of his wife and loved a lot, there was good relation and love between the two. He was very upset and sad after the death of his wife. P.W. 2 Krishna has also deposed that in the night, the deceased was strangled to death by someone, he did not see anyone while

committing the murder. The deceased was present at the time of inquest. P.W.3 Nandu has deposed that at 9:30 P.M. in the night they came to know about the murder of the deceased by the accused. The murder must have happened before that, how and by whom, he don't know. It has also been deposed by him that there were good relations between the accused and his wife. P.W. 5 Jairam Chaudhary has deposed that on the fateful night the accused Vinod Chaudhary, cousin brother Manoj Chaudhary and brother in-law had taken chicken dinner party. It will take 15-20 minute to reach from his house to the house of the accused. At 9:10 P.M. in the night they were informed that the deceased had been killed, he does not know as to why and by whom she was killed. This witnesses has also stated that his wife is cousin of deceased Sangeeta and she never complained that she has any problem with the accused or accused troubled her. The accused had gone to his house directly from his house. He also deposed that when the accused was at his house, Sangeeta had come to ask about making evening meal. After meeting with Hari Ram and his wife she had returned. Similar statement has been given by P.W.6 Manoj Chaudhary brother in law of the accused. This witness has also deposed that Vinod had good behavior with his wife when Vinod went from the house of Jayram, after 10-15 minutes, it was known that Sangeeta was killed. Thus from the above evidence it could not be established that soon before death the deceased and accused were together. It could not be proved that the deceased died after reaching the accused at his house.

In *Kulwinder Singh Vs. State of Punjab*, AIR 2007 SC 2868, it has been held that there must be proximity of time and place. In this case it is lacking.

In *Ganpat Singh Vs. State of M.P.*, (2018) 2 SCC (Cri) 159, it has been observed, it would be difficult in some cases to positively establish that the deceased was lastly seen with the accused when there is a long gap and possibility of other persons coming in between exists. In absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in such cases.

In this case the prosecution has failed in establishing that soon before death the deceased was with the accused but it has been proved that when the accused came to his house, he found the deceased was killed by splitting her throat.

On the basis of above discussion this Court is of the conclusion that the chain of circumstantial evidence as last seen together has not been proved beyond reasonable doubt and it is concluded that the deceased had died when the accused was taking dinner at the house of his brother-in-law.

(c) **Extra judicial confession-** The prosecution has not taken the pleas of extra judicial confession by the accused, though as per I.O., the accused had confessed his guilt before him and at his disclosure statement the blood stained axe was recovered from the heap of woods on his pointing. Such statements written in the case diary has not been proved by the I.O. and such confessions can not be proved in view of Section 25 of the Evidence Act.

(d) **Recovery:** According to the I.O., the accused confessed his guilt and made a disclosure statement on which the blood stained axe used in commission of crime was recovered on his pointing. P.W.4 Shyam Charan Giri has denied that on 3.10.2014, the alleged axe was recovered from the heap of woods before him on the pointing of the accused Vinod. He has also

denied that such axe was sealed before him and has also denied preparation of recovery memo of the axe before him rather he has deposed that on 3.10.2014 he was in Chopan. P.W. 10, I.O. R.B. Maurya, has proved the recovery memo and has also proved the axe as M Ex. 1. but has accepted that he has not written the time of its recovery, neither the wooden part nor the sharp edged part was signed by him.

In this regard, the FSL report is also considered in which blood was found on the axe but it could not be ascertained as to whether it was human blood or not, hence it can not be said that the sharp edged part of the axe was containing human blood of the deceased. The argument of the learned counsel for the appellant is material that if there was any doubt upon the appellant, why he would keep the axe there. Since he had not escaped after the incident and was not arrested, he had ample opportunity to destroy it. Generally such axe are found in every house and when it has not been proved that there was human blood on it, it can not be said that the said axe was used in commission of crime by the accused and when the I.O. found it to be a blind case, he charge-sheeted the accused to shift his burden.

Thus, this Court is of the view that the prosecution has failed in establishing that the axe M Ex. 1 was used in commission of crime and it was containing human blood or it was recovered on the pointing of the accused.

(e) It is also not a case of the prosecution that after the commission of crime, the accused had absconded. Sometimes abscondance of an accused is considered in favour of the prosecution but in this case it has been proved that after knowing that the wife of the accused has

been killed, he informed his brother and lodged F.I.R. through him.

(f) **Applicability of Section 106 of the Indian Evidence Act-** The learned Trial Court has based his judgment of conviction and sentencing upon Section 106 of the Evidence Act and has relied on Trimukh Maroti Kirkan (Supra) in which it had been proved that when the wife was injured in the dwelling house, the husband ordinarily resided there and the husband offered no explanation for the injuries to his wife. In that situation the Apex Court held that the husband was responsible for the injuries.

In this case the facts are quite different. It is not denied that the accused and the deceased were not living together in their dwelling house but it could not be proved that at the time of commission of crime the accused was present there.

Section **106 Evidence Act** is as under:-

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

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

In **P. Mani Vs. State of Tamilnadu, AIR 2006 SC 1319**, it has been held that it is for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, accused and deceased were last seen together inside a room. Hence Section 106 of the Evidence Act can not be said to have any application whatsoever.

In ***Kailash Chandra Vs. State of Rajasthan, (2017) 11 SCC 268***, it has been held that it is trite that prosecution has to stand on its own legs and sufficient evidence should be produced to prove the allegation, no aid of Section 106 can be taken by the Trial Court.

Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused, but the Section would apply to the cases where prosecution has succeeded in proving facts for which reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the Court to draw a different inference.

In para 22 of ***Shivaji Chintappa Patil (Supra)***, it has been held that ---

22. It could thus be seen, that it is well-settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused.

In para 28.1 of ***Smt. Gargi Vs. State of Haryana, 2019 0 Supreme SC 1042***, it has been held that---

28.1. Insofar as the 'last seen theory' is concerned, there is no doubt that the appellant being none other than the wife of the deceased and staying under the same roof, was the last person the deceased

*was seen with. However, such companionship of the deceased and the appellant, by itself, does not mean that a presumption of guilt of the appellant is to be drawn. The Trial Court and the High Court have proceeded on the assumption that Section 106 of the Indian Evidence Act¹¹ directly operates against the appellant. In our view, such an approach has also not been free from error where it was omitted to be considered that Section 106 of the Indian Evidence Act does not absolve the prosecution of its primary burden. This Court has explained the principle in *Sawal Das (supra)* in the following:-*

"10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt.

It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused....."

10. The appellant has relied on following rulings:

Satye Singh and Another Vs. State of Uttrakhand 2022 0 (SC) 143, in this case the deceased was the wife, the entire case was based on circumstantial evidence as there was no eyewitness to the alleged incident, injuries on the dead body were ante mortem in the nature, no incriminating articles were recovered during the investigation and no attempt was made to collect any evidence much less cogent evidence to connect the accused with the alleged crime. The deceased had left house on previous evening of the

alleged incident. It was held that circumstances howsoever strong can not take place of proof and guilt of accused have to be proved by prosecution beyond reasonable doubt. Prosecution had miserably been failed in proving the entire chain of circumstances that the alleged act was committed by the accused only and none else. Hence the order of conviction and sentencing passed by the High Court of Uttarakhand was quashed and the accused were acquitted.

In ***Devilal; Babulal vs. State of Rajasthan 2019 Law Suit (SC) 36***, it has been held that while scrutinizing the circumstantial evidence, a Court has to evaluate it to ensure the chain of events clearly and completely established to rule out any reasonable likelihood of innocence of the accused, there must be evidence to come to conclusion that there can not be a person other than the accused who alone is the perpetrator of the alleged crime and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

In para 11 of ***Shivaji Chintappa Patil (Supra)*** similar principles have been laid down regarding the cases based on circumstantial evidence.

"11. The law with regard to conviction on the basis of circumstantial evidence has been very well crystalised in the 5 (2010) 9 SCC 189 6 (2019) 19 SCC 447 7 (2006) 12 SCC 254 judgment of this Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra :-

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] "19. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions." (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. "

11. On the basis of above discussion this Court is of the view that any ingredient mandatory for conviction and sentencing of an accused in a case based on circumstantial evidence has not been proved beyond reasonable doubt and chain of circumstantial evidence also could not be established against the accused-appellant. Thus, this Court concludes that the order of conviction and sentencing passed by the learned Trial Court is not liable to be sustained in the eye of law and is liable to be set-aside.

Order

The appeal is **allowed** and the impugned order of conviction and sentencing dated 13.12.2019 is hereby quashed. Let the appellant be set free from jail. This order be sent immediately to the Jail Superintendent concerned. Lower Court record be sent back along with a copy of this judgment.

Further Order

After we pronounced the judgment, we are told that there is marriage of the daughter of the appellant. We, therefore, direct the Registry to send operative portion of this judgment to the Jail Authority by E-mail so that the appellant be set free on or before 3rd of May, 2023, with compliance to this Court.

(2023) 5 ILRA 535
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02-12-2022

BEFORE

**THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.**

Criminal Appeal (U/S 374 Cr.P.C.) No. 3129 of
2010
And
Criminal Appeal No. 3379 of 2010

Amar Pal ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Ramanuj Tripathi, Sri Abhishek Mayank

Counsel for the Respondent:
G.A.

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

Penal Code, 1860- Sections 323/34, 325/34, 307/34 & 393-Challenge to Conviction-the evidence on record shows that accused-appellant demanded in extortion (Dhauns) two bottles of liquor and Rs. 10,000/- which was refused by injured who was working as Sales Man at the Wine shop of one person and as such the accused-appellant became furious and caused bodily injuries, which has been reported to be grievous in nature and were on vital part (upper chest region) of injured, who remained under medical treatment for several days-The learned Trial Court after discussing the evidence and statement of the witnesses in detail have rightly come to the conclusion that there is uniformity in the oral and documentary evidence produced by the prosecution and as such the prosecution story cannot be doubted-Held, the appellant has already faced the agony of the protracted prosecution-he has served out more than four years of his sentence and that accused-appellant alone cannot be held responsible for long delay in disposal of this appeal-Considering all aspects of the matter, , it will be in the interest of justice that his sentence be reduced to the period of sentence already undergone.(Para 1 to 36)

B. The term 'Proper Sentence' was explained in *Deo Narain Mandal's Case* by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. (Para 29, 30)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Accused 'X' Vs St. of Mah. (2019) 7 SCC 1

2. St. of M.P. Vs Udham & ors. (2019) 10 SCC 300

3. Mohd. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

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

5. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

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

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

8. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

9. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

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

11. Gopal Singh Vs St. of U.K. (2013) 7 SCC 545

(Delivered by Hon'ble Mohd. Azhar
Husain Idrisi, J.)

1. Heard learned counsel for the appellant and learned A.G.A. for the State. Perused the record.

2. Both the aforementioned criminal appeals arise out of the common judgement and order dated 01.05.2010 passed by the learned Additional Sessions Judge, Court No. 7, Aligarh and are connected to each other, they were heard together and are being decided by a common judgment.

3. The instant criminal appeals arise out of the common judgment and order dated 01.05.2010 passed by the Additional Sessions Judge, Court No.7, Aligarh in Sessions Trial No.334 of 2008, arising out of Case Crime No. 123 of 2007, under Sections 323/34, 325/34, 307/34 and 393 I.P.C., Police Station Gaunda, District

Aligarh whereby the accused persons have been convicted and sentenced under Section 323/34 I.P.C. to undergo six months' simple imprisonment, under Section 325/34 I.P.C. to undergo two years' simple imprisonment, under Section 307/34 I.P.C. to undergo seven years' simple imprisonment and under Section 393 I.P.C. to undergo two years' simple imprisonment with default clauses.

4. Succinctly, the prosecution story is Suneet Arora gave a written tehrir at Police Station Gaunda, District Aligarh stating therein that on 20.09.2007 when his salesmen, namely, Kamal Singh and Umesh Kumar were selling liquor in his English Wine shop, two persons came riding on a black colour motor cycle at about 09:15 P.M. and asked for one bottle of liquor, to which the Kamal Singh denied to give. Due to which they assaulted Kamal Singh with kick and fist and one of the accused had fired shot from his country made pistol with an intention to kill him. The other person was also equipped with a country made pistol. On an alarm raised by the Umesh, the accused persons fled away. At the time of incident, electric bulbs were illuminating. Umesh immediately informed about this incident to the complainant over the phone. At the time of incident, the complainant's partner, namely, Jabir Ali was in Iglas town and on hearing about the incident, they both came to the Police Station Gaunda where Umesh had also brought the injured Kamal Singh. The injured Kamal Singh told the name of accused person, who fired the gun shot as Amar Pal and he also narrated the entire incident. It is also stated in the written report that both the salesmen can recognize the accused persons on seeing them. On the basis of above written report, a first information report was registered as Case

Crime No.123 of 2007, under Sections 323, 307 IPC at Police Station Gaunda, District Aligarh against the accused persons. The injured was examined at J.N. Medical College, Aligarh and was also admitted in that hospital that on 20.09.2007, the informant for further treatment.

5. Initially, the investigation of this case was entrusted to Sub-Inspector Phool Singh and later on was handed over to S.I. Farooq Ahmad. The I.O. prepared site plan, recorded the statement of witnesses under Section 161 CrPC. After completing necessary formalities and due investigation I.O. submitted charge sheet against the accused Amar Pal and Bobby under Sections 323, 325, 307, 393 IPC, in the court of CJM, Aligarh who took the cognizance in the matter.

6. The case being exclusively triable by the court of sessions, learned CJM committed it to the court of sessions, for trial. Where it was registered as S.T. No. 334 of 2008.

7. The learned Trial Court framed the charges against both the accused persons under Sections 323/34, 307/34, 325/34 and 393 I.P.C., the accused abjured the charges. They denied the charge and claimed to be tried.

8. In order to prove its case, the prosecution before the trial court examined the following ocular witnesses:-

S.L. Nos.	Particulars of witnesses	Witness Nos.
1	Kamal Singh	Pw-1
2	Suneet Arora	Pw-2
3	Umesh Pal	Pw-3
4	Dr. Ahshan Ahmad	Pw-4

5	Vijendra Singh	Pw-5
6	Dr. Professor M.H. Veg	Pw-6
7	S.I. Phool Singh	Pw-7
8	S.I. Farooq Ahmad	Pw-8
9	Dr. Basant Kumar	Pw-9

9. Apart from it, the prosecution has also relied upon following documentary evidence:-

S.L. Nos.	Particulars	Ext. Nos.	Proved By
1	Tehrir	Ext. Ka-1	Pw- 2
2	Chik FIR	Ext. Ka-3	Pw- 5
3	Carbon copy of kaimi G.D.	Ext. Ka-4	Pw- 5
4	Injury Report	Ext. Ka-2	pw- 4
5	Site Plan	Ext. Ka-28	Pw- 7
6	Charge-sheet	Ext. Ka-29	Pw- 8
7	Radiology report	Ext. ka-30	Pw- 9
8	Injury status report of injured	Ext. Ka-5 to 27	Pw- 6

10. After completion of the prosecution evidence, accused were examined under Section 313 Cr.P.C. Accused-appellant wherein accused denied the statement of prosecution witnesses and stated they are falsely implicated due to party bandi.

11. Accused/ appellant in their defence did not adduce any ocular or documentary evidence.

12. The learned Sessions Judge after appreciating the evidence on record and other material came to the conclusion that the prosecution has been able to prove its case beyond reasonable doubt against the accused persons. He accordingly convicted and sentenced them as stated above. Aggrieved the impugned judgment and order accused/ appellants preferred these separate appeals.

13. It has been argued by the learned Counsel for the appellant that the impugned judgment of conviction is wholly unjustified as the findings recorded by the learned trial court are not based on correct appreciation of evidence on record. Learned Sessions Judge has given too much weight to the prosecution version. The learned Sessions Judge has also committed error in believing the testimony of the prosecution witnesses, overlooking the fact that there are major contradictions in their statement.

14. Learned counsel for the appellant has vehemently argued that the actual incident has not been witnessed by anyone and there was no motive for the appellant to commit the said offence but on account of past enmity of village parti-bandi, they were falsely implicated in the present case.

15. Lastly, it has been argued by the learned counsel for the appellant that even assuming though not conceding that the appellants have committed the offence, then too the punishment awarded to the appellants is excessive as from the medical report it is clearly established that the injuries were not on vital part and the case will fall only under Section 324 IPC and not under Section 307 IPC as held by the learned Sessions Judge.

16. Refuting the assertions of the appellant's Counsel, learned State Counsel has submitted that it is incorrect to say that the findings of conviction recorded by the learned court below are erroneous or not based on correct appreciation of record. As a matter of fact, the learned court below has scrutinized the evidence in its correct prospective and thereafter has recorded the findings of guilt. The eye-witnesses have supported the prosecution version and even if, it is assumed that there were certain contradictions in their statement that were minor in nature and were not fatal for the prosecution case. He further submitted that the medical evidence has fully supported the prosecution version and as such it would be wrong to say that the findings are perverse. Lastly, it has been submitted that the accused persons are criminal minded and were earlier involved in various criminal cases. They have spread terror in the locality.

17. A perusal of the material on record reflects that the incident had occurred on 20.09.2007 at about 9.15 PM and the FIR was lodged on the same day at about 10.15 PM at PS Gaunda, District Aligarh under Section 323/307 IPC. Before the court below, the accused persons have brought by Constable Jagdish Singh, whose name is entered in the medical record. Had the FIR would not have come to existence, there was no occasion for the injured being brought to the Medical College with 'chitti majroobi' by the Head Constable. It has come in the statement of the injured Kamal-Singh that he had told the name of persons who had fired shot to complainant Sunit Arora. The said finding of the Trial Court is based on documentary evidence, which is fully justified in the circumstances of the case.

18. Kamal Singh (P.W.1), who is injured witness in his testimony has stated in clear words that three persons came on the Motor Cycle out of whom Amar Pal and Bobby were armed with weapon. He had further deposed that first shot was fired by Amar Pal while the second shot was fired by Bobby as a result of which he fell down. Nanau, who was working as Salesman carried him to the Medical College where he remained admitted for quite some time and treatment went for a month. He further deposed that Bobby and Amar Pal were known to him from much earlier as he was working in the shop since three years. Firing of shot by the accused persons have been corroborated by the P.W.3 Umeshpal, who is an eye witness of the incident and was working on the Wine Shop as Salesman.

19. Vijendra Singh (P.W.5) is Constable Clerk at PS Gaunda and he has registered the FIR on 20.9.2007 at 22.15 hrs as case crime no. 279/07 under Section 323/307 IPC on the basis of report of the complainant. The said witness has proved the document before the court. Dr Ahsan Ahmad (P.W.4) has deposed before the Court that he was posted at Medical College Aligarh and about 10.55 Constable Jagdish Singh had brought the injured to the hospital. He was examined by him and found grievous injuries including gun shot injury on the body of the injured. Thus, it is clear that the version as given in the FIR has been corroborated by oral and medical evidence.

20. It is pertinent to mention that it is fully established from the evidence on record that accused-appellant demanded in extortion (Dhauns) two bottles of liquor and Rs. 10,000/- which was refused by injured -Kamal Singh, who was working as

Sales Man at the Wine shop of Sunit Arora and as such the accused-appellant became furious and caused bodily injuries, which has been reported to be grievous in nature and were on vital part (upper chest region) of Kamal Singh, who remained under medical treatment for several days.

21. The learned Trial Court after discussing the evidence and statement of the witnesses in detail have rightly come to the conclusion that there is uniformity in the oral and documentary evidence produced by the prosecution and as such the prosecution story cannot be doubted. It is relevant to point out that it is hard to believe that the injured will falsely implicate the appellant and would allow the real assailants to go scot free. Therefore, the assertions of the appellant are wholly baseless and unfounded. Moreover, the learned Counsel for the appellant have failed to establish any concrete evidence for upsetting the findings of guilt recorded by the Trial Court.

22. In view of the aforesaid discussions, I am of the considered opinion that the view taken by the lower court below is perfectly justified and based on correct appreciation of evidence on record and as such the conviction as awarded to the appellants is upheld.

23. So far the sentencing of the accused go the learned trial judge has awarded the following sentence to the accused appellants:-

"अभियुक्तगण अमर पाल पुत्र श्री तुलाराम एवं बौबी पुत्र सरदार सिंह को भारतीय दण्ड संहिता की धारा 323 सपठित धारा 34, 325 सपठित धारा 34, 307 सपठित धारा 34 एवं 393 के अधीन दण्डनीय अपराध का दोषी पाते हुये उनमें से प्रत्येक अभियुक्त को भारतीय दण्ड संहिता की धारा 323 सपठित धारा 34 के आरोप में छः माह के सश्रम कारावास, भा०दं०सं० की धारा 325 सपठित धारा 34 के अधीन

दण्डनीय आरोप में दो वर्ष के सश्रम कारावास तथा रुपये 1000-00 के अर्थदण्ड से दण्डित किया जाता है। अर्थदण्ड की धनराशि अदा न करने पर उनमें से प्रत्येक को एक माह का अतिरिक्त साधारण कारावास भुगतना होगा, भा०द०सं० की धारा 307 सपठित धारा 34 के अधीन दण्डनीय अपराध के लिए उनमें से प्रत्येक को सात वर्ष के सश्रम कारावास एवं रुपये 2000-00 के अर्थदण्ड से दण्डित किया जाता है। अर्थदण्ड की धनराशि अदा न करने पर उनमें से प्रत्येक को दो माह का अतिरिक्त साधारण कारावास भुगतना होगा तथा भा०द०सं० की धारा 393 के अधीन दण्डनीय अपराध के अन्तर्गत उनमें से प्रत्येक को दो वर्ष का सश्रम कारावास तथा 2000-00 रुपये के अर्थदण्ड से दण्डित किया जाता है। अर्थदण्ड की धनराशि अदा न करने पर उनमें से प्रत्येक को दो माह का अतिरिक्त साधारण कारावास भुगतना होगा। अभियुक्तगण की सभी सजाएँ साथ-साथ चलेंगी।"

24. So far as sentence regarding the accused/ appellant Bobby is concerned he was lodged in jail on 06.02.2009 and after serving the period of sentence as awarded to him by the trial court and deposition of fine, was released from jail on 2.7.2014, which is evident from the report dated 18.8.2022 of Senior Jail Superintendent, Aligarh. As I have already held that the conviction of the appellant-Bobby was perfectly justified, the Criminal Appeal No. 3379 of 2010 filed by him is liable to be dismissed. Since, the appellant-Bobby has already served out the sentence, he need not to surrender and his bail bonds, if any, stood discharged.

25. So far as Amar Pal is concerned, he was awarded maximum sentence of seven years. and is incarceration since 01.05.2010 for a long period, therefore, He prayed to reduce his sentence for the period already undergone. In view of this argument it will be useful to navigate the law relating to sentencing in India.

26. In historical backdrop, Indian parliament has not laid down any sentencing policy, though **Malimath Committee (2003)** and **Madhava Menon Committee (2008)** has asserted the need of

sentencing policy in changing circumstances of the society. So, the Courts are dependant on the precedent laid down by the Supreme Court.

27. Principle of sentencing has been an issue of concern before the Supreme Court in many cases and tried to provide clarity on the issue. Apex Court has time and again cautioned against the cavalier manner considering the way sentencing is dealt with High Courts and Trial Courts.

In Accused 'X' vs. State of Maharashtra (2019) 7 SCC 1) "the Apex Court has held that" It is established that sentencing is a socio-legal process, wherein a Judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature peroxided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner."

"12. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

13. In **State of Madhya Pradesh vs. Udham and others (2019) 10 SCC 300** the Apex Court has held "we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material support of amenity; (iii) extent of humiliation; and (iv) privacy breach."

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

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

29. The term 'Proper Sentence' was explained in **Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]** by observing

that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

30. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, the Supreme Court referred the judgments in **Jameel vs State of UP [(2010) 12 SCC 532]**, **Guru Basavraj vs State of Karnataka, [(2012) 8 SCC 734]**, **Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323]**, **State of Punjab vs Bawa Singh, [(2015) 3 SCC 441]**, and **Raj Bala vs State of Haryana, [(2016) 1 SCC 463]** the Apex Court has reiterated that,

in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate

punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

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

32. As discussed above, 'reformatory theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as

discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

33. It is well settled principle that sentence must be just, but simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the court but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value based social mainstream may be the guiding factors. Needless to emphasize, these are certain illustrative aspects put forth in a condensed manner.

34. It has also been observed by the Apex Court that

there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self adhered moralistic vision nor hypothetical apprehensions should be allowed to have

any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment. In **Gopal Singh v. State of Uttar Pradesh (2013) 7 SCC 545**, the Apex Court elaborating the sentencing that, while imposing sentence, has to keep in view the various complex matters in mind. In respect of certain offences, sentence can be reduced by giving adequate special reasons but the special reasons have to rest on real special circumstances.

35. In the instant case, alleged incident took place on 20.09.2007, about 16 years ago. Appellant Amar Pal is not a previous convict. He has no criminal antecedents. Nothing has been brought to the notice of the court that the accused/ appellant after being released on bail had ever misused the liberty of bail so granted to him. Keeping in view the facts and circumstances of the case and the fact that the appellant has already faced the agony of the protracted prosecution A perusal of the record reveals that he has served out more than four years of his sentence and that accused-appellant alone cannot be held responsible for long delay in disposal of this appeal. Considering all aspects of the matter, no useful purpose would be served by sending accused-appellant in to judicial custody to suffer further imprisonment, rather it appears that ends of justice would meet, if his sentence is reduced to the period already undergone, it will be in the interest of justice that his sentence be reduced to the period of sentence already undergone. Sentence of fine is, however,

maintained along with its default clause. His appeal is liable to be dismissed with above modification in the impugned judgment and order dated 01.05.2010.

36. Resultantly, the instant appeal is **party allowed** against the appellant Amar Pal with following directions:-

(i) The judgment of conviction dated 01.05.2010 is confirmed though the sentence awarded, is modified to the period of already undergone. Accordingly, he be enlarged forthwith, if he is not in judicial custody he need not surrender and his bail bonds are cancelled and sureties stands discharged.

(ii) The amount of fine shall be paid by appellant Amar Pal within three months from the date of furnishing certified copy of the judgment. In default, thereof, appellant has to undergo an additional simple imprisonment as awarded by the trial court.

(iii) A copy of judgment be sent to Court concerned for necessary information and compliance.

(iv) Trial court's record be remitted back forthwith.

(2023) 5 ILRA 543
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Appeal No. 5184 of 2022

And

Criminal Appeal No. 6104 of 2022

And

Application U/S 482 No. 22777 of 2022 & 2189 of 2023

Jhabbu Dubey @ Pradeep Kumar Dubey
...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:

Sri Jaysingh Yadav

Counsel for the Respondents:

G.A., Sri Ashutosh Kumar Tiwari, Sri Animesh Srivastava, Sri Ashish Kumar

A. Criminal Law - Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act (POA), 1989 - Section 14-A(1), 3(1)(a) & (b) of SC/ST - Indian Penal Code, 1860 - Section 324 - Challenge to Chargesheet as well as Cognizance order - the informant and the injured have given their respective affidavits before the concerned court denying the entire story and denying his presence over the place of incident - The injured himself in his affidavit clearly absolved the appellant from commission of the offence - He stated in his affidavit that out of sheer accident he has fallen down and consequently received injuries and the appellant is not at all guilty of the alleged offences - if there is a compromise between the contesting parties, then the deposit of the amount back in the State exchequer shall be sine qua non and condition precedent for any settlement or truce between the parties without which no compromise could be verified by the court concerned - Since all the four proceedings have already been allowed by this Court, still the victims are directed to deposit the amount received by them within next twenty days in the treasury of Samaj Kalya Vibhag of respective Session's Division. (Para 1 to 27)

B. When there is settlement between the parties, there is no threat for any offensive against the victim and the entire atmosphere is full of peace, tranquility and positivity. There cannot be any good justification to keep that money for the victim and in all fairness they are supposed to return back the money to the State Government. This is the hard-earned money of innocent tax-payers and any atrocities against the victims cannot be exploited to earn and enjoy the money from the State

Government even when there is compromise between them. (Para 24)

C. The financial assistance is given with a sole motive to victims considering that they are downtrodden so that they may not feel scared or hopeless and give-up the proceedings on account of paucity of funds. The State has come out to help them and Welfare Department of the State has been authorised and empowered to provide financial assistance to them. This indeed is a laudable object whereby the State being a welfare State is providing the financial assistance to the victims belonging to SC/ST community so that they may contest their cases, summon the witnesses and meet out all the expenses incurred during trial. Thus the underline idea of providing financial assistance is that there shall not be any paucity of funds to the victim in contesting the case to its logical conclusion and the wrongdoers may be suitably punished and penalized for their acts committed against the victims. All these arrangements are provided to the victims by the State Government only to achieve an objective that the members of SC/ST community should feel free in contesting the case and rest of the financial burden shall be borne out by the State. (Para 22)

The appeal is allowed. (E-6)

List of Cases cited:

1. Ramgopal Vs The St. of M.P. in CRLA No.1489 of 2012
2. Ramawatar Vs The St. of M.P. in CRLA No.1393 of 2011
3. The St. of M.P. Vs Laxmi Narayan & ors. (2019) 5 SCC 688
4. Gian Singh Vs St. of Punj. (2012) 10 SCC 303

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri Jaisingh Yadav, Shri Achyut Jee, Shri Girish Singh, Shri Anil Kumar Yadav, Shri Ajeet Singh learned

counsel for the appellants/applicant and Shri Animesh Srivastava, Shri Ashish Kumar, learned counsel for opposite party no.2 as well as learned Additional Government Advocate for the State. Perused the record of the case.

2. The common prayer sought by these proceedings, is that the further proceedings of the respective cases which are pending against the accused-appellants before different courts at different stages may be dropped in the light of compromise/settlement between the parties. These cases relate to the relevant provisions of SC/ST Act along with sections of I.P.C. are also involved, for which accused-appellants are facing trial, meaning thereby, that the pending cases against the appellants/applicants may be quashed, as there is truce and settlement between the contesting parties and the informants of these cases are not inclined to prosecute the appellants/applicants in the light of compromise/settlement executed between the parties.

3. Before addressing on the merit of the case, it is desirable to give a bird's eye view on the factual aspect involved in respective cases, so as to appreciate the controversy in hand in its correct perspective :

**(I) CRIMINAL APPEAL
NO.5184 OF 2022 (JHABBU DUBEY @
PRADEEP KUMAR DUBEY) :**

This is the appeal u/s 14-A(1) of SC/ST Act on behalf of Jhabbu Dubey @ Pradeep Kumar Dubey challenging the charge sheet dated 7.6.2022 as well as the cognizance order dated 4.7.2022 in S.S.T. No.265 of 2022 (State vs. Jhabbu Dubey @ Pradeep Kumar Dubey), pending in the court of Special Judge (SC/ST) Act,

Lalitpur, arising out of Case Crime No.76 of 2022, u/s 324, 504 I.P.C. and 3(1)(a) & (b) of SC/ST Act, P.S.- Jakhaura, District Lalitpur. The informant of the F.I.R. is Surendra s/o Haricharan Khatik and the injured in this case is his brother Shailendra.

F.I.R. was registered by the informant Surendra against the appellant Jhabbu Dubey on 11.4.2022 for the incident said to have taken place on 10.4.2022, with the allegation that on the fateful day the informant along with his brother Shailendra was sitting, suddenly Jhabbu Dubey, without any rhyme and reason, started hurling filthy abuses and when resisted, he became aggressive and by sword, he has caused injuries to his brother Shailendra. The investigation reveals sufficient material against the appellant and accordingly on 7.6.2022 a report u/s 173(2) of Cr.P.C. by the concerned I.O. was filed u/s 324, 504 I.P.C. and Section 3(1)(a) & (b) of SC/ST Act against the appellant. Special Judge, SC/ST Act, Lalitpur on 4.7.2022 has taken cognizance of those offences and issued process against the appellant to face the prosecution arising out of Case Crime No.76 of 2022 u/s 324, 504 I.P.C. and Section 3(1)(a) & (b) of SC/ST Act.

Pending the proceeding, the informant Surendra s/o Haricharan Khatik and the injured Shailendra s/o Haricharan Khatik have given their respective affidavits before the concerned court on 31.5.2021, denying the entire story of 10.4.2022 and denying his presence over the place of incident. The injured Shailendra himself in his affidavit clearly absolved the appellant from commission of the offence. He stated in his affidavit that out of sheer accident he has fallen down and consequently received injuries and the

appellant is not at all guilty of the alleged offences.

After having the affidavits, present appeal u/s 14-A(1) of SC/ST Act was filed for quashing of the proceeding pending against the appellant.

On the earlier occasion, in this case the Court has sought a report from the District Magistrate, Lalitpur/Social Welfare Officer as to what amount of compensation has been advanced to the injured Shailendra. Consequently, a report from the C.J.M., Lalitpur dated 3.8.2022 was received, which indicates that Rs.25,000/- (25%) has been advanced to the injured pursuant to Rule 12(4) of SC/ST Rules, 1995 and its relevant Schedule.

(II) Criminal Appeal No.6104 of 2022 (Vishwanath Yadav and another vs. State of U.P. and another):

Short counter affidavit filed today by Devendra Kumar-opposite party no.2, in which in paragraph 5, there is admission to the effect that a compromise was executed on 10.5.2021 on his own volition and accord and he voluntarily moved before the concerned court so as to quash the proceeding pending against the appellants on the basis of compromise between the contesting parties.

In this appeal the prayer sought is to set aside the impugned order dated 10.5.2022 passed by the Special Session Judge, SC/ST Act, Jhansi as well as entire criminal proceeding of Special Case No.1578 of 2019 (State vs. Vishwanath and another), arising out of Case Crime No.114 of 2019, u/s 323, 504, 506 I.P.C. and Section 3(1)(a) & (b) of SC/ST Act, Police Station-Moth, District -Jhansi in terms of compromise dated 10.5.2022.

Perusal of the order impugned dated 10.5.2022 indicates that the learned Session Judge have mentioned that the said compromise relates to the SC/ST Act and

as the offences u/s SC/ST Act are not compoundable, and thus the compromise is rejected and declined.

In this case the F.I.R. was got registered as Case Crime No.114 of 2019 on 27.4.2019, u/s 323, 504, 506 I.P.C. and Section 3(1)(a) of SC/ST Act by the informant Devendra against the appellants Vishwanath Yadav and Shilu with the allegation, in brief, that on the fateful day around 06.30 he was sitting at his house and per force the appellants were compelling the informant to perform their work and when the informant refused, they started hurling filthy abuses and assaulting him by kicks and fists, causing injuries to him. After commission of assault, both of them fled away from the site.

After recording the statements, the police have submitted charge sheet on 31.5.2019 u/s 323, 504 I.P.C. and 3(1)(a) of SC/ST Act against the appellants and the learned Special Judge, SC/ST Act, have taken cognizance of those offences on 25.9.2019 under the aforesaid sections. In addition to this, on 20.2.2020 the charges were also framed against the appellants u/s 323, 504 I.P.C. and 3(1)(a) of SC/ST Act by the Special Judge, SC/ST Act, Jhansi. Thereafter, the appellants were bailed out in the matter and the trial is progressing against them slowly.

Meanwhile an application dated 10.5.2022 was given by the informant before the Special Judge, SC/ST Act, Jhansi, mentioning therein that the opposite party no.2 is the injured as well as the informant of the case who lodged the FIR, but on account of intervention by the local co-villagers and other respectable members of the society, the matter has been settled down amicably between the parties outside the court. Now there is no grudges against the appellants and the opposite party no.2

does not want to proceeding with the case any more and same may be quashed.

(III) APPLICATION U/S 482 No.22777 OF 2022 (Dharmendra @ Bauwa Bajpai and another vs. State of U.P. and 2 others):

In this case, the extra-ordinary power of this Court u/s 482 Cr.P.C. was invoked to quash the charge sheet No.89/2021 dated 01.06.2021, cognizance order dated 29.7.2021 as well as entire criminal proceeding of Case No.672 of 2021 (State vs. Dharmendra @ Bauwa Bajpai and another), arising out of Case Crime No.44/2021, u/s 342, 323, 308 I.P.C. and 3(1)(a) of SC/ST Act, Police Station Chaubepur, District Kanpur Nagar on the basis of compromise dated 24.6.2022, pending in the court of Additional District/Session Judge, Court No.2/Special Judge (SC/ST Act), Kanpur Dehat.

Genesis of this case starts from lodging of F.I.R., which was registered as Case Crime No.44 of 2021 at Police Station Chaubepur on 28.2.2021 by the informant Harishchandra (opposite party no.2) against Bauwa Bajpai and Vinay for the incident said to have taken place on 27.02.2021 with the allegation that on the fateful day around 11.00 in the night the applicants had called the informant's brother Shobhit Gautam and brutally assaulted him by kicks and fists and he got admitted in Prakash Nursing Home. The FIR was registered u/s 342, 323 I.P.C. and 3(1)(a) of SC/ST Act, but after the investigation into the case, the police have submitted report u/s 173(2) Cr.P.C. u/s 342, 323, 308 I.P.C. and 3(1)(a) of SC/ST Act, mentioning that Section 308 I.P.C. has been added among array of sections keeping in view that the injured has received head injury. Cognizance of those offences was taken by the learned Special Judge, SC/ST Act, Kanpur Dehat on 29.7.2021.

Learned counsel for the applicants has drawn attention of the Court to Annexure-6, which is a compromise deed executed on 24.6.2022, signed by Harishchandra (the informant) and Shobhit Gautam and countersigned by Dharmendra @ Bauwa Bajpai and Vinay. In support of said application, they have filed the affidavit sworn by Shobhit Gautam, the injured. In para-5 of the affidavit, it is mentioned that since both the accused as well as victim belongs to same village, therefore, after intervention of reputed persons of the village, there is truce and compromise between them. After this compromise which was signed by the informant on his free and sweet will, the informant does not want to proceed with the case any more and he wants that the impugned proceeding against the applicants may be quashed in the light of the compromise.

(IV) APPLICATION U/S 482 No.2189 OF 2023 (Rakesh and 3 others vs State of U.P. and another):

By means of the present 482 application the applicants are invoking the plenary power of this Court u/s 482 Cr.P.C. challenging the entire proceeding of Special Session Trial No.134 of 2022 (State vs. Bhajuram & others), arising out of Case Crime No.152 of 2014, u/s 147, 323, 504, 427 I.P.C. & Section 3(1)(10) of the SC/ST Act, Police Station Puranderpur, District Maharajganj, pending in the court of learned Special Judge, SC/ST Act, Maharajganj in the light of compromise entered between the parties.

In fact this is the third application u/s 482 Cr.P.C. on behalf of applicants. First 482 Application No.6326 of 2022 (Rakesh & 3 others vs. State of U.P. & another) which was disposed of by Coordinate Bench of this Court vide order dated 6.7.2022 with a direction to get the

compromise executed between the parties verified from the concerned court below. Thereafter, second 482 Application No.29644 of 2022 (Rakesh & 3 others vs. State of U.P. and another) which was dismissed as withdrawn with liberty to file a fresh vide order dated 07.12.2022.

It is contended by learned counsel for the applicant that the informant Arjun belongs to 'Dhobi' caste has lodged an FIR through an application u/s 156(3) Cr.P.C. for the incident said to have taken place on 30.11.2013 at 05.00 in the evening, but its FIR was came into existence on 12.02.2014 at 13.10 hours. It was alleged by the informant that all named accused persons have assaulted by lathi and danda causing injuries to Prabhavati and Sharda. The accused persons are 5 in number including one lady Ishrawati, belongs to caste 'Kalaar' (OBC). FIR was registered u/s 147, 323, 504, 506, 427, 452, 380 I.P.C. and during investigation the police has added Section 3(1)X of SC/ST Act, but the charge sheet was submitted against the applicants on 26.2.2014 only u/s 147, 323, 504, 506, 427 I.P.C. and Section 3(1)X of SC/ST Act.

I have perused the compromise deed dated 23.02.2022 and 20.7.2022 (Annexure-9 and 10 to the petition) and verification order dated 18.8.2022 passed by the court below (Annexure-10 to the petition). I have also perused the respective affidavits of the informant as well as injured lady, who in so many words have accepted that on account of some misunderstanding they have lodged an FIR, but now there is a truce and compromise between them and the injured does not want to proceed with the case any further against the applicants. Therefore, they have requested that they have got no objection, if the entire proceeding pending against the

applicants is quashed in the light of compromise.

4. Above-mentioned is the factual narration of respective cases which deserves attention of the Court.

5. Respective counsels have floated their statements at length and have relied upon two recent judgments pronounced by Hon'ble Apex Court on the issue of compounding of offences, especially focusing the provisions of SC/ST Act in addition to the provisions of Indian Penal Code. These two celebrated judgments recently pronounced by the Hon'ble Apex Court are :

(i) Ramgopal vs. The State of Madhya Pradesh in Criminal Appeal No.1489 of 2012 decided on 29.9.2021.

(ii) Ramawatar vs. The State of Madhya Pradesh in Criminal Appeal No.1393 of 2011 decided on 25.10.2021.

Both these judgments are of great help in deciding of aforesaid Criminal appeals u/s 14A(1) of SC/ST Act as well as Applications u/s 482 Cr.P.C.

6. After hearing the respective counsels at considerable length and learned A.G.A., a question of law poses for consideration; as to whether the High Court has power to quash the proceedings emanating from non-compoundable offences, which has no adverse impact or depriving effect on the society at large on the basis of compromise between the accused and the victim. This issue is no longer res integra and same has been authoritatively settled by number of judgments by the Hon'ble Apex Court. The learned counsels have heavily counted on these compromise/settlement between the parties and sought the quashing of criminal

prosecution in its entirety, relying upon the aforesaid recent judgments of Hon'ble Apex Court, Ram Gopal (*supra*) and Ramawatar (*supra*).

7. Learned A.G.A. has controverted the factum of compromise and floated his own submissions against the prayer sought by the appellants/applicants.

8. Before scrutinizing the facts of these cases and especially the power of this Court u/s 482 Cr.P.C., it would be desirable to spell out the relevant extract of yet another celebrated judgment of Hon'ble Apex Court in the case of **Gian Singh vs. State of Punjab, 2012 (10) SCC 303** which reads thus :

"61. the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. **Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed.** However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have

serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. **But the criminal cases having overwhelmingly and pre-dominantly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim.** In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

9. On the identical footing the Hon'ble Apex Court have carved out broad fundamentals from the various judicial

pronouncements and has been recapitulated by a three Judges Bench of Hon'ble Apex Court in the case of ***State of Madhya Pradesh vs. Laxmi Narayan and others, 2019 (5) SCC 688***, wherein the Hon'ble Apex Court in its para-15 has elaborated, as under :

(1) *that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;*

(2) *such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;*

(3) *similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;*

(4) xxxxxxxxxxxx;

(5) ***while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the***

antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc."

10. Now the Court has to strike a balance between the provisions of Section 320 Cr.P.C. on one hand, and Section 482 Cr.P.C. on the other hand. Meaning thereby, the offences which are not compoundable can be compounded in the criminal court in purported exercise of powers u/s 482 Cr.P.C. Any such exercise or attempt by the court would amount to alteration, addition and modification of Section 320 of Cr.P.C., falls within the exclusive domain of the legislature. Nevertheless, the limited jurisdiction to compound an offence within the framework of Section 320 Cr.P.C. is not an embargo against invoking the inherent powers of the High Court in the interest of justice and in order to attain the larger good keeping in view the peculiarity of the facts and circumstances of such cases and for the justifiable reasons could be invoked its plenary powers to prevent the abuse of process of court and to secure the ends of justice. Thus the High Court, therefore, having regard to the nature of the offence and the facts of the parties, who have amicably settled their dispute and misunderstandings outside the court and willingly consented to nullify the criminal proceeding, can quash such proceeding in exercise of its plenary power u/s 482 Cr.P.C., even though the offences are not compoundable in nature. The High Court can indubitably evaluate the consequential impact of the offence beyond the body of an individual, and therefore, adopt a pragmatic approach to ensure that the felony, even if goes unpunished, does not

tinker with or paralyze the very object of administration of criminal justice.

11. The offences which are serious offences or which involved the moral turpitude or have a harmful effect on the society or a moral fabric of the society or matter involves the concerning of public policy can not be construed betwixt two individual or group only and such an offence have a potential to impact the society at large. If such an offence is permitted to compound or the offender of such an offence goes unpunished, it would not only send a wrong signal to the society, but may also accord undue benefit to unscrupulous, habitual or professional offenders, who can secure a settlement through duress, threats, societal boycotts, bribes or other dubious means.

12. Marshaling the facts and circumstances and crystallizing the various previous legal pronouncements of Hon'ble Apex Court, in the case of ***Ramgopal vs. The State of Madhya Pradesh, Criminal Appeal No.1489 of 2012 decided on 29.9.2021***, the Hon'ble Apex Court have well analyzed the axiom that the plenary jurisdiction of this Court to impart a complete justice under Article 142 of the Constitution cannot ipso facto be limited or restricted by ordinary statutory provisions. It is also noteworthy that even in the absence of an express provision akin to Section 482 Cr.P.C., conferring powers on the Supreme Court to abrogate and set aside criminal proceedings, the jurisdiction exercisable under Article 142 of the Constitution embraces this Court with scopious powers to quash criminal proceeding also, so as to secure complete justice. Similarly on the same line and path, the High Courts too, are armed with the power u/s 482 Cr.P.C. to quash the

proceedings where the parties on its own volition and accord decided to bury their differences and dispute outside the court, approaches the High Court for quashing the proceedings, the High Court can exercise its power u/s 482 Cr.P.C. for quashing the proceedings to secure the complete justice between them. In doing so a due regard must be given to the overarching objective of sentencing in the criminal justice system, which is grounded on the sublime philosophy of maintenance of peace of the collective and that the rational of placing an individual behind bars is aimed at his reformation.

13. Thus, the L.C.M. of aforesaid discussion is that as opposed to section 320 Cr.P.C. where the Court is squarely guided by the compromise between the parties in respect of offences 'compoundable' within the statutory framework, the extra-ordinary power enjoined upon a High Court Under Section 482 Cr.P.C. or vested in the Hon'ble Apex Court under Article 142 of the Constitution, can be invoked beyond the metes and bounds of Section 320 Cr.P.C. Nonetheless, it is reiterated that such powers of wide amplitude ought to be exercised with its extreme care and cautious in the context of quashing criminal proceeding, bearing in mind : (i) nature and effect of offence on the conscious and temper of the society; (ii) seriousness of the injury, if any; (iii) voluntary nature of compromise between the accused and the victim; and lastly (iv) conduct of the accused persons, prior to an after the occurrence of the purported offence and/or other relevant considerations in accepting the settlement and to be acted upon by the court of law in exercise of power u/s 482 Cr.P.C.

14. Now in the instant cases where the informant/victims belonging to SC/ST

community lodged F.I.Rs. u/s 323, 324, 504, 506, 342, 308 and other allied sections of I.P.C. and Section 3(1) (अ) & (घ) of SC/ST Act, and now the parties have come to terms. In this regard a judgment of Hon'ble Apex Court in **Ramawatar vs. The State of Madhya Pradesh** (supra) is of great value and help. In para-18 of this judgment Hon'ble Apex Court was conscious enough to hold that having a truce and compromise with a person belong to scheduled caste and scheduled tribes community, it is expected from the courts law to be more vigilant and cautious to ensure that the complainant/victim has entered into compromise on his/her own free will and sweet will and there is no duress or coercion, threat or allurement from any quarter. It is further observed that since a member of scheduled castes/scheduled tribes community belong to the weaker sections of our country, they are more prone to acts of coercion, and therefore, ought to be accorded a high level of protection. Therefore, accepting settlement between them the court has to test the covenants of the said compromise on the touchstone of following tests, namely :

Firstly, the occurrence(s) involved in these appeals can be categorized as purely personal or having overtones of criminal proceedings of private nature;

Secondly, the nature of injuries incurred, for which the Appellants have been convicted, do not appear to exhibit their mental depravity or commission of an offence of such a serious nature that quashing of which would override public interest;

Thirdly, give the nature of the offence and injuries, it is immaterial that the trial against the Appellants had been

concluded or their appeal(s) against conviction stand dismissed.

Fourthly, the parties on their own volition, without any coercion or compulsion, willingly and voluntarily have buried their differences and wish to accord a quietus to their dispute(s);

Fifthly, the occurrence(s) in both the cases took place way back in the years 2000 and 1995, respectively. There is nothing on record to evince that either before or after the purported compromise, any untoward incident transpired between the parties;

Sixthly, since the Appellants and the complainant(s) are resident of the same village(s) and/or work in close vicinity, the quashing of criminal proceedings will advance peace, harmony, and fellowship amongst the parties who have decided to forget and forgive any ill-will and have no vengeance against each other; and

Seventhly, the cause of administration of criminal justice system would remain un-effected on acceptance of the amicable settlement between the parties and/or resultant acquittal of the Appellants; more so looking at their present age.

Though the list is not exhausted but these are the basic tests on which the settlement is to be tested between the parties.

15. Taking the guidance from above guidelines of Hon'ble Apex Court and comparing the facts of the present cases, the nature, gravity of the offence in which charge sheet has been submitted by the police, more particularly the contesting parties belong to same village, reside either in the neighbourhood or nearby, and out of a sheer fit of anger some heated passion or altercation took place which resulted into an act of offensive by the accused against

the complainant. After lapse of time the contesting parties themselves feel like that they have to reside in the same village for their remaining life with the intervention of elders and sane people of the society, adhering to the cardinal principle of forget and forgive, in a cool and composite mind, they have decided to settle down the issue forever.

16. We are in our 75th year of independence, a mature democracy where there is sufficient spread of education system even in rural areas and there is sufficient amount of awareness among all the stratas of the society including persons belonging to SC/ST community. In addition to this, there is upsurge of electronic media, social media even in the remote areas of our villages, the people are now more aware and vigilant about their rights, powers and duties. The situation is improving slowly but steadily, even in the rural areas, and therefore, there is steep rise in lodging of the criminal cases by the members of Scheduled Caste/ Scheduled Tribes community. It is also a welcome step that the parties are readily accepting the compromise between them on various accounts viz : resides in same village or in close vicinity; relationship between them for generations; inter-dependence etc. are cooling factors. These are the circumstances where the role of law courts should be act as a catalyst between them to bury their disputes and differences, instead of keep the matter linger on for an unlimited period permitting the animosity between them more firm and irrevocable. Long drawn enmity sometimes give a disastrous result to the general peace and tranquility of the society, and thus, it is expected from the law courts to act in a pro-active way and after evaluating and taking into account the above mentioned

factors, try to bury the differences for good in larger interest of the society.

17. In all above mentioned four cases, the penal provisions involved are u/s 147, 323, 324, 427, 504, 506, 342, 308 and other allied sections of I.P.C. and Section 3(1) (२) & (३) of SC/ST Act. The parties on their own have decided to come to truce and bury their differences amicably. This Court in exercise of its plenary power u/s 482 of Criminal Procedure Code or Section 14(A)-1 of SC/ST Act have seen the covenants of the compromise and gauged the nature and gravity of the offence, in which the accused persons charged for, and this Court has no hesitation or objection to quash the proceedings of aforementioned cases in the light of compromise between the contesting parties for attaining the larger good and welfare of society. As mentioned above, the law courts should act in a pro-active way with the hope and trust that nothing untoward may happen in future between the parties and, thus, in the light of the above discussion these Criminal Appeals u/s 14A(1) of the SC/ST Act and Applications u/s 482 Cr.P.C. are **ALLOWED**, and the impugned orders and proceedings of respective cases, whose details are given herein below :-

(i) Charge sheet dated 7.6.2022, cognizance order dated 4.7.2022 and entire proceeding in S.S.T. No.265 of 2022 (State vs. Jhabbu Dubey @ Pradeep Kumar Dubey), pending in the court of Special Judge (SC/ST) Act, Lalitpur, arising out of Case Crime No.76 of 2022, u/s 324, 504 I.P.C. and 3(1)(२) & (३) of SC/ST Act, P.S.- Jakhaura, District Lalitpur.

(ii) Impugned order dated 10.5.2022 passed by the Special Session Judge, SC/ST Act, Jhansi as well as entire criminal proceeding of Special Case

No.1578 of 2019 (State vs. Vishwanath and another), arising out of Case Crime No.114 of 2019, u/s 323, 504, 506 I.P.C. and Section 3(1)(a) & (v) of SC/ST Act, Police Station-Moth, District -Jhansi.

(iii) charge sheet No.89/2021 dated 01.06.2021, cognizance order dated 29.7.2021 as well as entire criminal proceeding of Case No.672 of 2021 (State vs. Dharmendra @ Bauwa Bajpai and another), arising out of Case Crime No.44/2021, u/s 342, 323, 308 I.P.C. and 3(1)(a) of SC/ST Act, Police Station Chaubepur, District Kanpur Nagar, pending in the court of Additional District/Session Judge, Court No.2/Special Judge (SC/ST Act), Kanpur Dehat.

(iv) Entire proceeding of Special Session Trial No.134 of 2022 (State vs. Bhajuram & others), arising out of Case Crime No.152 of 2014, u/s 147, 323, 504, 427 I.P.C. & Section 3(1)(10) of the SC/ST Act, Police Station Puranderpur, District Maharajganj, pending in the court of learned Special Judge, SC/ST Act, Maharajganj.

The above mentioned impugned charge sheets, orders or proceedings pending against the respective appellants/applicants before the concerned courts are hereby QUASHED.

RETURN OF AMOUNT TO THE STATE IS SINE QUA NON

18. Yet another aspect of the issue which cropped up during arguments that, in the State case (FIR) initiated by any member of the SC/ST community against named or unnamed accused persons (not belonging to the SC/ST community) or the persons of the higher caste for any cognizable or non-bailable offence, the police lodges FIR under the relevant sections of the I.P.C. and the SC/ST Act

and proceeds to inquire and investigate into the matter.

19. Normally any State Case, where any offence took place, there are two parties, viz : Complainant/Informant or the victim on one hand and the proposed accused persons named or unknown persons are on the other hand. State being prosecutor contest the criminal proceedings on behalf of victim or the informant. But in the instant legislation in the name of SC/ST (Prevention of Atrocities) Act, 1989 (Act No.33 of 1989), in addition to above mentioned role, the State is not only prosecutor but also acts and renders financial aid and assistance to the victim/informant's family. In fact this is the only legislation, where the State government not only provides fund to the victim, but also provides travelling allowances, daily allowances, maintenance expenses and transport facilities to the victim of atrocities, his or her dependents and witnesses (Rule 11 of Rules 1995). In addition to this, the District Magistrate or S.D.M. or any other Executive Magistrate shall make necessary administrative and other arrangements to provide relief in cash or in kind or both, within seven days to the victim of atrocities, or their family members and dependents, according to the scale as provided in Annexure-I read with Annexure-II of the Schedule annexed to those Rules and shall also make such immediate relief including food, water, clothing, shelter, medical aid, transport facilities and other aid (Rule 12(4) of Rules 1995). This extra ordinary provision was added in the Rules of 1995 keeping in view the objective of Act 33 of 1989, which reads thus, "The SC & ST (Prevention of Atrocities) Act, 1989 was enacted with a view to prevent the commission of offences of atrocities against the members of SC/ST

and establish special courts for the trial of such offences and for providing relief and rehabilitation of the victim of such offences."

20. This is the only legislature where the State is providing funds to the victims to contest the case so that the offenders may be punished. From the objective as mentioned in Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 it would reflect that "despite of the various measures adopted to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they have remained vulnerable. They are subjected to various offences, indignities, humiliations and harassments. Through spread of education some awareness has been created amongst them and they have been trying to assert their rights. Still there has been an increase in the disturbing trend of commission of certain atrocities upon the members of SC/ST community. In some part of country, specially in rural areas, they have been denied certain civil rights. In some part of country untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour are in practice. The people of the higher castes will treat them as sleeves or look upon them with utter humiliation and indignified way. When the members of SC/ST community try to preserve their self-respect and honour of their women, they become irritants for the dominant and the mighty. In order to cap this yawning difference, the legislature in its own wisdom have legislated the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 with a laudable object to have a deterrent impact upon dominant society and to check their highhandedness towards them. The special courts are

formed and the procedures are eased so that have a speedy justice and effective punishment system for offenders.

21. In addition to above penal clauses in aforesaid Act, the SC/ST Rules of 1995 have also promulgated which provides the financial assistance to such victims so that they may contest their cases. Earning of the State is being utilized to water them so that they may contest their case to its logical conclusion. In this regard Rules 11 and 12 of the SC/ST Rules, 1995 deserve special attention, which reads thus :

"11. Travelling allowances, daily allowance, maintenance expenses and transport facilities to the victim atrocity, his or her dependent and witnesses.-

(1) Every victim of atrocity or his/her dependent and witnesses shall be paid to and for rail fare by second class in express / mail/ passenger train or actual bus or taxi fare from his / her place of residence or actual bus or taxi fare from his /her place of residence or place of stay to the place of investigation or hearing of trial of an offence under the Act.

(2) The District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall make necessary arrangements for providing transport facilities or reimbursement of full payment thereof to the victims of atrocity and witnesses for visiting the investigating officer, Superintendent of Police/Deputy Superintendent of Police, District Magistrate or any other Executive Magistrate.

(3) Every woman witness, the victim of atrocity or her dependent being a woman or a minor, a person more than sixty years of age and a person having 40 per cent or more disability shall be entitled to be accompanied by an attendant of her/

his choice. The attendant shall also be paid travelling and maintenance expenses as applicable to the witness or the victim of atrocity when called upon during hearing, investigation and trial of an offence under the Act.

(4) The witness, the victim of atrocity or his/her dependent and the attendant shall be paid daily maintenance expenses for the days he/she is away from the place of his/her residence or stay during investigation, hearing and trial of an offence, at such rates but not less than the minimum wages, as may be fixed by the State Government for the agricultural laborers.

(5) In addition to daily maintenance expenses the witness' the victim of atrocity (or his/her dependent) and the attendant shall also be paid diet expenses at such rates as may be fixed by the State Government from time to time.

(6) The payment of travelling allowance, daily allowance, maintenance expenses and reimbursement of transport facilities shall be made immediately or not later than three days by the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate to the victims, their dependents/attendant and witnesses for the days they visit the investigating officer or in-charge police station or hospital authorities or Superintendent of Police, Deputy Superintendent of Police or District Magistrate or any other officer concerned or the Special Court.

(7) When an offence has been committed under Sec. 3 of the Act, the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall reimburse the payment of medicines, special medical consultation, blood transfusion, replacement of essential

clothing, meals and fruits provided to the victim(s) of atrocity.

12. Measures to be taken by the District Administration.-

(1) The District Magistrate and the Superintendent of Police shall visit the place or area where the atrocity has been committed to assess the loss of life and damage to the property and draw a list of victim, their family members and dependents entitled for relief.

(2) Superintendent of Police shall ensure that the First Information Report is registered in the book of the concerned police station and effective measures for apprehending the accused are taken.

(3) The Superintendent of Police, after spot inspection, shall immediately appoint an investigation officer and deploy such police force in the area and take such other preventive measures as he may deem proper and necessary.

(4) The District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall make arrangements for providing immediate relief in cash or in kind or both to the victims of atrocity, their family members and dependents according to the scale as in the schedule annexed to these Rules (Annexure-I read with Annexure-II). Such immediate relief shall also include food, water, clothing, shelter, medical aid, transport facilities and other essential items.

(4A) For immediate withdrawal of money from the treasury so as to timely provide the relief amount as specified in sub-rule (4), the concerned State Government or Union territory Administration may provide necessary authorisation and powers to the District Magistrate.

(4B) The Special Court or the Exclusive Special Court may also order

socio-economic rehabilitation during investigation, inquiry and trial, as provided in clause (c) of sub-section of section 15A of the Act.

(5) The relief provided to the victim of the atrocity or his /her dependent under sub-rule (4) in respect of death, or injury to, or damage to property shall be in addition to any other right to claim compensation in respect thereof under any other law for the time being in force.

(6) The relief and rehabilitation facilities mentioned in sub-rule (4) above shall be provided by the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate in accordance with the scales provided in the Schedule annexed to these rules.

(7) A report of the relief and rehabilitation facilities provided to the victims shall also be forwarded to the Special Court by the District Magistrate or the Sub-Divisional Magistrate or the Executive Magistrate or Superintendent of Police. In case the Special Court is satisfied that the payment of relief was not made to the victim or his/her dependent in time or the amount of relief or compensation was not sufficient or only a part of payment of relief or compensation was made, it may order for making in full or part the payment of relief or any other kind of assistance.

22. It would not be out of place to mention here that this financial assistance is given with a sole motive to victims considering that they are downtrodden so that they may not feel scared or hopeless and give-up the proceedings on account of paucity of funds. The State has come out to help them and Welfare Department of the State has been authorised and empowered to provide financial assistance to them. This indeed is a laudable object whereby

the State being a welfare State is providing the financial assistance to the victims belonging to SC/ST community so that they may contest their cases, summon the witnesses and meet out all the expenses incurred during trial. Thus the underline idea of providing financial assistance is that there shall not be any paucity of funds to the victim in contesting the case to its logical conclusion and the wrongdoers may be suitably punished and penalized for their acts committed against the victims. All these arrangements are provided to the victims by the State Government only to achieve an objective that the members of SC/ST community should feel free in contesting the case and rest of the financial burden shall be borne out by the State.

23. Thus, the objective behind Rules 11 & 12 of the SC/ST Rules, 1995, is indeed laudable and commendable, but with a caveat/a rider over it. It pre-supposes that the state government has to bear the financial burden of the entire trial, whereby the offenders and wrongdoers may be punished after the trial. That's why at every stage of trial the Welfare department of the state government releases funds to the victim.

But, where the parties have come to truce and settle their dispute outside the court, without any threat or coercion upon them, resultantly the entire trial gets aborted in its midst. No doubt it's a welcome step taken by the contesting parties, but the state government or its treasury shall not be put to any kind of financial loss. We are living in a Welfare State but surely not in a Charitable State. At the cost of repetition, since release of the funds in favour of the victim is at every stage of the trial viz : lodging of FIR; filing of charge sheet; committal of the case; and

lastly conclusion of trial, as such, in the event of any truce between the parties, it's natural and logical result should be, return of the amount received by the victim from the state exchequer.

24. Moreover, when there is settlement between the parties, there is no threat for any offensive against the victim and the entire atmosphere is full of peace, tranquility and positivity. There cannot be any good justification to keep that money for the victim and in all fairness they are supposed to return back the money to the State Government. This is the hard-earned money of innocent tax-payers and any atrocities against the victims cannot be exploited to earn and enjoy the money from the State Government even when there is compromise between them.

25. Thus, under these circumstances, where there is compromise/settlement between the victim and the accused, the same shall be verified by the concerned Session Judge, SC/ST Act taking into account the factors enumerated by the Hon'ble Apex Court quoted above. After being satisfied the concerned Session Judge shall ask the informant/victim to deposit the entire amount received from the "Samaj Kalyan Vibhag" of the State Government back within next ten days and then pass a suitable order verifying the covenants and the signatories of the compromise.

26. Deposit of the amount received by the victim belonging to the SC/ST community, if there is a compromise between the contesting parties, then the deposit of the amount back in the State exchequer shall be sine-qua-non and condition precedent for any settlement or truce between the parties without which no compromise could be verified by the court concerned.

27. Since all the four proceedings have already been allowed by this Court, still the victims are directed to deposit the amount received by them within next twenty days in the treasury of Samaj Kalya Vibhag of respective Session's Division.

28. Let the copy of this judgment be circulated to all the Sessions Division of the State so as to comply with the orders in the same terms and conditions in future.

(2023) 5 ILRA 558

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 08.03.2021

BEFORE

THE HON'BLE SUBHASH CHAND, J.

Criminal Appeal No. 7876 of 2017

And

Criminal Appeal No. 7877 of 2017

Panna Lal & Anr. ...Appellants (In Jail)

Versus

State of U.P.

...Respondent

Counsel for the Appellants:

Sri Arun Kumar Tripathi, Sri Ashwini Kumar Awasthi, Sri Atharva Dixit

Counsel for the Respondent:

G.A.

Criminal Law - Indian Penal Code, 1860

-Section 304 B-Accused-husband, father in law and mother in law-marriage -3 years ago-FIR-alleges demand of dowry-death by hanging-Trial Court convicted all the accused-all ingredients of section 304-B IPC are made out-separate living of deceased and husband with in laws-beneficiary of demand of dowry was the husband-failed to discharge the burden of rebutting the mandatory statutory presumption of dowry death against him-father in law and mother in law are acquitted.

Appeal of accused husband dismissed. (E-9)

List of Cases cited:

1. Dagdu & ors. Vs St. of Mah.(1977) 3 SCC 68;
2. Shamnsaheb M. Multtani Vs St. of Karn. (2001) 2 SCC 577;
3. Kans Raj Vs St. of Punjab & ors. (2000) 5 SCC 207;
4. Pathan Hussain Basha Vs St. of Andhra Pradesh (2012) 8 SCC 594;
5. Hira Lal & ors. Vs St. (Govt. of NCT), Delhi (2003) 8 SCC 80
6. Pawan Kumar Vs St. of Har. (1998) 3 SCC 309 para-6;
7. Kans Raj Vs St. of Pun. (2000) 5 SCC 2079 para-9:
8. Heera Lal Vs St. (Govt. Of NCT), Delhi (2003) 8 SCC 80 para-8;
9. Bakhsish Ram Vs St. of Pun. (2013) 4 SCC 131 para-14
10. Suresh Kumar Vs St. of Har. (2013) 16 SCC 553 in para 27
11. Sher @ Pratap Vs St. of Har. AIR 2015 SC 980
12. Satyaveer Singh Vs St. of Pun.AIR 2001 SC 2828
13. Devi Lal Vs St. of Raj. (2009) 1 SCC (Criminal) 785
14. Andhra Pradesh Vs Raj Gopal Asawa AIR 2004 SCW1566
15. Bhateri Devi Vs St. of Har. 2011 (Cri.) 463

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

1. The instant Criminal Appeal No. 7876 of 2017 has been preferred on behalf

of the appellant Panna Lal and another and Criminal Appeal No. 7877 of 2017 has been preferred on behalf of Bhure Lal alias Shyam Manohar against the judgment and order dated 1.12.2017 passed by the Additional Sessions Judge, Fast Track Court No. 1, Mainpuri in Special Trial No. 136 of 2004 (State Vs. Pannal Lal and others) arising out of Case Crime No. 106 of 2001 P.S. Bhogaon, District-Mainpuri whereby the appellants were convicted and sentenced for the offence under section 304-B of I.P.C and were punished with imprisonment of 10 years each and for the offence under section 498-A were convicted and punished with imprisonment of 3 years and a fine of Rs. 5,000/- each and in default of payment of fine additional imprisonment of six months was awarded to be undergone. For the offence under section 4 of Dowry Prohibition Act each of the accused was convicted and sentenced with imprisonment of six months and a fine of Rs. 2,000/- and in default of payment of fine the additional imprisonment of one month was awarded to be undergone.

2. Both the aforesaid appeals are against the judgment and order dated 1.12.2017, therefore, both the appeals are disposed of by the common judgment.

3. The brief facts giving rise to both these appeals are that the informant Ram Singh, son of Munshi, resident of village Semalpur, P.S. Vishunpur, District Kannauj moved the written information with the police station concerned with the allegations that on 29th March 2001 at 5.00 O'clock he received the information in his village that his daughter Anita had been killed by hanging by her in-laws. He reached to village Shivai and saw his daughter hanged with Sari and her father-in-law, mother-in-law and his son-in-law

were absconding from the house. His daughter was got married about 3 years back and endowment was made by him at the time of marriage as per capacity; but the father-in-law and mother-in-law being not satisfied, made additional demand of Gold Chain, T.V., and Almirah in dowry. The informant was not capable to fulfill these demands, consequently his daughter was subjected to cruelty and due to this reason his daughter was killed and the body was hanged. On this written information the case crime no. 106 of 2001 was registered under section 498-A, 304-B of IPC and 3/4 D.P. Act with the Police Station Bhogaon, District-Mainpuri. The Investigating Officer after having concluded the investigation filed charge sheet against all the accused persons under sections 498-A, 304-B and 3/4 D.P. Act on which the cognizance was taken by the Chief Judicial Magistrate and after considering that the offence is triable by the court of sessions, the case was committed by the CJM concerned to the court of sessions for trial.

4. The trial court summoned all the accused persons and framed charges against all the accused persons under sections 304-B, 498-A of IPC and 3/4 D.P. Act and the alternate charge under section 302 IPC was also framed against all the accused persons. The charge was read over and explained to all the accused persons who denied the charge and claimed to be tried.

5. On behalf of prosecution to prove the charge against all the accused persons in **documentary evidence** adduced written information, Exb. Ka-1, Marriage card, Exb. Ka-2, Site plan of place of occurrence, Exb. Ka-3, Charge sheet against Panna Lal and Smt. Maya Devi @ Mayawati, Exb.

Ka-4, Charge sheet against Bhure Lal @ Shyam Manohar, Exb. Ka-5, Inquest report, Exb. Ka-6, letter to Chief Medical Officer, Exb. Ka-7, Specimen seal, Exb. Ka-8, letter to RI, Exb. Ka-9, Photo Nas, Exb. Ka-10, Post mortem report, Exb. Ka-11 and check FIR, Exb. Ka-11-A.

In **ocular evidence examined PW-1, Ram Singh, PW-2, Ganesh, PW-3, Hukum Singh, PW-4 Lala Ram, PW-5, Om Prakash, Naib Tehsildar, PW-6 Retired Doctor S.K. Seth, PW-7, Krishna Kumar Chaturvedi.**

6. The statement of accused persons under section 313 of Cr.P.C was recorded. All the accused persons denied the incriminating circumstances in evidence against them and stated that deceased had no issue, with this reason, she was mentally disturbed and consequently had committed suicide. On behalf of Panna Lal and Smt. Maya Devi @ Mayawati it was also stated that both of them were residing separate from their son Bhure Lal @ Shyam Manohar.

7. On behalf of accused persons in **defence evidence** examined **DW-1, Bhoj Raj and DW-2, Ram Kishan.**

8. Trial court after hearing the submissions of learned counsel for both the parties had convicted all the accused persons vide judgment and order dated 1.12.2017 for the offence under sections 304-B, 498-A of IPC and section 4 of D.P. Act and sentenced as stated above.

9. Aggrieved with this impugned judgment the Criminal Appeal No. 7876 of 2017 was preferred on behalf of the appellants Panna Lal and Smt. Maya Devi @ Mayawati and Criminal Appeal No.

7877 of 2017 was preferred on behalf of the appellant Bhure Lal @ Shyam Manohar on the grounds that the impugned judgment and conviction order passed by the court below is against the weight of the material evidence on record and the impugned judgment and order is bad in the eyes of law. In view of the facts and circumstances of the case as well as the evidence available on record, the punishment awarded by the court below is too severe. Accordingly, prayed to allow these criminal appeals and set aside the impugned judgment and order of conviction.

10. I have heard the submissions of learned counsel for the appellants and learned AGA for the State and perused the relevant materials brought on record.

11. Learned counsel for the appellants has submitted that the allegations made in the FIR in regard to alleged demand of dowry are general in nature. There is no evidence in regard to harassment caused to the deceased for non fulfillment of alleged demand of dowry. In inquest report there is no whisper in regard to alleged demand of dowry. As per autopsy report the cause of death of deceased was asphyxia as a result of ante mortem hanging. There is no external injury on any part of the body. Hyoid bone is intact. It was a case of suicide committed by the deceased herself who was disturbed because of having no issue. From the evidence on record no offence under section 304-B of IPC is made out against the accused persons. As per prosecution case the marriage was solemnized 3 years before the date of occurrence. There is no evidence in regard to exact date of marriage. In fact, the marriage of deceased was solemnized in the year 1993 and 7 years had elapsed from the date of occurrence. Moreover, the

appellant Panna Lal and Smt. Maya Devi @ Mayawati both father-in-law and mother-in-law respectively of deceased were residing separate from their son Bhure Lal @ Shyam Manohar. On behalf of accused persons this defence case was also put to all prosecution witnesses in cross examination and the defence evidence was also adduced. Moreover, all the accused persons in their statement under section 313 of Cr.P.C., have taken this plea of separate living of father-in-law and mother-in-law from their son and also the plea of committing suicide of deceased herself on account of being disturbed because of no issue to herself.

Learned counsel for the appellants has further submitted that there is no evidence on record in regard to harassment for non-fulfillment of demand of dowry soon before the death. Moreover no proper opportunity of the hearing was afforded to the appellants on the quantum of sentence in view of section 235(2) of the Criminal Procedure Code.

In support of these submissions learned counsel for the appellants has relied upon the following case laws:-

(1) Dagdu and Others Vs. State of Maharashtra (1977) 3 SCC 68;

(2) Shamasaheb M. Multani Vs. State of Karnataka (2001) 2 SCC 577;

(3) Kans Raj Vs. State of Punjab and others (2000) 5 SCC 207;

(4) Pathan Hussain Basha Vs. State of Andhra Pradesh (2012) 8 SCC 594; and

(5) Hira Lal and others Vs. State (Govt. of NCT), Delhi (2003) 8 SCC 80.

12. Learned AGA on behalf of State per contra submitted that the impugned judgment of conviction and sentence passed by the court below is based on the

proper appreciation of evidence on record and passed the proper judgment which bears no illegality. Moreover, the accused persons were afforded complete opportunity of hearing by the court below on the quantum of sentence.

13. On behalf of prosecution to prove its case in ocular evidence examined PW-1 Ram Singh, PW-2 Ganesh, PW-3 Hukum Singh as witness of the fact.

PW-1 Ram Singh is the informant and the father of the deceased. This witness in his statement says that his daughter Anita was married with Bhure Lal @ Shyam Manohar about 3 years ago from the date of occurrence in the year 1998. The father-in-law and mother-in-law and husband of his daughter made additional demand of dowry of Gold Chain, T.V, and Almirah and for non fulfillment of the same his daughter was subjected to cruelty. His daughter used to make complaint of the same to him and her mother. His daughter Anita also made complaint of the same to his son also. On the occasion of Holi on the very year of the occurrence he has gone to the in-laws house of his daughter and asked them not to torture his daughter for the alleged demand of dowry but on this, reiterated the aforesaid demand of dowry. After that he left the in-laws house of his daughter and on 29.3.2001 he received information from Dharmendra Singh, son of Suraj Singh of village Bhadaura at 5- O clock that his daughter had been killed by her in-laws. On this information he reached along with family members to village Sevai and saw the dead body of his daughter hanged with the Sari with the hook of Veranda. He moved the written information with the police station concerned Exb. Ka-2. He also gave the invitation card of marriage to the Investigating Officer which

is Exb. Ka-2. He was also the witness of the inquest report. The dead body of his daughter was got down from the hook of Varandah by Darogaji. Many persons of the locality were present there. Panna Lal and Bhure Lal @ Shyam Manohar were not residing separately. It is wrong to say that his daughter committed suicide because of having no issue to her.

PW-2 Ganesh is the real brother of the deceased. This witness in his statement says that his sister was married 3 years before the date of occurrence with Bhure Lal @ Shyam Manohar. Whenever, his sister had come from her in-laws house to parental house, she told in regard to demand of Gold Chain, T.V., Almirah and also told that all the accused persons had beaten her for non fulfillment of the same demand. On receiving the information from Dharmendra Singh on 29.3.2001 accompanied his parents, his cousin brother Hukum Singh and Ram Shankar of the village to reach village Sevai to the in-laws house of his sister and saw the dead body of his sister hanged with Sari with the hook of balcony. The dead body was got down by Darogaji. It is wrong to say that his sister was mentally disturbed because of having no issue and committed suicide.

PW-3 Hukum Singh is the cousin brother of the deceased. He also gave the same kind of statement as that of PW-1 Ram Singh and PW-2 Ganesh and corroborated the prosecution story. This witness also stated that the complaint in regard to the demand of dowry and subjecting to cruelty to Anita was made by Anita to her parents in his presence. Anita has all to say, told in regard to alleged demand of dowry to him about two months ago from the date of occurrence when she had come to her parental house. It is wrong to say that Anita along with her husband

resided separate from Panna Lal in another house.

14. On behalf of prosecution to prove the cause of death and papers relating to inquest report examined **PW-5 Om Prakash, Naib Tehsildar** proved the inquest report Ka-6 and papers relating to inquest report Exb. K-7 to Ka-10. This witness in his statement also says that all the panch witnesses have told him that the death of the deceased was caused by hanging her with Sari with the hook of balcony.

15. To prove the autopsy report of deceased examined **PW-6 retired Doctor S.K. Seth**. This witness in his statement proves the post mortem report of the deceased Exb.Ka-11 and says that the **cause of death of deceased is asphyxia as a result of ante mortem hanging and ante mortem injury ligature mark 30.0 cm x 3.0 cm on around neck except on right side where it is intercepted behind right ear mark is obliquely placed following the line of mandible. The hyoid bone was intact (not broken).**

16. At this stage provision of section 304-B of IPC read with section 113-B of the Evidence Act is necessary to be considered.

Section 304-B of IPC reads as under:-

304-B. Dowry death:-

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

any demand of dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation- For the purpose of this sub-section "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961(28 of 1961) same meaning as in section 2 of the Dowry Prohibition.

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

The Hon'ble Apex Court has indicated the ingredients of section 304-B of IPC in the following cases as under:-

1. Pawan Kumar Vs. State of Haryana (1998) 3 SCC 309 para-6;

2. Kans Raj Vs. State of Punjab (2000) 5 SCC 207 para-9:

3. Heera Lal Vs. State (Govt. Of NCT), Delhi (2003) 8 SCC 80 para-8; and

4. Bakhsish Ram Vs. state of Punjab (2013) 4 SCC 131 para-14.

(A) that the married women had died otherwise than normal circumstances;

(B) As the death was within 7 years of marriage; and

(c) the prosecution has established that there was cruelty or harassment by her husband or near relative of her husband in connection with demand of dowry soon before the death.

17. The Hon'ble apex Court held in **Suresh Kumar Vs. State of Haryana (2013) 16 SCC 553 in para 27** that any death occurring otherwise than under normal circumstances can be homicidal, suicidal or accidental.

18. The Hon'ble Apex Court held in **Sher @ Pratap Vs. State of Haryana AIR**

2015 SC 980 held the word "soon" before death not to be interpreted in terms of six months or year but it is necessary to indicate domain of dowry should not be stale. It should be continuing because of death under section 304-B of IPC.

19. The Hon'ble Apex Court also held in ***Satyaveer Singh Vs. State of Punjab AIR 2001 SC 2828*** held that there should be nexus between death of wife and the dowry related to harassment inflicted on her.

20. The Hon'ble Apex court held in ***Devi Lal Vs. State of Rajasthan (2009) 1 SCC (Criminal) 785*** under section 304-B "soon" before death depends upon the facts and circumstances of each case.

21. The Hon'ble Apex Court held in ***State of Andhra Pradesh Vs. Raj Gopal Asawa AIR 2004 SCW1566*** the definition of dowry is not restricted to agreement or demand for payment of dowry before or at the time of marriage; but also includes demand made subsequent to marriage.

22. The Hon'ble Apex Court in ***Suresh Kumar (Supra)*** in **para 30** held if the ingredients of section 304-B of IPC are made out, the accused is deemed to have caused the death of women; the accused is entitled to rebut this statutory presumption of having caused death. The presumption under section 113-B is the presumption of law which is mandatory.

23. The Hon'ble Apex Court also held in ***Suresh Kumar (Supra)*** in **para 34** a Bench of three Judges of this Court has elucidated the requirement of section 304-B of IPC read with section 113-B of the Evidence Act and contrasted it with section 113-A of the Evidence Act in **paras 27 to**

30 in ***Shamnsaheb M. Multtani (Supra)*** held that if the ingredients of section 304-B of IPC are made out, the court has no option but to presume that the accused has caused the dowry death unless the accused disapproves it. It is a statutory compulsion of the Court. However, the accused has to be rebut it. He can discharge this burden either by elucidating answers, through the cross examination of prosecution witness or by adducing defence evidence or by both.

Section 113-A of the **Evidence Act** says that in almost similar conditions of dowry death the court may presume having regard to the circumstances of the case that as the suicide has been abetted by his husband or the relative of the husband.

24. The provisions of Section 113-B of the Evidence Act are relevant to mention herein below:-

"113B. Presumption as to dowry death:-

When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection, any demand for dowry, the court shall presume that such person had caused the dowry death."

25. As per prosecution case the daughter of the informant Anita was married with Bhure Lal @ Shyam Manohar **in 1998, three years ago from the date of occurrence.** In this regard in documentary evidence **invitation card of marriage Exb. Ka-2** has been proved by PW-1 Ram Singh. In this marriage invitation card **the date of marriage is shown as 28.4.1998.** The name of bride is Anita, daughter of Ram Singh Rajpoot, resident of Semalpur,

Amaltabad (Kannauj) and the name of bridegroom is Shyam Manohar son of Panna Lal, resident of Rewai (Mainpuri). All the three witnesses of fact PW-1 Ram Singh, PW-2 Ganesh, PW-2 Hukum Singh who are father, real brother and cousin brother stated that Anita was married with Bhure Lal @ Shyam Manohar before three years ago on the date of occurrence.

On behalf of the accused persons this plea has been raised by giving suggestion to the prosecution witness that the deceased was married with Bhure Lal @ Shyam Manohar in 1993 more than 7 years ago from the date of occurrence. This plea is also taken by all the accused persons in their statement under section 313 of Cr.P.C.

On behalf of defence the defence witnesses **DW-1 Bhoj Raj** and **DW-2 Ram Kishan** also say that the accused Bhure Lal was married with Anita in the year 1993. **In view of the ocular evidence adduced on behalf of prosecution and also the documentary evidence marriage invitation card of Smt. Anita it is proved that the marriage of Smt. Anita and Bhure Lal @ Shyam Manohar had solemnized on 28.4.1998.** The marriage invitation card is not questioned by the defence counsel in the cross examination from the prosecution witness, as such, on this point the balance of the evidence tilts in favour of the prosecution. On behalf of the accused persons no documentary evidence has been adduced to rebut the date of marriage being 28.4.1998.

26. So far as the death of deceased Anita is concerned, **from the ocular evidence as well the medical evidence itself well proved that the death of Anita was not caused in normal circumstances, rather it was homicidal or suicidal.**

All the prosecution witnesses have deposed the evidence that the death of Anita was homicidal. As per medical evidence **DW-6 Dr. S.K. Seth** says that the cause of death was asphyxia **as a result of ante mortem hanging.** This witness also says that the ligature mark was 30.0 cm. X 3.0 cm around the neck. This mark was obliquely placed following the line of mandible. This **ligature mark was not in V shape to establish the cause of suicide.** So far as the hyoid bone being intact is concerned, PW-6 in his statement deposed **that trachea was congested. The bloodfroth was in trachea.** This witness in his cross examination says that he has not written the cause of death in post mortem report throttling or strangulation because death was caused due to hanging.

In inquest report the cause of death as per the information of panch witnesses has been mentioned **asphyxia due to hanging with the Sari by the hook of balcony.**

PW-5 Om Prakash, Naib Tehsildar proves the inquest report and the papers of the inquest report and also says that **all the Panch have stated to him that the body of the deceased was hanged with the hook of balcony tied with Sari, as such, the death of deceased Anita was an unnatural death. It was not a death of normal circumstances.**

27. So far as the demand of dowry and non fulfillment of the same causing cruelty to deceased soon before the death is concerned, all the witnesses have stated that the accused persons had made demand of Gold Chain, T.V., and Almirah after solemnizing the marriage and for non fulfillment of the same Anita was subjected to cruelty. All these witnesses have stated whenever Anita had visited her parental house from her in-laws house she has made

complaint in regard to making alleged dowry by her in-laws and had told in regard to the same to PW-1 Ram Singh, PW-2 Ganesh, PW-3 Hukum Singh who are father, real brother and cousin brother of the deceased respectively. PW-1 Ram Singh has also stated at one instance at the occasion of Holi in the very year of occurrence, when he had visited the in-laws house of her daughter and asked her in-laws not to harass and torture her daughter for the alleged demand of Gold Chain, T.V and Almirah. All the accused persons refused to desist of their demand of dowry. This witness also says that he has shown his incapability to fulfill the aforesaid demand and left his daughter in-laws house and thereafter on 30.3.2001 he received information from Dharmendra Singh who told him that his daughter has been killed by her in-laws. This fact is also corroborated with the opinion of Panch witnesses in the inquest report.

28. It is pertinent to mention here that in the inquest report among all the Panch witnesses none is from the in-laws side. **This entry in the inquest report also corroborates the ocular evidence in regard to absconding of inmates of in-laws house. This subsequent conduct of the inmates of in-laws house being not present at the place of occurrence, more so, when the dead body of Anita was hanged with hook of balcony tied with Sari becomes relevant to prove the guilty mind of the inmates of in-laws house. This subsequent conduct of the inmates of in-laws house is relevant under section 8 of the Evidence Act.**

29. Therefore, the prosecution has been successful to prove this fact that the death of deceased Anita took place in matrimonial house within 7 years of

marriage was unnatural. There is also evidence that soon before the death there was demand of Gold Chain, T.V. Almirah and for non fulfillment of the same deceased was subjected to cruelty and harassment. If for the sake of argument, death of deceased is taken to be suicidal, the possibility of demand of dowry and non fulfillment of the same, subjecting the deceased for cruelty and harassment can not be ruled out. The death of deceased whether homicidal or suicidal has a nexus with the harassment and cruelty connected with the demand of dowry. **As such, all the ingredients of section 304-B of I.P.C., are made out. From the evidence on record and legal presumption of law which is mandatory shall be taken against the accused persons in regard to committing dowry death.**

30. This statutory mandatory presumption under section 113-B of the Evidence Act is rebuttable. The burden of proof shifts upon the accused persons to disprove that it was not a dowry death.

31. On behalf of accused persons in their statement under section 313 Cr.P.C., this plea has been taken that Panna Lal and Smt. Maya Devi @ Mayawati who are father-in-law and mother-in-law of the deceased both were residing separate from their son Bhure Lal @ Shyam Manohar and this plea is also taken that deceased was having no issue therefore she was mentally disturbed, for the same reason, she committed suicide. On behalf of defence counsel of the accused persons this suggestion was also given to all the prosecution witnesses that deceased was having no issue was disturbed and sad and consequently she committed suicide. The suggestion of separate living of Panna Lal and Smt. Maya Devi @ Mayawati has been

given by the defence counsel to all the prosecution witnesses.

32. On behalf of the accused persons to rebut this presumption in defence evidence have been examined **DW-1 Bhoj Raj** in his statement says after two years of marriage Pannal Lal began to reside separate with his son Bhure Lal @ Shyam Manohar. Anita had no issue, so her temper was irritating and she committed suicide. This witness also says that at the time of occurrence he was at his agricultural field and was not present at the place of occurrence.

PW-2 Ram Kishan in his statement says that Bhure Lal @ Shyam Manohar along with his wife had been residing separate after two years of marriage with his parents. Anita had no issue, so she had become ill temper and with this reason she committed suicide.

33. So far as defence plea of separate living of Panna Lal and Smt. Maya Devi @ Mayawati, father-in-law and mother-in-law respectively is concerned, this plea has been taken by the accused persons in their statement under 313 Cr.P.C., and had also elicited to all the prosecution witnesses during cross examination. Both the defence witnesses DW-1 Bhoj Raj and DW-2 Ram Kishan had deposed this fact.

34. But so far as this plea that deceased for having no issue was ill tempered and had committed suicide is not found cogent and trust-worthy. As per prosecution evidence the deceased was married with Bhure Lal @ Shyam Manohar 3 years ago from the date of occurrence. If after solemnization of marriage deceased was not conceived and she was disturbed for having no issue, under such

circumstances, deceased might have consulted some Gynecologist in regard to treatment of having no issue. As of man ordinary prudence her husband might have taken her to some doctor, more so, if her condition was so depressed that she had become ill tempered for having no issue. No such documentary evidence in regard to treatment of having no issue and consultant prescription in regarding to having no issue had been adduced on behalf of the accused persons which would have been the best evidence in their possession to prove this plea. Under such situation, the ocular evidence adduced on behalf of the defence can not be relied upon on the touch stone of preponderance of possibilities.

35. Here it is also noteworthy that in view of defence evidence the father-in-law and mother-in-law of the deceased were residing separate from their son and so far as the alleged demand of dowry of Gold Chain, T.V., and Almirah is concerned, the direct beneficiary of this demand was the husband of the deceased, as such, the burden to proof will shift upon the husband of the deceased to disprove the legal presumption of dowry death. The husband of the deceased Bhure Lal @ Shyam Manohar has miserably failed to discharge the burden of rebutting the the mandatory statutory presumption of dowry death against him.

The Punjab and Haryana High Court in **Bhateri Devi Vs. State of Haryana 2011 (Crl.) 463** held that husband is the beneficiary in case of dowry demand, hence he is liable for dowry death and is to give explanation as to why the death occurred.

36. Learned counsel for the appellants has also submitted that the trial court has

imposed the sentence of 10 years for the offence under sections 304-B of IPC without recording any reason and without affording any opportunity of hearing to the appellants convict on the quantum of sentence.

Section 304-B of IPC provides minimum sentence for 10 years and the maximum sentence may be extended upto life imprisonment. The trial court has awarded the sentence of 10 years for the offence under section 304-B of IPC which is less than the maximum as provided under section 304-B of IPC.

So far as the opportunity of hearing under section 235 (2) of Cr.P.C., is concerned, the trial court had given opportunity of hearing to the convict on the quantum of sentence and it was argued on behalf of the convicts that it is the first offence of the accused persons and have no criminal antecedent and accused is a young person and none is to look after his old parents and after taking into consideration the statements made by the counsel of convicts and also Additional District Government Counsel for the prosecution the trial court passed the order of sentence after having recorded reasons for the same. Therefore, this plea raised on behalf of learned counsel for the appellant is not sustainable in law and the same is discarded.

37. In view of re-appreciation of the evidence on record the judgment and order of conviction of the accused Panna Lal and Smt. Maya Devi @ Mayawati for the offence under section 304-B,498-A and 4 of Dowry Prohibition Act deserves to be set aside. Accordingly, the Criminal Appeal No. 7876 of 2017 (Panna Lal and another Vs. State of U.P.) is hereby **allowed**. The appellants Panna Lal and Smt. Maya Devi

@ Mayawati are hereby acquitted from the charges levelled against them under section 304-B,498-A and 4 of Dowry Prohibition Act. The personal bonds and two sureties each in the like amount to the satisfaction of the court concerned in compliance of provisions of section 437-A of Cr.P.C, be furnished by them before the trial court.

38. So far as the Criminal Appeal No. 7877 of 2017 is concerned, in this appeal the appellant **Bhure Lal @ Shyam Manohar** is the husband of the deceased, whose liability is to protect and save the life and liberty of his wife but the appellant has failed to do so, therefore, the present appeal lacks merit and deserves to be **dismissed**. Accordingly, the appeal is dismissed. The conviction and sentence awarded to the present appellant is hereby affirmed. The appellant is in jail. He is directed to serve out the remaining sentence as has been awarded by the trial court by judgment and order dated 1.12.2017.

39. Let the copy of the judgment/order be certified to the court concerned for necessary information and follow up action.

(2023) 5 ILRA 568

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 24.04.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 7960 of 2019

**Rinku @ Prempal ...Appellant (In Jail)
Versus**

State of U.P. ...Respondent

Counsel for the Appellant:

Sri Sanjay Srivastava, Sri Prayogendra Pal Singh

Counsel for the Respondent:

G.A., Smt. Archana Singh, Ms. Ruchi Srivastava

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860- Sections 354-B, 363, 366, 376 & Section 4, 8 Protection of Children from Sexual Offences Act-2012-Challenge to-Conviction- In the present case the medical report based on radiological examination her age is determined as 15-16 years. Therefore, the victim is evidently a minor. Hence offence under Section 363 I.P.C. can be committed against her- PW-2 victim has also corroborated her evidence in her statement under Section 164 CrPC that the appellant-accused used criminal force against her at night in the rented room in Haridwar with an intention to disrobe her- PW-1 has also corroborated the evidence of PW-2 that the victim had informed him about her kidnapping by the accused appellant-Nothing has been found in the cross examination of PW-1 and PW-2 by defence that may raise doubt about the reliability and veracity of their statements- With aforesaid modification of sentence under Section 354-B I.P.C. the conviction and sentence of Trial Court under Sections 363, 366 and 354-B I.P.C. against the accused-appellant is confirmed.(Para 1 to 52)

B. Considering the provisions of Section 42 POCSO Act, since 354-B I.P.C. has greater sentence of seven years viz-a-viz punishment of five years which provided under Section 8 POCSO Act thus accused-appellant is liable to be punished under Section 354-B I.P.C. for seven years imprisonment with fine of Rs. 2000/- with default stipulation. The Trial Court has convicted the appellant-accused under Section 354-B I.P.C. but wrongly sentenced him under Section 8 POCSO Act. Thus, the sentence under Section 354-B I.P.C. is modified to seven years

imprisonment with fine as imposed by the Trial Court. Both the substantive sentences shall run concurrently. Period of detention undergone by the accused to be set off against the sentence of imprisonment under Section 428 Cr.P.C. (Para 49, 50)

C. Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [376A, 376AD, 376B, 376C, 376D, 376DA, 376DB], [376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000)], then notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal code as provides for punishment which is greater in degree."

The appeal is dismissed. (E-6)

List of Cases cited:

1. Suhani & anr. Vs St. of U.P. & ors. Civil Appeal No.4532 of 2018
2. St. of H.P. Vs Sanjay Kumar @ Sunny (2017) 2 SCC 51
3. Deepak Vs St. of Har., (2015) 4 SCC 762
4. Kavita Chandrakant Lakhani Vs St. of Mah. & anr., CRLA No. 459 of 2016
5. Gabbu Vs St. of Mah. (2006) AIR SC 246

(Delivered by Hon'ble Surendra Singh-I, J.)

1. Heard Sri Prayogendra Pal, learned counsel for the appellant, Ms. Ruchi Srivastava, Advocate, holding brief of Ms. Archana Singh, learned counsel for the informant and learned A.G.A. for the State.

2. This criminal appeal has been instituted against the judgement and order

dated 30.11.2019 passed by Special Court (POCSO Act)/Additional Sessions Judge, Court No. 3, Bulandshahr in Special Case No. 74 of 2017 (State of U.P. Vs. Rinku @ Prempal) arising out of Case Crime No. 447 of 2016 u/s 363, 366, 376 I.P.C. & Section 4 of POCSO Act, P.S.- Aurangabad, District- Bulandshahr.

3. By the impugned order, the trial court has convicted the appellant-accused Rinku alias Prempal under Sections 354-B, 363, 366 I.P.C. and Section 8 POCSO Act and sentenced the appellant-accused, Rinku @ Prempal u/s 366 I.P.C. to undergo 7 years imprisonment and a fine of Rs.2,000/- with default stipulation. The trial court has also convicted the appellant-accused u/s 8 of POCSO Act and sentenced him to undergo 5 years imprisonment and a fine of Rs.2,000/- with default stipulation. The trial court has acquitted the appellant-accused u/s 376 I.P.C. and Section 4 of POCSO Act. There is no criminal appeal filed by the State or victim against acquittal of appellant-accused u/s 376 I.P.C. and Section 4 of POCSO Act. Thus, the trial court's order acquitting the accused under these sections has become final.

4. The provisions of Section 228-A I.P.C. as well as Section 33 of POCSO Act and in the judgement of the Apex Court in the case of **Nipun Saxena & Anr. Vs. Union of India & Anr.** passed in **Writ Petition (Civil) No. 565 of 2012** prohibit disclosure of name of the victim against whom sexual offence has been committed. Therefore, in the present case, the prosecutrix shall be referred as the victim.

5. The prosecution case in brief is that the informant/father of victim, Kalua S/o Umrao Lodhi, resident of village-Ratanpur, P.S.- Aurangabad, District-

Bulandshahr, submitted written report (Ext.Ka.1) on 12.10.2016 at P.S.- Aurangabad, District- Bulandshahr to the effect that on 07.10.2016 at 1 p.m., his daughter/victim aged 14 years suddenly went somewhere from her home. He has made search at all possible places but could not find her. He has full belief that accused, Rinku @ Prempal, S/o Sripal Lodhi, resident of Jagsana Kala, P.S.- Jahangeerabad, District- Bulandshahr, has enticed away her daughter. Accused, Rinku @ Prempal is his brother-in-law (*sarhoo*). In the absence of informant, accused stayed for 8 days in his house and thereafter, left his house.

6. On the basis of written report (Ext.Ka.1) submitted on 12.10.2016 at 9.40 a.m., Case Crime No. 447 of 2016 u/s 363, 366 I.P.C. was registered in police station concerned against Rinku @ Prempal. The chik first information report is (Ext.Ka.5). The registration of the case crime number was simultaneously entered into the general diary at Sr. No. 16 (Ext.Ka.6).

7. The case was investigated by P.W.3 S.I. Yashveer Singh, who was handed over the investigation on 12.10.2016. The victim was recovered on 12.10.2016 and her statement u/s 161 Cr.P.C. was recorded. On the basis of the statement of the victim, Section 376 I.P.C. and Section 4 of POCSO Act was added to the case crime number. The statement u/s 164 Cr.P.C. of the victim was recorded by the Judicial Magistrate concerned on 14.10.2016. The victim has stated in her statement u/s 164 Cr.P.C. (Ext.Ka.2) that on 07.10.2016, her maternal uncle (*mausha*), appellant-accused, Rinku @ Prempal took her from her home on a 4 wheeler on the pretext that her mother is standing nearby and she has phoned and

asked him to bring her. Accused took her to the Bulandshahr Bus Station and from there to Ghaziabad Bus Station and then again from there to Railway Station, Ghaziabad and from there to Railway Station, Haridwar where they reached at 6 p.m. and from there, he took her to a rented room where he committed rape on her for 2-3 times. On her request, after 4 days, he took her to Railway Station, Ghaziabad and from there to Jahangirabad where he left her there. A woman constable held the hands of the victim. Seeing her, the appellant-accused fled from the spot. From there, she was brought to the police station concerned.

8. On 14.10.2016, the medical examination of the victim was done by P.W.4 Dr. Sudha Sharma in District Hospital, Bulandshahr. She prepared her medical examination report (Ext.Ka.7). The victim's age was determined by a Medical Board constituted by the C.M.O., Bulandshahr on the basis of x-ray report of fusion of elbow, knee and wrist bones. Her medico-legal age certificate (Ext.Ka.8) was issued by C.M.O., Bulandshahr on 17.10.2016. According to this certificate, her medico-legal age was 15-16 years.

9. The Investigating Officer visited the place of occurrence and prepared site plan (Ext.Ka.3) and arrested the appellant-accused on 19.10.2016. He then recorded the statements of the witnesses and after conclusion of investigation, submitted charge-sheet (Ext.Ka.4) u/s 363, 366, 376 I.P.C. and Section 4 of POCSO Act, 2012 against accused, Rinku @ Prempal.

10. On 27.06.2017, the trial court framed charge u/s 363, 366, 376 I.P.C. and Section 4 of POCSO Act, 2012. The accused denied the charge and claimed trial.

11. To prove the charge against the accused, the prosecution examined witnesses of fact, namely, informant P.W.1 Kalua, P.W.2 victim and formal witnesses, namely, Investigating Officer P.W.3 S.I. Yashveer Singh, Medical Officer P.W.4 Dr. Sudha Sharma and Principal of the school (Divine Science Vidyapeeth, Ghaziabad) of the victim P.W.5 Suman Lata.

12. P.W.1 Kalua proved the written report (Ext.Ka.1) and gave evidence about the occurrence. P.W.2 victim proved her statement recorded u/s 164 Cr.P.C. (Ext.Ka.2) and deposed about the occurrence. The Investigating Officer P.W.3 Yashveer Singh proved the site plan (Ext.Ka.3), charge-sheet (Ext.Ka.4), chik F.I.R. (Ext.Ka.5) and G.D. entry of the institution of the case crime number (Ext.Ka.6). P.W.3 Yashveer Singh also deposed regarding the investigation done by him. The Medical Officer P.W.4 Dr. Sudha Sharma proved the medical examination report prepared by her as (Ext.Ka.7). She also proved the age certificate of the victim issued by C.M.O. (Ext.Ka.8). She deposed about the medical examination of the victim done by her. The Principal of Divine Science Vidyapeeth, Ghaziabad P.W.5 Suman Lata proved the original attendance register (from April 2014 to March 2015) relating to the victim as (Ext.Ka.9). She stated that in that register, the date of birth of the victim was mentioned as 14.11.2002. The victim's father's name, Kalua and mother's name, Yashoda was mentioned at Sr. No. 10. She filed its certified copy as (Ext.Ka.9). P.W.5 also stated that Scholars Register has not yet been prepared in her school. She also admitted that no documents have been attached in proof of the date of birth of the victim. She stated that the attendance register is not signed by any authority. Her

school is not recognized by the government.

13. On 03.04.2019, the trial court recorded the statement of the appellant-accused, Rinku @ Prempal u/s 313 Cr.P.C. The appellant-accused denied the statement of P.W.1 Kalua and P.W.2 victim to the effect that on 07.10.2016 in the absence of victim's father, Kalua, he stayed in her house for 5-6 days and on 07.10.2016, enticed away his daughter/victim aged 14 years who was recovered by the police on 12.10.2016 and the case was registered on the basis of written report submitted by the informant in the police station concerned. He also denied that after enticing away the victim, he carried her to Haridwar and from there in a room. He did obscene gestures with her and committed rape on her for 2-3 times during the period of 4 days. He has also denied that after this period, he carried the victim to Ghaziabad and when he was waiting for bus at the Jahangeerabad Bus Station, on query being made by the woman police constable, he left the victim there and ran away. He denied the statement made by the victim against him u/s 164 Cr.P.C. He stated that the Investigating Officer had done wrong investigation. He stated that the prosecution papers, namely, site plan (Ext.Ka.3), chik F.I.R. (Ext.Ka.5), G.D. of the institution of the criminal case (Ext.Ka.6), medical report of the victim (Ext.Ka.7) and her age certificate (Ext.Ka.8), are wrong and have been falsely prepared. The appellant-accused stated that the victim's father is his real brother-in-law (*sarhoo*). He had borrowed Rs.60,000/- from him. When the appellant-accused asked him for its repayment, he quarrelled with him, refused to make repayment thereof and filed false case against him.

14. It has been argued by learned counsel for the appellant that the first

information report has been lodged after a gap of 5 days and no explanation has been given for it. It has also been submitted that there is no eye witness of the incident of appellant-accused carrying the victim with him. The victim was not recovered from the possession of the appellant-accused. The charge of rape is not corroborated by the medical examination report of the victim. He has also submitted that victim's father had borrowed Rs.60,000/- from the appellant-accused. When the appellant-accused asked him to pay back his money, he refused to do so and filed false case against him. He further submitted that the prosecution has failed to prove the charge against the appellant-accused and he should be acquitted of the charge framed against him and the trial court without proper appreciation of oral and documentary evidence has wrongly convicted him vide impugned order.

15. Learned A.G.A. has argued that the prosecution has proved the charge against the appellant-accused with the aid of oral evidence of witnesses of fact corroborated by duly proved documentary evidence produced by the prosecution.

16. Under Section 363 I.P.C., punishment for kidnapping a person from India or from lawful guardianship is provided. Kidnapping from lawful guardianship has been defined u/s 361 I.P.C. which is as follows :-

361. Kidnapping from lawful guardianship.--Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is

said to kidnap such minor or person from lawful guardianship.

17. Under Section 366 I.P.C., the punishment for kidnapping, abducting or inducing a woman to compel her marriage etc., has been provided. The ingredients of Section 366 I.P.C. are as follows :-

1. *kidnapping or abducting of any woman;*

2. *such kidnapping or abducting must be -*

(i) *with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will, or;*

(ii) *in order that she maybe forced or seduced to illicit intercourse;*

(iii) *by means of criminal intimidation or otherwise by inducing any woman to go to any place with intent that she maybe, or knowing that she will be forced or seduced to illicit intercourse; it is immaterial whether the woman kidnapped is a married woman or not.*

18. The Apex Court has held in **Gabbu Vs. State of Maharashtra, AIR 2006 SC 246** that unless the prosecution proves that the abduction is for the purposes mentioned in Section 366 I.P.C., 1860, the Court cannot hold the accused guilty and punish him u/s 366 I.P.C., 1860. If the criminal was 18 years old or over, she could only be abducted and not kidnapped but if she was not 18 years, she could be kidnapped as well as abducted if the taking was by force or enticing was by deceitful means.

19. To constitute an offence under Section 366 I.P.C., it is necessary for the prosecution to prove that the accused induced the complainant-woman or compelled by force

to go from any place that such inducement was by deceitful means, that such abduction took place with the intent that the complainant may be seduced to illicit intercourse and/or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction.

20. In order to establish an offence under Section 366 I.P.C., it must first be established that the offence of kidnapping under Section 361 or abduction under Section 362 I.P.C., has been proved. It must then be shown that such kidnapping was with the contumacious intent referred to under Section 366 I.P.C.

21. Hon'ble Apex Court in **Kavita Chandrakant Lakhani vs. State of Maharashtra and another, Criminal Appeal No. 459 of 2016**, order dated 24 April, 2018, has held as under:

*"...In order to constitute the offence of 'abduction' a person must be carried off illegally by force or deception, that is, to compel a person by force or deceitful means to induce to go from one place to another. The intention of the accused is the basis and the gravamen of an offence under this Section. The volition, the intention and the conduct of the accused determine the offence; they can only bear upon the intent with which the accused kidnapped or abducted the woman, and the intent of the accused is the vital question for determination in each case. **Once the necessary intent of the accused is established, the offence is complete, whether or not the accused succeeded in effecting his purpose, and whether or not the woman consented to the marriage or the illicit intercourse.**"(emphasis by Court)*

22. Section 354-B I.P.C. is included in the offence of "Sexual Assault" as

defined under Section 7 POCSO Act and made punishable under Section 8 of the Act. Section 354-B I.P.C. reads as under:

354-B. *Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment or either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.*

23. "**Sexual assault**" has been defined in Section 7 of Protection of Children from Sexual Offences Act, 2012, which is as follows :-

7. Whoever, with sexual intent touches, the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

24. Punishment for sexual assault has been provided in Section 8 of Protection of Children from Sexual Offences Act, 2012, which is as follows :-

8. Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

25. In this criminal appeal it has to be considered whether prosecution has been successful in proving the charge under Sections 363, 366, 354-B I.P.C. and Section 8 POCSO Act under which the

accused-appellant Rinku alias Prem Pal has been convicted and sentenced by the Trial Court.

Whether the appellant-accused Rinku alias Prem Pal on 07.10.2016 at 1 pm kidnapped or enticed the minor daughter aged 14 years of informant Kaluwa from his lawful guardianship without the consent of such guardian.

Whether the appellant accused kidnapped the minor daughter of informant with intention that she may be forced or seduced to illicit intercourse .

Whether on the alleged date, time and place the appellant-accused assaulted or used criminal force against the informant's minor daughter/victim or abet such an act with intention of disrobing or compelling her to be naked.

26. First of all we have to see whether the victim was less than 18 year of age at the time of occurrence. The alleged offence took place on 07.10.2016. On that date the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Juvenile Justice (Care and Protection of Children) Model Rules 2016 had come into force. The provision for determining the age of victim under the Protection of Children from Sexual Offences is given under Section 94 of the Juvenile Justice (Care and Protection of Children) Act 2015. The provision of Section 94(2) of the Juvenile Justice Act is given as under:

94. Presumption and determination of age.- (1) *Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the*

Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining--

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

27. To prove the age of the victim, the prosecution has examined PW-5 Suman Lata the Principal of Divine Science Public School, Awantika Chiranjeev Vihar, Ghaziabad in which school the victim was studying from Class 3. PW-5 Suman Lata has produced photocopy of the particulars mentioned in the attendance register of class 3 relating to admission of victim as class 3 student. PW-5 Suman Lata has deposed in her evidence that the details

regarding the age of the victim is mentioned at Serial No. 10 of the register where her date of birth is mentioned as 14.11.2002. PW-5 Suman Lata certified the photocopy of the relevant page of the register with the original and produced it as Exhibit Ka-9. PW-5 Suman Lata has admitted that in the register at Serial No. 10 the name of the victim and her father's name Kaluwa and mother's name Yashoda is mentioned. Her date of birth given is 14.11.2002. She admitted that only in the attendance register in the school the date of birth and other particulars of the student is mentioned. There is no SR register in the school. She had admitted that her school is not recognized by the Government. PW-5 Suman Lata deposed that the attendance register is not signed by any officer of education department. She admitted that she had not inscribed the date of birth and other particulars of the victim in the register nor she can recognize the name and handwriting of the person who had made the entry in the aforesaid register. Under aforesaid circumstances, the date of birth of the victim mentioned in the attendance register of the school which is not duly maintained cannot be accepted for legal purposes.

28. Further, the prosecution has produced the age certificate dated 17.10.2016 of the victim issued by the Chief Medical Officer, Bulandshahar (Exhibit Ka-8). This age certificate is based on ossification test of the victim. The age certificate of the Chief Medical Officer has been proved by Dr. Sudha Sharma (PW-4). In this age certificate of the victim her age is mentioned as 15-16 years. Thus, age given in the certificate issued by the CMO, Bulandshahar is a valid document and the age given in it can be accepted. According to the aforesaid age certificate (Exhibit Ka-

8) at the time of her age determination by ossification test i.e. 17.10.2016 her age is about 15-16 years. Therefore, she was minor at the time of commission of the offence.

29. Now, it has to be seen whether the victim was kidnapped or enticed away from lawful keeping of her guardian. It has also to be seen whether kidnapping was done by the accused-appellant with the intention to marry her against her will or with the intention or knowledge that she will be subjected to illicit intercourse. Informant and father of the victim PW-1 Kaluwa has proved the written report (Exhibit Ka-1) which he had filed in Police Station Aurangabad on 12.10.2016.

30. PW-1 Kaluwa has stated in his evidence that his brother-in-law (Sarhu) Rinku came to his house in his absence on 07.10.2016. He stayed there for 5-6 days. He kidnapped and enticed away his minor daughter from his house and at that time his married son, his daughter-in-law and his daughter were residing in his house. He searched for his daughter in his relations but the victim was not found anywhere. Then he submitted written report (Exhibit Ka-1) on 12.10.2016 at Police Station Aurangabad and got a criminal case registered against his brother-in-law for kidnapping his minor daughter from the keeping of her lawful guardian. His daughter was recovered on the same day of registration of FIR. She informed him that appellant-accused Rinku alias Prem Pal had enticed and kidnapped her and repeatedly committed rape with her for several days. The age of his daughter was 14-15 years at the time when she was kidnapped. PW-1 Kaluwa stated that as time was taken in searching his daughter in all possible places and due to his concern for the reputation of

the family there was some delay in lodging the FIR. PW-1 stated in his cross examination that as the accused-appellant Rinku alias Prem Pal was brother-in-law therefore, he used to frequently visit his home. He stated that on the date and time when his daughter was kidnapped he was residing in Ghaziabad where he used to ply a tempo. Rinku alias Prem Pal did not kidnap her in his presence. PW-1 Kaluwa denied that as he had borrowed Rs. 60,000/- from the appellant-accused Rinku alias Prem Pal and he did not want to make payment of that amount he lodged a false FIR against him.

31. The victim PW-2 has stated in her evidence that the incident took place on 07.10.2016. She has stated that accused-appellant, resident of Ruksana who was her Mause came to her house on 07.10.2016 at about 11 o'clock. He enticed and kidnapped her by his car. He reached Shyana and from there he took her by bus to Garh. She was taken by train from Garh to Haridwar. In Haridwar he took room on rent. He brought the victim in the room at 7 o'clock in the evening and after having the dinner the appellant-accused started making obscene gesture with her. When she forbid him from doing so he slapped her. She became frightened. The victim requested him to leave her. The accused-appellant disrobed her and committed rape on her. The appellant-accused raped her on the next day and night for 2 to 3 more times. He kept her in the room for 4 days and continuously committed rape on her. The accused threatened to kill her and her family members. After that period, the accused took her to Ghaziabad from where he wanted to carry her to his home at Jugsana. He was waiting with the victim at Jahagirabad Chauraha crossing bus station. A female police constable asked the victim

her name. Rinku left her and ran away. The female police constable took her to Police Station Aurangabad. She told the police about the incident. From the police station she was sent for medical examination and for recording of her statement under Section 164 Cr.P.C. by the Magistrate. The witnesses stated that she told the Magistrate about the incident which happened with her. PW-2 victim proves her statement under Section 164 Cr.P.C. which is Exhibit Ka-2.

32. PW-2 victim stated in her cross examination that she informed about the occurrence to her father on her recovery. Her mother and accused Rinku's wife are real sisters. The accused used to visit her house alone and not with his wife. When the accused Rinku had came to her house at that time she, her sister and her Bhabhi were in the house. The victim stated that she has two brothers and two sisters. She is youngest among all of them. She stated that earlier she used to live in Ghaziabad with her parents but after the marriage of her brother she came to stay in her village. PW-2 stated in her cross examination that the accused-appellant enticed away from her house at 11 am. The accused had told her that her mother is feeling ill. She has ringed to the accused to bring the victim to her mother.

33. PW-2 further stated in her cross examination that while she was being carried by the accused from her house to Haridwar she was threatened by the accused hence she did not inform anyone that accused has kidnapped her from her lawful guardian. She has stated that from the date of her being kidnapped by the accused till her recovery by Police, on the way she had not informed anyone about the kidnapping and rape by accused as she was

threatened by the accused that if she would complain she and her family members will be killed. PW-2 victim had admitted that there was no injury on her person. She has denied that her father had borrowed Rs. 60,000/- from the accused and when the accused asked for return of the money he lodged the first information report.

34. From the evidence of PW-2 victim, it transpires that the accused took away the victim from her house on the false pretext that her mother is ill and she had asked the accused to bring the victim to her. PW-1 Kaluwa has also corroborated the evidence of PW-2 that the victim had informed him about her kidnapping by the accused appellant. Nothing has been found in the cross examination of PW-1 and PW-2 by defence that may raise doubt about the reliability and veracity of their statements. Therefore, it is proved that the accused kidnapped the victim from her lawful guardian.

35. The victim PW-2 has stated in her evidence that after kidnapping from her home when the appellant-accused had kept her in a rented room in Haridwar there at night he started making obscene gestures with her and he slapped her several times and disrobed her. From the evidence of PW-2 the victim it is clear that the appellant-accused not only disrobed her but also slapped her several times. Thereafter he used criminal force on the victim with the intention of disrobing her and made her naked. The offence of using criminal force to disrobe a woman has been defined under Section 354-B I.P.C.

36. PW-2 victim has also corroborated her evidence in her statement under Section 164 CrPC that the appellant-accused used criminal force against her at

night in the rented room in Haridwar with an intention to disrobe her.

37. For the applicability of POCSO Act following two conditions are necessary:

(i). At the time of incident the victim is minor

(ii) Sexual assault has been committed against the victim

38. Since Both these conditions are present in this case, the offence under Section 354-B I.P.C. is also covered under the sexual offence defined under Section 7 POCSO Act has been made punishable under Section 8 POCSO Act.

39. When a person is being prosecuted for offences under Sections 3,5,7 and 9 then according to provision of Section 29 POCSO Act it shall be presumed that the accused has committed or attempted to commit the offence unless the contrary is proved. Section 29 POCSO Act is as follows:

29. Presumption as to certain offences. - *Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.*

40. Apart from the aforesaid presumption required culpable mental state for any of the offences mentioned in Section 29 shall be presumed against the accused who is being prosecuted for aforesaid offences. This is provided under

Section 30 of the POCSO Act which is as follows:

30. Presumption of culpable mental state. - *(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

41. From the above discussion of the evidence of PW-2 victim it is evident that the offence defined under Section 7 POCSO Act is proved against the accused-appellant. The accused-appellant has not put any suggestion to PW-2 in her cross examination or made any statement under Section 313 Cr.P.C. in rebuttal of aforesaid evidence regarding sexual assault.

42. From the evidence of the victim PW-2 which corroborated by her statement under Section 164 Cr.P.C. recorded after her recovery and that of other prosecution witnesses, it is proved that the victim was minor when the appellant-accused took her from the lawful guardianship. No suggestion has been on behalf of the accused-appellant in the cross examination of PW-1 Kaluwa or PW-2 victim or and in his statement under Section 313 Cr.P.C. that at the time of the occurrence the appellant-accused was not with the victim and he was at some other place. The accused-appellant has only stated in his

statement under Section 313 Cr.P.C. that the informant had borrowed Rs. 60,000/- from him and when he asked him to return it, he lodged a false case against him. DW-1 and DW-2 produced on behalf of the accused-appellant have not supported this statement of appellant-accused made under Section 313 CrPC. Neither of these witnesses have stated that informant had borrowed Rs. 60,000/- from the appellant-accused and when that amount was demanded by him a false FIR was registered against him. The evidence of PW-1 Kaluwa and PW-2 the victim is true, cogent and reliable. Nothing emerges in the cross examination of PW-1, PW-2 or the prosecution witnesses which may rebut or make the prosecution case doubtful that the appellant-accused kidnapped the victim with the intention/knowledge that she will be seduced or subjected to illicit intercourse.

43. It has been argued on behalf of the appellant-accused that the FIR has been lodged after a gap of five days which raises doubt about the veracity of the occurrence.

44. It has been argued on behalf of the learned A.G.A. For the Stae that in the matter of kidnapping and rape of a woman due to the reputation of family is at stake therefore family members hesitate to promptly lodge the FIR. Therefore, delay of five days does not make the case doubtful

45. From the perusal of averment made in written report (Exhibit Ka-1) it is clearly mentioned that after kidnapping of the victim on 07.10.2016 the informant made search for her at all possible places but she could not be found. When he was convinced that she was enticed and kidnapped by his brother-in-law then he

lodged an FIR. The alleged delay in lodging the FIR has been sufficiently explained in the written report.

46. In the case of **Deepak vs. State of Haryana, (2015) 4 SCC 762** the Hon'ble Apex Court has held as under:

15. The Courts cannot overlook the fact that in sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family.

47. In the case of **State of Himanchal Pradesh vs. Sanjay Kumar alias Sunny, (2017) 2 SCC 51** the Hon'ble Supreme Court has held as under:

It is not to be forgotten that the person accused by the prosecutrix was none else than her Uncle. It is not easy to lodge a complaint of this nature exposing the prosecutrix to the risk of social stigma which unfortunately still prevails in our society. A decision to lodge FIR becomes more difficult and hard when accused happens to be a family member. In fact, incestuous abuse is still regarded as a taboo to be discussed in public. This reticence hurts the victims or other family members who struggle to report. After all, in such a situation, not only the honour of the family is at stake, it may antagonize

other relations as well, as in the first blush, such other members of family would not take charge of this nature very kindly."

48. Learned counsel for the appellant-accused has stated that even if in the academic records of the victim shows her minor. If in the medical report based on ossification test she is shown as major the medical report will prevail over her certificate issued by the educational institution and she will be considered as major. He has placed reliance on the judgment of the Apex Court in **Civil Appeal No.4532 of 2018, Suhani and another vs. State of U.P. and others**. From perusal of the aforesaid judgment it is clear that it is not applicable in the present case as in that case before the Apex Court the age of the victim in her school record was 13 years and 8 months whereas in the medical report prepared after radiological examination her age was fixed between 19-24 years. But in the present case the medical report based on radiological examination her age is determined as 15-16 years. Therefore, the victim is evidently a minor. Hence offence under Section 363 I.P.C. can be committed against her.

49. From the discussion of the above evidence it is proved that the appellant accused kidnapped the minor girl/victim out of keeping of her lawful guardian by deceitful means and made obscene gestures, slapped her and used criminal force to disrobe the victim. Thus the prosecution has proved beyond reasonable doubt the charge under Section 363, 366 and 354-B I.P.C. against the accused-appellant. Thus the Trial Court has rightly convicted him of charge under these sections. Offence under Section 354-B I.P.C. is included in the offence defined under Section 7 POCSO Act and it is made

punishable under Section 8 POCSO Act as "sexual assault". Section 42 POCSO Act reads as under:

42. Alternate Punishment. -

Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [376A, 376AD, 376B, 376C, 376D, 376DA, 376DB], [376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000)], then notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal code as provides for punishment which is greater in degree."

50. Considering the provisions of Section 42 POCSO Act, since 354-B I.P.C. has greater sentence of seven years viz-a-viz punishment of five years which provided under Section 8 POCSO Act thus accused-appellant is liable to be punished under Section 354-B I.P.C. for seven years imprisonment with fine of Rs. 2000/- with default stipulation. The Trial Court has convicted the appellant-accused under Section 354-B I.P.C. but wrongly sentenced him under Section 8 POCSO Act. Thus, the sentence under Section 354-B I.P.C. is modified to seven years imprisonment with fine as imposed by the Trial Court. Both the substantive sentences shall run concurrently. Period of detention undergone by the accused to be set off against the sentence of imprisonment under Section 428 Cr.P.C.

51. With aforesaid modification of sentence under Section 354-B I.P.C. the conviction and sentence of Trial Court

under Sections 363, 366 and 354-B I.P.C. against the accused-appellant is confirmed. Thus, the criminal appeal has no force and is liable to be dismissed.

52. The appeal is, accordingly, dismissed with the aforesaid modification of sentence awarded under Section 354-B I.P.C.

53. Let a copy of the judgment along with the record of the Trial Court be sent to the Court concerned for compliance.

(2023) 5 ILRA 581
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.04.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, C.J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 8080 of 2008
 With
 Criminal Appeal No. 8477 of 2008

Indra Pal & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

Sri Noor Mohammad, Sri R.K. Rathore, Sri A.K. Pandey, Sri Ajit Kumar Singh Solanki, Archana Hansh, Sri J.S. Sengar, Sri S.B. Singh

Counsel for the Opposite Party:

Sri Amit Sinha, A.G.A., Ms. Mayuri Mehrotra, State Counsel

A. Criminal Law - Criminal Procedure Code, 1973-Section 378 - Indian Penal Code, 1860-Sections 364-A & 365-Challenge to-Conviction-Victim was kidnapped and was recovered after 14 days under wrongful confinement- The informant PW-2 and victim/kidnapped boy

PW-3 both have proved this fact that the boy was recovered after an encounter between the police and the accused persons-The Investigating Officer PW-5 also proves the story of recovery of kidnapped body and states that after police encounter wherein the accused persons opened fire upon the police party which was reciprocated in defence by the police, accused persons were arrested and rest of the accused persons fled away-The boy was retrieved from the kuthia, whose hands and mouth were roped, arms and cartridges were also retrieved, memo of recovery was prepared. The rope and cloth used in tiding the boy were also proved by PW-5- PW-6, who was accompanying the police at the time of recovery of the boy also states the same story-no injury was caused to any of the accused persons or police personnel-Thus, the prosecution has fully proved that the kidnapped boy was recovered from the possession of the accused appellants-the evidences fulfils essential ingredients of offence u/s 365-No evidence of ransom and prosecution has failed to establish essential ingredients of any such demand as required u/s 364-A-the offence falls within the purview of Section 365-Accordingly conviction of appellants under section 364-A was altered and modified to one under Section 365.(Para 1 to 78)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Suman Sood @ Kamal Jeet Kaur Vs St. of Raj. r/w Daya Singh Lahoriya @ Rajeev Sudan Vs St. of Raj.(2007) 5 SCC 634
2. Hari Kishan & St. of Har.Vs Sukhbir Singh (1988) AIR SC 2127
3. St. of M.P. Vs Harjeet Singh & anr. (2019) AIR SC 1120
4. Susanta Das Vs St. of Ori. (2016) 4 SCC 371
5. Shivaji Sahab Rao Vs St. of Mah. (1973) SCC (Cri) 1033

6. Netra Pal Vs St. (NCT of Delhi) (2001) 0 Supreme (Del) 293

7. Shaik Ahmed Vs St. of Telangana (2021) 0 SCC 304

8. J. Yashoda Vs K. Shobha Rani (2007) 5 SCC 730

9. H. Siddiqui Vs A. Ramlingam (2011) 4 SCC 240

10. Jagmail Singh Vs Karamjit Singh (2020) 5 SCC 178

11. Ram Suresh Singh Vs Prabhat Singh (2009) 6 SCC 681

12. Mahesh Vs St. of UP CRLA No. 3647 of 2005

13. Ashwani Dubey Vs St. of UP CRLA 7740 of 2006

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

1. Since these appeals have been preferred against the same judgment and relate to same Crime Number, they were heard together and are being decided by this common judgment.

2. The Special Judge (DAA) / Additional Sessions Judge, Court No.5, Etah by judgment and order dated 22.11.2008 passed in Special Sessions Trial No. 25 of 1998 (Crime No. 346 of 1997), P.S. Soron, District Etah convicted and sentenced the appellants under Section 364A I.P.C. to undergo life imprisonment with a fine of Rs. 2,000/- each and under Section 307 I.P.C. read with Section 149 I.P.C. to undergo seven years rigorous imprisonment with a fine of Rs. 500/- each and in default of payment of fine, to undergo three months additional rigorous imprisonment. All the sentences were directed to run concurrently. Aggrieved

with the said judgment, present appeals have been preferred by the appellants.

3. Brief facts, as culled out from the record, are that a First Information Report was lodged by the informant, Chandra Pal son of Roopram, resident of Badanpur, Police Station Soron, District Etah, on 22.11.1997 at 2.45 p.m., with the averments that in the night of 21/22.11.1997, as usual, he was sleeping inside his shop and his wife Prema Devi was sleeping in the shed with the kids and nearby his children were also sleeping on different cots. At about 12.00 p.m. when the wife of the informant made noise that miscreants had come, he came out unlocking the shop. Six seven miscreants came and took his 11 years old son Rajesh. On raising alarm by the informant and his wife, his neighbors also came there. When everyone tried to rescue the boy from the miscreants, they fired with guns and went towards south with the boy. Jabar Singh son of Siya Ram Jatav received gunshot injury in the occurrence.

4. On the basis of aforesaid written report, on 22.11.1997 F.I.R. was lodged against 6-7 unknown miscreants for the offence under Sections 364 and 307 I.P.C. Investigating Officer started investigation and inspected the spot and prepared the site plan. Injured Jabar Singh was medically examined on the same day at the Community Health Centre, Soron, Etah. During the course of investigation, on the basis of an information dated 4.12.1997, the Investigating Officer with other police personnel, reached Badanpur where the informant Chandrapal met and handed over a letter regarding demand of ransom of Rs. 70,000/- in respect of the kidnapped boy. When the police personnel alongwith the informant and other persons, with a view to

search out the kidnapped boy, reached the old brick kiln before the village Goyti, information was received that in the house of Pusey son of Sonpal Kashyap, the kidnapped boy alongwith the kidnappers are present. On the basis of the said information, the police personnel alongwith informer and other persons, reached at village Chauraghat and when on the tip of the informer, reached the corner of the western wall of the house of Pusey Kashyap, it was seen that six persons, armed with gun and tamancha, were sitting on the north face of the roof (kotha) and when they saw the police personnel, they fired 5-6 shots with intention to kill them. In their defence, the police personnel also fired upon them and by using necessary force, two miscreants were caught by surrounding them in front of Pusey's house and the remaining four miscreants, namely, Pusey, Mahatma, Awadhesh and Kallu managed to escape. Of the criminals caught, one told his name as Shripal son of Chhuni Lal, resident of Pachauraghat, P.S. Soron, District Etah and on his search, one SBBL gun 12 bore with three live cartridges of 12 bore were recovered, whereas the other person identified himself as Indrapal son of Anar Singh, resident of Badanpur, P.S. Soron, District Etah. On his search, one tamancha deshi bore and two live cartridges were recovered. On the pointing out of Shripal, the kidnapped boy was recovered from the Pusey's roof (kotha). Informant Chandrapal identified him as his son Rajesh, who was kidnapped for ransom. Accused persons Shripal and Indrapal were arrested and recovered SBBL gun and country made pistol alongwith live and empty cartridges were sealed in separate cloths and specimen seal was prepared. The plastic rope, with which the kidnapped boy was tied, was also seized and a memo was prepared. On the basis of

seizure, cases under Sections 147, 148, 149, 307 I.P.C. against accused Kallu, Shripal, Indrapal, Mahatma and Pusey and under Section 25 Arms Act against accused Shripal and Indrapal were registered. Rajesh, the kidnapped boy, was medically examined on 4.12.1997 at the Community Health Centre, Soron at 2.45 p.m. and was handed over to his father Chandra Pal. After completing the investigation, charge sheets under Sections 364A and 307 I.P.C. against the accused Shripal, Indrapal, Mahatma, Awadhesh, Kallu and Pusey, under Sections 147, 148, 149, 307 I.P.C. against accused Kallu, Shripal, Indrapal, Mahatma and Pusey and under Section 25 Arms Act against the accused Shripal and Indrapal, were submitted. Concerned Magistrate took the cognizance. The cases being exclusively triable by Sessions Court, were committed to the Court of Sessions.

5. On 23.5.1998, charges under Sections 148, 307 I.P.C. read with Section 149 I.P.C. were framed against accused Kallu, Shripal, Indrapal and Mahatma in S.T. No. 193 of 1998. On the said date, charge under Section 25 Arms Act was also framed against accused Indrapal and Shripal in the said S.T.. On 18.8.1999, charges under Sections 364A and 307 I.P.C. read with Section 149 I.P.C. were framed against accused Shripal, Indrapal, Mahatma, Awadhesh, Pusey and Kallu in S.S.T. No. 25 of 1998. On 4.12.1998 in S.T. No. 676 of 1998 against the accused Pusey, charges under Sections 148, 307 I.P.C. read with Section 149 I.P.C. were framed.

6. All the six accused persons appeared before the trial court. They denied the charges and claimed their trial.

7. It transpires from the record that accused persons charged in this case were

tried in different sessions trials, which were subsequently amalgamated. Accused Shripal, Indrapal, Mahatma, Kallu and Pusey were tried in S.S.T. No. 25 of 1998, accused Kallu, Shripal, Indrapal and Mahatma were tried in Sessions Trial No. 193 of 1998 and accused Pusey was tried in Sessions Trial No. 676 of 1998. It also transpires from the record that earlier evidence of separate Sessions Trial was recorded separately, particularly, in Sessions Trial Nos. 25 of 1998 and 193 of 1998 and that is why the exhibits marked over the documents in separate sessions trials when taken together make a confusing situation and accordingly Exhibit Numbers marked over the documents are somewhere overlapping, but the learned trial court has made a systematic assessment of the evidence on record and this Court is also apprised of this fact.

8. Trial proceeded and to bring home the charges against the accused persons, prosecution has examined in all eight witnesses, who are as follows:

1	Jabar Singh	PW-1 (injured) (in S.S.T. No. 25/1998)
2	Chandra Pal	PW-2 (informant) (in S.S.T. No. 25/1998)
3	Rajesh	PW-3 (kidnapped boy) (in S.S.T. No. 25/1998)
4	Dr. Awadhesh Kumar	PW-4 (witness of injury report) (in S.S.T. No. 25/1998)
5	Indra Pal Singh Solanki	PW-5 (Investigating Officer) (in S.S.T. No. 25/1998)
6	Inspector	PW-6 (witness of

	Dharam Singh	recovery of the boy) (in S.S.T. No. 25/1998)
7	HCP Giridhari Singh	PW-7 (scribe) (in S.S.T. No. 25/1998)
8	S.I. Shitla Prasad	PW-8 (Investigating Officer of police firing case) (in S.S.T. No. 25/1998)

9. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Chik F.I.R. crime no. 346/1997	Ext. A-1
2	Copy of recovery memo	Ext. A-2
3	Supurdginama	Ext. A-3
4	Injury report	Ext. A-4
5	Injury report	Ext. A-5
6	Site Plan	Ext. A-6
7	Site Plan	Ext. A-7
8	Charge sheet	Ext. A-8
9	Carbon copy of G.D.	Ext. A-9
10	Site plan of place of recovery	Ext. A-10
11	Charge sheets	Ext. A-11, Ext. A-12, Ext. A-13, Ext. A-14
12	Prosecution sanction letter against accused Shripal	Ext. A-15
13	Prosecution sanction letter against accused Indra Pal	Ext. A-16
14	Supplementary	Ext. A-17

	charge sheet	
15	Chik F.I.R. under Section 25 Arms Act	Ext. A-18

10. After closure of evidence, incriminating materials appearing in the prosecution evidence were put to the appellants in their statements under Section 313 CrPC of which they denied and claimed false implication.

11. Appellants in their defence have examined DW-1 Ram Prakash and DW-2 Saudan Singh.

12. During trial, accused Awadhesh died and trial against him was abated.

13. PW-1 Jabar Singh is the injured witness of the occurrence. In his examination-in-chief, he has stated that his house is near the house of the informant. It was 12.00 in the night. 5-6 miscreants came to the house of Chandrapal. On the noise, he woke-up. While the miscreants were taking away Rajesh son of Chandrapal, he shouted that he recognized the miscreant, the miscreant immediately shot him which hit on his ear. He further stated that firstly, the villagers carried him at Police Station and thereafter to the hospital. He further stated that he had recognized miscreant Awadhesh, who was the resident of Badanpur but could not recognize the other miscreants. He further states that he fainted as soon as he got shot. After 15-20 days of the incident, his statement was recorded by the police. He further stated that when he regained consciousness after eight days, he told the name of Awadhesh to Chandrapal.

14. PW-2, Chandrapal, is the informant of the occurrence. He has supported the contents of the written

report and also the entire prosecution case including the recovery of the kidnapped boy and the weapons and also the role of the miscreants.

15. PW-3 is Rajesh, the kidnapped boy. He has stated the manner in which he was kidnapped by the miscreants. He has also stated that he recognized the miscreants as Kallu, Shripal, Awadhesh, Mahatma and Indrapal. He also stated that the miscreants had not covered their faces. He has deposed the entire scene of his recovery.

16. PW-4 Dr. Awadhesh Kumar has medically examined the injured Jabar Singh and Rajesh, the kidnapped boy and has proved the injury reports as Ext. A-4 and Ext. A-5.

17. PW-5 S.S.I. Indrapal Singh Solanki is the Investigating Officer. He has proved the proceedings of investigation in his examination-in-chief and also proved the site plans (Ext A-6 and Ext. A-7). He has also proved the charge sheet (Ext. A-8).

18. PW-6 Inspector Dharm Singh was posted as S.O. of the police station concerned. He also accompanied the Investigating Officer for the recovery of the kidnapped boy and has proved the manner of the recovery of the kidnapped boy, firing on police by the miscreants, the weapons, live and empty cartridges recovered from the possession of the accused persons, the rope with which the kidnapped boy was tied, the blindfold and the empty cartridges, which the police had fired in defence.

19. PW-7, Head Constable Giridhari Singh, is the scribe of the F.I.R. and has proved the chik F.I.R. and G.D. Rapat No.

4 at 2.45 a.m. as Ext. A-18 and Ext. A-9, respectively.

20. PW-8, Sub-Inspector Shitla Prasad, the Investigating Officer of crime no. 354 of 1997 under Section 147, 148, 149, 307 of I.P.C. P.S. Soron and crime nos. 355 of 1997 and 356 of 1997, which was handed over to him on 4.12.1997. He has proved the investigation proceeding, the site plan (Ext. A-10) and charge sheets (Ext. A-11 and Ext. A-17). He has also proved the permission letters of the District Magistrate to initiate prosecution under Section 25 Arms Act against accused Shripal and Indrapal as Ext. A-15 and Ext. A-16, respectively. He has also proved the chik F.I.R. (Ext. A-18).

21. DW-1, Ram Prakash @ Prakash, has stated in his deposition that Chandrapal is his uncle and Rajesh, the abductee, is his brother. Upon hearing the noise, he had gone to the house of Chandrapal. He has further stated that the miscreants had not covered their faces. He knew the accused persons Indrapal, Kallu, Shripal, Pusey, Mahatma and Awadhesh before the incident. They had come to his village shop to take ration. They had not kidnapped Rajesh. Awadhesh had not fired upon Jabar Singh. He had also gone to police station alongwith other villagers. Since the miscreants could not be recognized, the F.I.R. was lodged against unknown persons. He further stated that there was strong partibandi in his village. He further stated that neither the kidnapped boy was recovered before him nor there was any firing between the police party and the miscreants. No weapon was recovered before him from the possession of accused Indrapal and Shripal. He had seen the miscreants carrying Rajesh alongwith them.

22. DW-2 Saudan Singh, has stated that on the day of incident at about 11.00-12.00 p.m. the buffalo of his uncle Chandrapal (informant) was calving. The gas lantern was en-lighting due to calving of buffalo. His house is in front of the house of Chandrapal (informant). Rajesh was kidnapped by unknown miscreants. When the miscreants came, their faces were uncovered. He, Jabar Singh and Chandrapal could not recognize them. He had also gone to police station for lodging F.I.R. but as the miscreants could not be recognized, the F.I.R. was lodged against unknown persons. He was not interrogated by the police about the incident.

23. On the basis of aforesaid evidence, learned trial court came to the conclusion that the prosecution has succeeded to establish the guilt against the accused persons on the basis of cogent, consistent and reliable evidence and charges against accused were proved beyond reasonable doubt and accordingly conviction order was passed.

24. Heard Shri Noor Mohammad, learned counsel for the appellants in both the appeals and Shri Amit Sinha, learned AGA and Ms. Mayuri Mehrotra, learned State Counsel.

25. Learned counsel for the appellants has assailed the impugned judgment and order on various grounds. It has been argued that the accused persons are not named in the F.I.R. and F.I.R. was lodged against unknown persons whereas the evidence reveals that the accused persons were identified at the place of occurrence at the time of kidnapping. It is also pointed out that the kidnapping of the son of the informant was not done for any ransom and, hence, the case of the prosecution does

not fall within the ambit of Section 364A I.P.C. It is further submitted that the evidence of witnesses of fact is contradictory to each other. In the so called police firing case, all the accused persons have been acquitted and it is found by the trial court that the alleged occurrence of police firing was false and since the kidnapped boy is said to be recovered in the incident of the aforesaid police firing case, the story of which has been falsified by the witnesses, the alleged recovery of the kidnapped boy from the possession of the present appellants is also proved to be a false story. It is next contended that due to previous animosity, the appellants have been falsely implicated in this case and on some other points also it has been submitted that the appellants deserve to be acquitted of the charges and the appeals deserve to be allowed.

26. Per contra, learned AGA, vehemently opposing the appeals has stated that the kidnapping of the son of the informant was made for ransom. The factum of kidnapping has been proved by cogent and reliable evidence of the kidnapped boy himself, which is fully corroborated by the evidence of his father and village witness Jabar Singh. The injury report of the injured Jabar Singh affirms the fact that during the commission of the offence of kidnapping, the injured Jabar Singh was shot fired by the appellants. The evidence also reveals that ransom letter was received by the informant, which was sent by the appellants and the same was handed over to the Investigating Officer. Apart from this, on the basis of several other grounds, the present appeals have been assailed by the learned State Counsel and dismissal of the appeals is prayed for.

27. To proceed with the present matter, it will be desirable to have a glance upon the provisions of Section 364A I.P.C., which are as follows:

"364 A. Kidnapping for ransom, etc.-- Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

28. The Hon'ble Apex Court in **Suman Sood alias Kamal Jeet Kaur vs. State of Rajasthan read with Daya Singh Lahoriya alias Rajeev Sudan vs. State of Rajasthan, (2007) 5 SCC 634** has laid down certain requirements for the application of Section 364A I.P.C. and it has been so held by the Hon'ble Apex Court :

"57. Before above section is attracted and a person is convicted, the prosecution must prove the following ingredients:

(1) the accused must have kidnapped, abducted or detained any person;

(2) He must have kept such person under custody or detention; and

(3) Kidnapping, abduction or detention must have been for ransom."

29. The first and foremost fact to be ascertained in the case in hand is whether the minor son of the informant was kidnapped by the present appellants and firearm injury was caused to injured Jabar Singh during the commission of crime of kidnapping.

30. A perusal of the F.I.R. (Ext. ka-1) proved by the informant PW-2 goes to show that at the time of occurrence, 6-7 accused persons took away Rajesh Kumar, the son of the informant and when on their shrieks their neighbours also came over there and tried to rescue the boy, the accused persons fled away with the boy firing by their guns and the gun shot injury also inflicted upon Jabar Singh and he sustained injury. The said F.I.R. was written in the hand writing of PW-7, the scribe of the F.I.R., who has proved his hand writing and signature over it and also the registration G.D. as Ext. ka-9.

31. In his cross-examination, PW-1 further states that accused persons Awadhesh, Indrapal and Mahatma are the native of his own village, who are acquainted with him and further he states that the accused persons were very well identified by him in the light of gas lantern. At one place, he says that he did not know the accused persons by name, but later in his deposition, he names the accused persons involved in the incident. Further more, he states that he knew the accused persons by their names and face prior to the incident and none of the accused persons had hidden their face. He fairly admits that he has not named the accused persons in his report, nor disclosed it to the Investigating Officer and further testimony of this witness reflects that he had a fair reason to conceal the name of the accused persons.

32. This witness states that during the commission of the occurrence, fire was made upon Jabar Singh, which inflicted injury over his ear. He further clarified that it was the accused Awadhesh who had shot fire upon Jabar Singh, but he was afraid of the murder of his son, if he disclose the name of Awadhesh Singh, as his son was in the custody of the accused persons. In his cross-examination, he fairly admits that "मैंने बयान में कहा था की अवधेश ने जबर सिंह को फायर मारा था । 5 कदम की दूरी से मारा था । अवधेश का नाम मैंने रिपोर्ट में इसलिए नहीं लिखाया था कि मेरा लड़का फंसा हुआ था । अगर मैं नाम लिखाता तो मेरा लड़का मारा जाता ।"

33. The aforesaid statement of PW-2 is found by us to be capable of explaining the circumstances under which albeit knowing very well the names and addresses of the accused persons, their identity was not disclosed in the F.I.R. by PW-2 and it was lodged against unknown persons. This is also an innocent statement of the poor father, PW-2 that he did not name the accused Awadhesh even to the Investigating Officer or any other person in order to save the life of his young son.

34. PW-1, injured Jabar Singh, has also corroborated this fact that when on shrieks he awoke in the night, he saw that some accused persons were carrying the son of Chandrapal and when he shouted, he was fired upon by one of the accused Awadhesh, a native of his own village and the firearm injury was inflicted upon his ear. He was taken to the police station and thereafter to the hospital. In the cross-examination, he has clearly stated that accused Awadhesh had not hidden his face at the time of occurrence but he did not know the other co-accused persons and eight days after the incident, when he became conscious, he disclosed this fact to the informant Chandrapal.

35. PW-3, Rajesh, is the kidnapped boy and is the key-witness. In his testimony, he has affirmed this fact that at the time of the occurrence, in the night, accused persons Kallu, Shripal, Awadhesh, Mahatma and Indrapal took him from his house with guns and deshi pistols with them and when they were chased by his family members, fire was opened by them. He has also clarified that since the accused person happened to come over his grocery shop, they were known to him prior to the incident. In his cross-examination, he has stated that none of the accused persons had hidden their face, they had come with open face, and during the occurrence, he has also received some injuries in his hand and buttock.

36. The Investigating Officer - PW-5 in S.S.T. No. 25 of 1998 has affirmed this fact that the kidnapped boy Rajesh in his statement had told him that Pusey, Shripal, Indrapal, Awadhesh, Kallu and Mahatma had kidnapped him in the incident. He has corroborated this fact that when the informant came to the police station, he himself was present over there and he had sent the witness Jabar Singh, who was not in a condition to speak, to the hospital. He was informed by them that some unknown persons had kidnapped Rajesh and it was also not disclosed to him that the fire was shot by accused Awadhesh. It is to be mentioned here that the reason for non-disclosure of the names of the accused persons has been discussed in the earlier part of this judgment. The same statement has been made by PW-6 Inspector Dharam Singh that in his presence the F.I.R. was lodged but the names of the accused persons were not disclosed by the informant or witnesses in the police station.

37. The prosecution has produced PW-4 Dr. Awadhesh Kumar to prove the fact that one gunshot injury was inflicted upon the injured Jabar Singh during the commission of offence of kidnapping.

38. PW-4, Dr. Awadhesh Kumar, has stated in his evidence that on 22.11.2003 at 3.20 a.m. he had medically examined injured Jabar Singh of P.S. Soron where he was working as Medical Officer and found following injuries on the injured Jabar Singh :

"(1) Organ damage Rt ear and Fire Arm wound size 10 cm X 4 cm X bone deep on Rt. side of Head about 9 cm. Lateral to Rt. Eye brow. Blackening & Burn present, injury kept U/O advice X ray skull (antero - posterior & lateral views). Pt. Refer to District Hospital Etah for x ray and further management.

(2) Abrasion size 2 cm X 0.5 cm on Lt forehead about 2 cm above Lt. Eyebrow.

Opinion - injury No. (1) caused by any type of fire arm and injury No. (2) caused by friction. Injury No. (1) kept U/O advice x ray skull (antero - posterior & lateral views) Injury no. (2) simple in nature. Duration of all injury - fresh."

PW-4 has proved the injury report as Ext. ka-4. It is important to mention here that the medical examination of injured Jabar Singh has been performed on the basis of "chitthi majrubi" (letter for medical examination) given by the police.

39. Although x-ray report of injured Jabar Singh is available on record wherein a fracture of right temporal bone has been found but the said X-ray report was not proved in evidence.

40. However, it is pertinent to mention here that the firearm injury has been inflicted over the right ear of the injured Jabar Singh and the dimension thereof was 10 cm X 4 cm X bone deep. This injury was 9 cm lateral to the right eyebrow with blackening and burn was also present which means that the injury was inflicted from a close range on a vital part of the body in the forehead area of the injured, which itself speaks that the fire was made with intention to kill the injured, who was trying to rescue the kidnapped boy.

41. The specific plea taken by the appellants in respect of non-proving of the x-ray report and thereby claiming a legal lacuna to put the case of the prosecution within the ambit of Section 307 I.P.C. takes us to the perusal of the provisions of Section 307 I.P.C. as conviction of the appellants has been made under Section 307/149 I.P.C. also for the specific charge of inflicting firearm injury over the injured Jabar Singh with intention to kill him.

42. Section 307 I.P.C. provides as under:

"307. Attempt to murder.-- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

Attempts by life convicts - When any person offending under this section is under sentence of imprisonment

for life, he may, if hurt is caused, be punished with death."

43. The law settled in the context of Section 307 I.P.C. is that it is not necessary that injury, capable of causing death, should have been inflicted. What is material to attract the provisions of Section 307 is the intention or knowledge with which, all was done, irrespective of its result. The intention and knowledge are the matters of inference from totality of circumstances and cannot be measured merely from the results. In fact the important thing to bear in mind for determining the question whether the offence under Section 307 I.P.C. is made out, is the intention and not the injury, even if it may be simple or minor. Question of intention to kill or knowledge of death is always a question of fact and not of law. The Hon'ble Supreme Court in *Hari Kishan and State of Haryana vs. Sukhbir Singh*, AIR 1988 SC 2127 has held that the intention or knowledge of the accused must be such as is necessary to constitute murder. In *State of Madhya Pradesh vs. Harjeet Singh and another*, AIR 2019 SC 1120, it was reiterated that Section 307 I.P.C. does not require that injury should be on vital part of the body. Merely causing hurt with intention or knowledge of causing death is sufficient to attract Section 307 I.P.C.

44. Since the blackening and burn was found in the injury of the injured by the doctor, fire might have been made from a close range and the injured PW-1 makes a specific statement on this point that the fire was made by Awadhesh from a distance of 3-4 steps, which elucidates the intention to kill the injured on the part of the appellants.

45. On the basis of evidence on record, we are of the considered view that

the learned trial court has made an anxious consideration of the evidence on record and has rightly convicted the appellants under Sections 307/149 I.P.C. It is noteworthy that albeit accused Awadhesh, who is said to be the main assailant to open fire upon injured Jabar Singh, has died but since the offence was committed in prosecution of common object of all the members of unlawful assembly, being the member of unlawful assembly, all the appellants were guilty jointly for the aforesaid offence and on that basis their conviction is legal and proper.

46. The legal position has been clarified in ***Susanta Das vs. State of Orissa, (2016) 4 SCC 371***, wherein it was held that :

"When once, participation of each member of an unlawful assembly of five or more persons is shown, who indulge in an offence as a member of such an unlawful assembly, for the purposes of invoking Section 149, it is not necessary that there must be specific overt act played by each of the member of such an unlawful assembly in the commission of an offence. What is required to be shown is the participation as a member in pursuance of a common object of the assembly or being a member of that assembly, such person knew as to what is likely to be committed in prosecution of any such common object. In the event of the proof of showing of either of the above conduct of a member of an unlawful assembly, the offence, as stipulated in Section 149, will stand proved."

47. After successfully proving its case in respect of kidnapping of the son of the informant and injury caused to the injured Jabar Singh, while trying to rescue the kidnapped boy, the prosecution further

claims that the kidnapped boy was recovered from the possession of the appellants.

48. The informant PW-2 and victim/kidnapped boy PW-3 both have proved this fact that the boy was recovered after an encounter between the police and the accused persons. The informant PW-2 states that the Investigating Officer had taken him to the place of recovery and there firing took place between both the sides. His son was recovered from the kuthia. The kidnapped boy PW-3 also states the same fact. The Investigating Officer PW-5 also proves the story of recovery of kidnapped body and states that after police encounter wherein the accused persons opened fire upon the police party which was reciprocated in defence by the police, accused persons Indrapal and Shripal were arrested and rest of the accused persons fled away. The boy was retrieved from the kuthia, whose hands and mouth were roped, arms and cartridges were also retrieved, memo of recovery (Ext. ka-7) was prepared. The rope and cloth used in tiding the boy were also proved as material Ext. ka 1,2 and 3 by PW-5. PW-6 Inspector Dharam Singh, who was accompanying the police at the time of recovery of the boy also states the same story. However, no injury was caused to any of the accused persons or police personnel. Thus, the prosecution has fully proved that the kidnapped boy was recovered from the possession of the accused appellants.

49. Against the cogent and reliable evidence adduced by the prosecution, depositions of DW-1 and DW-2 do not inspire confidence in its entirety because at one place both the DWs make a total denial of the prosecution version whereas at some

places, their depositions support the material facts of the prosecution story.

50. We have also noted that in their statements under Section 313 CrPC, the accused persons have not made any specific statement in their defence. They have simply stated that the incriminating evidence and circumstances proved against them are wrong and even the question regarding retrieving the kidnapped boy from their possession and his rescue has been answered only as 'wrong'. We would like to impress upon **Shivaji Sahab Rao vs. State of Maharashtra, 1973 SCC (Cri) 1033**, wherein it has been observed that:

"The prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. Where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. It is open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."

51. In the light of the aforesaid discussions, we find the testimony of DW-1 and DW-2 as unreliable and no benefit thereof can be given to the appellants.

52. Further, the prosecution is under obligation to establish that the demand of

ransom was made on the family of the complainant and it is also to be kept in mind that in the absence of there being any communication demanding payment of ransom, case of the prosecution will not be covered under Section 364A I.P.C.

53. In the case in hand, the informant Chandrapal, PW-2, who is the father of the kidnapped boy, deposes in his examination in chief that "लड़के को फिरोती के लिए चिट्ठी आई थी जिसे मैंने S.I. धर्म सिंह को दे दिया था जिसकी फोटो प्रति अभिलेख में शामिल है इस लड़के की वापसी के लिए फिरोती 70000/- सत्तर हजार मांगी गयी थी ये चिट्ठी डाक से आयी थी ।.....फिरोती की चिट्ठी मैंने दरोगा जी को गाँव में दी थी जब दरोगा जी 14 दिन बाद गाँव आये थे ।". Inspector Dharam Singh, PW-6, who was accompanying the Investigating Officer of the case S.S.I. Indrapal Singh Solanki when police surrounded the accused persons in order to recover the kidnapped boy from their possession, states in his evidence that when the police force came to Badanpur in order to enquire into the whereabouts of the accused persons and recovery of the kidnapped boy, Chandrapal, the father of the kidnapped body, met them and showed ransom letter which he had received and handed over to the Investigating Officer of the case S.S.I. Indrapal Singh Solanki. He has proved the photocopy of the ransom letter, sent by inland letter, as Ext. Ka-7.

54. To pay ransom may be taken as "to pay price or demand for ransom", as defined in Black's Law Dictionary, and the "demand" may be taken as "to require or to claim as one's due", "an asking with authority" "claiming" etc. It is also necessary that the demand for ransom must be communicated and claimed or imperative request or asking with authority could only be if the demand is conveyed or communicated. To transit or to convey or to give information or the sharing of knowledge by one with another is

communication in broad sense and thus we can say that the "demand" in order to communicate, requires necessarily the information to be conveyed to the person for whom it is meant. It is only receipt of this information that the question to pay a ransom would arise. The said dictum was promulgated by the Delhi High Court in **Netra Pal vs. State (National Capital Territory of Delhi), 2001 0 Supreme (Del) 293.**

55. In **Shaik Ahmed vs. State of Telangana, 2021 0 Supreme (SC) 304**, it has been held that the ingredients of Section 364A I.P.C. must be necessarily proved to bring home the charge under the aforesaid provision and the second condition provided in the said Section "threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom". It has been emphasized that the second condition is also a condition precedent, which requisite is to be satisfied to attract Section 364A I.P.C. and in the aforesaid case since the second condition was not satisfied the conviction and sentence under Section 364A I.P.C. was set aside by the Hon'ble Apex Court and the accused was held guilty only for the offence of kidnapping.

56. For the purpose of ascertaining whether the ingredients of Section 364A I.P.C. are made out or not in the case in hand, the contents of Ext. ka-7 are necessary to be taken into account. It has been mentioned in Ext. ka-7 that the

informant will come alone with Rs. 70000/- with him for the release of his son and if he is accompanied by some other persons or the matter is informed to the police, his son will be killed. It is also mentioned that the kidnapped son of the informant is in the custody of the accused persons.

57. At this stage a pertinent plea has been raised by the learned counsel for the appellants that Ext. ka-7, the so called ransom letter has not been properly proved in evidence and as such it cannot be read in evidence. It has been vehemently argued that the alleged ransom letter, which was handed over by the informant to the police, is not on record in original, rather, a photocopy of the same is found on record, which has been wrongly exhibited by the trial court without ascertaining the availability of the original copy of the alleged ransom letter.

58. From the perusal of the examination-in-chief of PW-6, it will be proper to read it in verbatim whatsoever has been stated by him in respect of ransom letter and he states that :

" पत्रावली कागज़ सं0 98/1 मूल अंतर देशीय पत्र की सही छाया प्रति है जिसको चंद्रपाल वादी ने दौरान विवेचना S.S.I. इंद्रपाल सिंह सोलंकी के सामने मुझे दी थी। जिसको देखकर गवाह ने कहा कि यह वही चिट्ठी की छाया प्रति है जिस पर इक्क क-7 डाला गया।"

59. PW-2 in his deposition has stated that the ransom letter was handed over by him to the police after 14 days and it has been sent by post. PW-6 Dharam Singh also states that the letter was handed over by Chandrapal to S.S.I. Indrapal Singh Solanki, the Investigating Officer of the case.

60. In view of that, our attention is drawn towards Section 62 of the Evidence At, 1872, which provides that :

"62. Primary evidence.--

Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.--Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.-- Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original."

61. Section 63 of the Evidence Act deals with secondary evidence.

62. The legal procedure to prove a document is incorporated in Section 64 of the Evidence Act, which formulates that :

"64. Proof of documents by primary evidence.--Documents must be proved by primary evidence except in the cases hereinafter mentioned."

63. Section 65 of the Evidence Act relates to the cases in which secondary evidence relating to the documents may be given and it says that :

"65. Cases in which secondary evidence relating to documents may be given.-- Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:--

(a) when the original is shown or appears to be in the possession or power--

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has

examined them, and who is skilled in the examination of such documents."

64. In **J. Yashoda vs. K. Shobha Rani, (2007) 5 SCC 730**, explaining the rule of best evidence, the Hon'ble Apex Court has observed as under :

"The rule which is the most universal, namely, that the best evidence the nature of the case will admit shall be produced only, means that, so long as the higher or superior evidence is within the possession of a person or may be reached by a person, that person shall give no inferior proof in relation to it. Essentially, secondary evidence is evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given."

65. In **H. Siddiqui vs. A. Ramlingam, (2011) 4 SCC 240** it has been so held by the Hon'ble Apex Court that :

"Court is obliged to examine probative value of documents produced in the court or their contents and decide question of admissibility of a document in secondary evidence."

66. From the above, we find that if original copy of any document is available it is the primary evidence and such document must be proved by virtue of Section 64 of the Evidence Act, except in the cases of secondary evidence which are provided in Section 65 of the Evidence Act. In the matter in hand, nowhere it has been explained by the prosecution that as to why the original ransom inland letter could not be produced before the Court. Unless the prosecution shows that the original has been lost, or destroyed or falls in any of the

categories mentioned in Section 65 of the Evidence Act, it was not permitted to produce photocopy of the document as secondary evidence. Even PW-5, who proves the photocopy of the ransom letter, does not speak a single word as to where the original was. Thus, on the basis of the aforesaid discussions, we find that a wrong procedure was adopted by the prosecution, to prove the photocopy of the alleged ransom letter without showing its inability to produce the original thereof before the Court and the trial court has also committed an error of law while permitting to exhibit the photocopy of the said ransom letter without ascertaining that for want of original, the photocopy was capable of being permitted to be produced in Court as evidence. Therefore, the said ransom letter (Ext. ka-7) has not been proved in the manner prescribed by law and thus having no legal sanctity is of no use and we cannot permit the trial court to proceed with the case on the basis of photocopy of a document only.

67. In the circumstances of the case in hand, we can take note of the judgment of the Hon'ble Apex Court in **Jagmail Singh vs. Karamjit Singh, (2020) 5 SCC 178** wherein it has been observed that :

"Factual foundational evidence must be adduced showing reasons for not furnishing evidence. Mere admission in evidence and making exhibit of a a document not enough as the same has to be proved in accordance with law."

68. In **Ram Suresh Singh vs. Prabhat Singh, (2009) 6 SCC 681**, it has been formulated by the Hon'ble Supreme Court that :

"Xerox copy / photocopy / facsimile copy in the absence of original is not admission in evidence."

69. Since no communication took place between the accused persons and the informant except through the alleged ransom letter, which is not proved in evidence, there is no evidence on record to show that the victim was anyway threatened for his death or hurt by the accused persons or hurt was actually caused to him in order to compel the informant to pay the ransom. The injuries caused to the victim are abrasions and simple in nature as mentioned in the injury report (Ext. ka-5) and were probably caused by friction as per the opinion of doctor (PW-4). We should remind here that both the hands of the victim were tied with rope, as discovered in the evidence.

70. No evidence is available on the record to show the source of knowledge on the part of the informant or the details in respect of demand of ransom by the accused persons / appellants, as the alleged ransom letter is not proved. Even PW-3, the victim, nowhere states in respect of any threatening given to him by the accused persons that he would be killed or assaulted if ransom is not paid by his father, nor by informant (PW-2).

71. Much thrust was given to the contention that there is absolutely no evidence for ransom and the ingredients of Section 364A of IPC are not attracted and thus, at the best, the appellants can be convicted only under Section 365 IPC and not under Section 364A IPC. This contention has force.

72. Now, the question arises whether the evidence on record satisfies the ingredients of Section 365 of IPC. The provisions of Section 365 of IPC reads as under:

"365. Kidnapping or abducting with intent secretly and wrongfully to

confine person.--Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

73. It is clear from the evidence that victim PW-3 was kidnapped on 21/22.11.1997 and was recovered on 4.12.1997 and as such remained under the custody of the accused appellants for about 14 days under unlawful confinement. The abducted boy has stated that he was rescued by police 14 days after the incident from the house of Pusey after encounter between police and gang of accused persons. The miscreants kept him in the field of sugar cane, thereafter in the field of bajra and then kept in kuthia. They had kept his eyes closed with cloth, and cotton was placed into his ears and hands were also tied. PW-5 also corroborates this fact that when the boy was retrieved inside the kuthia, his hands were tied with rope and mouth was also closed with some cloth and the rope was opened by the police and the said rope and cloth have also been identified by him in the Court. The aforesaid evidence fulfils the essential ingredients of the offence under Section 365 IPC.

74. In **Mahesh V State of UP, Criminal Appeal No. 3647 of 2005** decided on 16.08.2016, this Court found that there was no evidence of ransom and the prosecution has failed to establish the essential ingredients of any such demand as required under Section 364A of IPC. On the other hand, the offence alleged and proved against the appellants, squarely falls within the ambit and purview of Section 365 of IPC. Accordingly, the conviction of appellants u/s 364A of IPC was altered and

modified to one under Section 365 of IPC only.

75. Similarly, in the case of **Ashwani Dubey V State of UP, Criminal Appeal No. 7740 of 2006** decided on 10.08.2016, on the facts of similar nature, this Court taking similar view, has altered the conviction from Section 364A of IPC to one u/s 365 of IPC. In the case in hand, evidence on record reveals that the intention of the appellants for kidnapping the son of the informant was to keep him secretly and under wrongful confinement. It is thus clear that the ingredient of ransom is not proved and the evidence establishes the ingredients of Section 365 of IPC, and therefore, the conviction can be altered from Section 364A of IPC to u/s 365 of IPC.

76. Considering the entire facts, it is clear that the evidence on record fulfills all the ingredients of Section 365 of IPC. In view of the peculiar facts and circumstances of the case, there does not appear any hurdle in alteration of conviction of the appellants from Section 364A of IPC to u/s 365 of IPC. A perusal of the provisions of Sections 364A and 365 of IPC indicates that the mischief punishable u/s 365 IPC, is a less aggravated form of the offence punishable u/s 364A IPC and the offence punishable under Section 365 of IPC is of same nature and specific and it prescribes less punishment than that of Section 364A of IPC. In view of all these facts and evidence on record, the alteration of conviction of the appellants from Section 364A of IPC to Section 365 of IPC would not result into any prejudice to the accused-appellants. Learned counsel for the accused-appellants could also not dispute the above stated position of law. The evidence on record

clearly makes out a case of kidnapping as punishable u/s 365 of IPC. Accordingly, we are of the firm opinion that the conviction of appellants recorded by the trial court under Section 364A of IPC should be altered and modified to one under Section 365 of IPC only, wherein the offence is punishable with imprisonment of either description for a term which may extend to seven years, coupled with fine.

77. In view of the above, the conviction and sentence under Section 364A of IPC awarded by the trial court vide impugned judgment and order is set aside and modified to the extent that the appellants are convicted under Section 365 of IPC and are sentenced to the imprisonment of seven years with a fine of Rs. 2,000/-, each, however, the conviction and sentence awarded by the trial court for the offence under Section 307/149 IPC vide impugned judgment and order is affirmed. The appellants Indrapal and Shripal are said to be in jail since last about 14 years and thus, they have already spent more than seven years of incarceration. The sentences passed in all the offences were to run concurrently, therefore, the total period of imprisonment has already been undergone by the appellants Indrapal and Shripal. We maintain the fine amount and default sentence. The default sentence will start after seven years, which would also now over in respect of appellants Indrapal and Shripal. Appellants Indrapal and Shripal be released forthwith, if they are not wanted in connection with any other case. However, appellants Kallu and Mahatma are on bail, their bail bonds are cancelled and sureties are discharged. The concerned Court is directed to take the appellants Kallu and Mahatma into custody forthwith and send them to jail to serve-out the remaining sentence.

78. Criminal Appeals are **partly allowed** in above terms.

79. Registry is directed to transmit the record to the Court concerned for necessary compliance.

(2023) 5 ILRA 598

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 17.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 137 of 2023

Ramji Prasad & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Manoj Kumar Chaudhary

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 308, 323, 504 & 506 - Attempt to commit culpable homicide - Against summoning order - Allegation against accused that they assaulted complainant and his brother, caused serious head injury to complainant's brother - Accused ran away, presuming that complainant and his brother are dead - Charge-sheet - Revisionist moved application u/s 227 Cr.P.C. - Rejected - Doctor St.d that injuries are not grievous which may cause death and are simple in nature - St. submitted that assault has been made with intention of causing death - Held, the intention and circumstances under which act has been done was to be gathered from FIR, evidence - If there was ground for presuming that accused has committed offence, a prima-facie case against him exists and framing of charge was justified

- Order of discharge would be warranted only in those cases where court was satisfied that there are no chances of conviction - Sufficient ground to frame charge and has rightly rejected discharge application. (Para 3, 7, 8)

Criminal Revision dismissed. (E-13)

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

1. Heard learned counsel for the revisionist, learned AGA for the State and perused the record.

2. This criminal revision is directed against the order dated 08.07.2022 passed by Sessions Judge, Varanasi in S.T. No.268 of 2022 (*State vs. Brijesh and another*) crime no.480 of 2015 under section 147, 148, 149, 308, 323, 504, 506 IPC, P.S. Cantt. District Varanasi.

3. The FIR of this case was lodged by opposite party no.2 alleging therein that today on 19.08.2015 at about 10:00 am, the accused Brijesh Kumar, Guddu, Rakesh Kumar came at the door of the revisionists and started to abuse. Meanwhile, Brijesh and other family members Ramji, Randheer Kumar and Anil Kumar and Arun Kumar also came at the door of the complainant and started to assault the complainant and his brother Ravi Kumar with iron rod, bricks danda and butt of country made pistol causing serious head injury to Ravi Kumar. The complainant also suffered injuries on his head, back and waist and became unconscious on the spot. The accused-persons ran away presuming that the complainant and his brother are dead. The injured were medically examined and after investigation, charge-sheet was submitted against all the named accused persons. The accused-revisinist moved an

application U/s 227 Cr.P.C. alleging therein that the injured have not suffered any grievous injury. The doctor who has conducted the medical examination has not stated that injuries of the injured are grievous in nature which may cause death. Doctor has given the opinion that injuries are simple in nature. No supplementary report has been prepared on the basis of X-Ray report and C.T. Scan. Hence no offence U/s 308 is made out. The learned trial court by the impugned order, after hearing both the parties has rejected the aforesaid application. Aggrieved with it, this revision has been filed.

4. Learned counsel for the revisionists mainly contended that all the injuries are simple in nature. No supplementary report on the basis of X-Ray and C.T. Scan is prepared. The doctor has also stated that injuries are simple in nature. Hence no offence U/s 308 IPC is made out. It is also contended that while considering the bail application, the sessions court has observed that nature of the injuries is not serious. The medical report never support to frame the charge U/s 308 IPC. The learned court below has passed the impugned order without applying judicial mind, without appreciating the fact and circumstances of the case and without taking into consideration the evidence available on record. The order passed by learned court below is based on conjunctures and surmises and bad in the eye of law. The court below has misinterpreted section 308 IPC. It has totally ignored the medical report which is valuable evidence.

5. Learned AGA opposing the prayer, submitted that the assault has been made with the intention of causing death. Two

persons have received injuries. There is no illegality in the impugned summoning order.

6. Section 308 IPC provides as follows:

"Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punishable with imprisonment of either description for term which may extend to seven years, or with fine, or with both."

7. Section 308 IPC consists of two parts. The first is related to no injury cases while the second part deals where hurt is caused. So what is the material is intention or knowledge and the circumstances in which the act has been done and not the injuries. The intention or knowledge and the circumstances under which the act has been done is to be gathered from the allegations of the FIR, the evidence and other material and all other attending circumstances of the case. There are allegations in the FIR that accused persons were armed with iron rod, danda and country made pistol. They assaulted the injured with lathi, danda and butt of country made pistol causing head injury. It is also settled that at the stage of framing charge the test of prima-facie case has to be applied. If there is ground for presuming that accused has committed the offence, a court can justifiably say that a prima-facie case against him exists and framing of charge is justified. If on the basis of

materials on record, the courts comes to the conclusion that commission of offence is a probable case for framing charge exist. An order of discharge would be warranted only in those cases where the court is satisfied that there are no chances of conviction and the trial court would be an exercise in futility.

8. The learned trial court has considered the entire facts, evidence and other material available on record and after analyzing it has come to the conclusion that there is sufficient ground to frame charge U/s 147, 148, 149, 323, 308, 504 & 506 IPC and thus has rejected the discharge application. So there is no illegality in the impugned summoning order.

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

(2023) 5 ILRA 600
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.05.2023

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Revision No. 471 of 2023

Yuvraj Naag **...Revisionist**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Revisionist:

Ashish Kumar Rastogi

Counsel for the Opposite Parties:

G.A.

**Criminal Law - Indian Penal Code, 1860 -
Section 306 - Abetment of suicide - Against
summoning order - FIR was lodged against
six named accused persons including present
revisionist by first informant - After**

investigation, no charge sheet was submitted against present revisionist - St.ments of first informant and other family members recorded u/s 161 Cr.P.C., they St.d that another accused and present revisionist harassed and assaulted the victim/deceased - Relying on this, Trial Court took cognizance u/s 306 I.P.C. - Summoned present revisionist with other co-accused - Revisionist contention - Trial Court committed error in issuing process to present revisionist, against whom charge sheet was not submitted - Further submitted that if C.J.M. was found to be entitled to issue process u/s 190 Cr.P.C. against any person against whom no charge sheet has been filed, then in such eventuality, provision u/s 319, 461 Cr.P.C. would be rendered nugatory - St. arugued that CJM has unfettered power to issue summon any such person who has not been mentioned as accused in charge sheet or FIR - Held, no illegality in impugned order, in view of law laid down in Nahar Singh (infra). (Para 3, 4, 13)

Criminal Revision dismissed. (E-13)

List of Cases cited:

1. Prasad Shrikanth Purohit Vs St. of Maharashtra, 2015 (3) SCC (Cri) 138, (Para 77)
2. Bhagwant Singh Vs Commissioner of Police, 1985 AIR (SC) 1285
3. Nahar Singh Vs St. of U.P., (2022) 5 SCC 295
4. Dharam Pal Vs St. of Har., 2005 SCC Online SC 1781
5. Kishun Singh Vs St. of Bihar, (1993) 2 SCC 16
6. Hardeep Singh Vs St. of Pun., (2014) 3 SCC 92, (Para 111)

(Delivered by Hon'ble Ajai Kumar
Srivastava-I, J.)

1. Heard Sri A.K. Rastogi, learned counsel for the revisionist and Sri Anurag Verma, learned A.G.A. for the State.

2. The instant criminal revision has been has been filed by the present revisionist against order dated 24.02.2023, passed by learned Chief Judicial Magistrate, Sitapur, arising out of Case Crime No.0389/2022, under Section 306 I.P.C., Police Station Maanpur, District Sitapur, whereby learned Chief Judicial Magistrate, Sitapur summoned the present revisionist.

3. Brief facts of the instant case are that a first information report bearing Case Crime No.0389/2022 came to be lodged against six named accused persons including the present revisionist by the first informant, Vijay stating therein that his sister was married to accused Pinku @ Parmanand about 15 years ago and from their wedlock five children were born. It is also mentioned in the first information report that the sister of the first informant was being harassed continuously by all six named accused persons including the present revisionist. Due to harassment meted out by the named accused persons including the present revisionist, the sister of the first informant, Silpy is stated to have committed suicide on 29.11.2022 by hanging herself. Upon conclusion of investigation, a police report in the form of charge sheet came to be submitted against accused, Pinku @ Parmanand/husband of the deceased and Shiv Bhagwan only. The statements of first informant, Vijay, mother of the deceased, Smt. Kiran and another brother of deceased, Atul were recorded under Section 161 Cr.P.C., wherein they have stated that the accused, Shiv Bhagwan and present revisionist also harassed the victim/deceased and she was also assaulted by Shiv Bhagwan and the present revisionist. Thereafter, on the basis of aforesaid statements, vide impugned order dated 24.02.2023, learned C.J.M. Sitapur

has took cognizance for the offence under Section 306 I.P.C. and summoned the present revisionist also including the other accused Pinku @ Parmanand and Shiv Bhagwan.

4. Learned counsel for the revisionist has submitted that the learned trial Court has committed error in issuing process to the present revisionist against whom charge sheet was not submitted before learned trial Court, the impugned order is therefore, patently illegal. His further submission is that if the learned C.J.M. is found to be entitled to issue process at this stage under Section 190 Cr.P.C. against any person against whom no charge sheet has been filed, then in such eventuality, the provision contained under Section 319 Cr.P.C. would be rendered nugatory.

5. He has also submitted that as the learned Magistrate is not empowered to issue process to any person other than the person against whom a charge sheet has been laid by the police, therefore, such order taking cognizance of the matter and issuing process is hit by the provision contained in Section 461 Cr.P.C which declares such proceeding, an irregular proceeding.

6. To buttress his aforesaid submissions, learned counsel for the revisionist has placed reliance upon the judgments rendered by the Hon'ble Supreme Court in **Prasad Shrikanht Purohit vs. State of Maharashtra and Bhagwant Singh vs. Commissioner of Police.**

7. Per contra, learned A.G.A. has opposed the prayer by submitting that the learned Chief Judicial Magistrate has unfettered power to issue summon against

any such person who has not been mentioned as an accused in the charge sheet or arraigned in the first information report. To lend support to his aforesaid submission, he has placed reliance on the judgment passed by Hon'ble Supreme Court in the case of **Nahar Singh v. State of U.P.**

8. Having regard to the aforesaid overall facts and circumstances of this case and upon perusal of the records, it transpires that a first information report bearing Case Crime No.0389/2022 came to be lodged against six named accused persons including the present revisionist by the first informant, Vijay. Upon conclusion of investigation, no charge sheet was submitted against the present revisionist. The statements of first informant, Vijay, mother of the deceased, Smt. Kiran and another brother of deceased, Atul were recorded under Section 161 Cr.P.C., wherein they have stated that the accused, Shiv Bhagwan and present revisionist also harassed the victim/deceased and she was also assaulted by Shiv Bhagwan and the present revisionist. Thereafter, on the basis of aforesaid statements, vide impugned order dated 24.02.2023, learned C.J.M. Sitapur has taken cognizance for the offence under Section 306 I.P.C. and summoned the present revisionist also including the other accused Pinku @ Parmanand and Shiv Bhagwan.

9. Similar issue came to be considered by Hon'ble Supreme Court in **Nahar Singh (supra)** wherein it has been held that a Magistrate has power under Section 190 Cr.P.C. to issue summons against such person who has not been mentioned as an accused in the charge sheet or arraigned in the first information report.

10. Hon'ble Supreme Court in the case of **Nahar Singh (Supra)** in para no.17 has held as under :-

"17. As regards scope of jurisdiction of the Magistrate in a situation of this nature, it was held by the Constitution Bench in Dharam Pal [Dharam Pal v. State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] : (SCC p. 319, paras 35-36)

"35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2)CrPC. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in Column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

36. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Sessions Court."

11. A Constitution Bench of Hon'ble Supreme Court in the case of **Dharam Pal vs. State of Haryana** had affirmed its earlier view expressed in a judgment rendered in **Kishun Singh v. State of Bihar** which dealt with same issue wherein

the Court had opined that it is the duty of Magistrate while taking cognizance of an offence, to go to the root of the matter by identifying the offender. Once the Court has done so, it is the duty of the Court to take action against such persons irrespective of the person being mentioned in any police report.

12. Hon'ble Apex Court in the case of **Hardeep Singh v. State of Punjab** in para no.111 has also held as under :-

“111. Even the Constitution Bench in Dharam Pal [Dharam Pal v. State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the charge-sheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the main part of the charge-sheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193CrPC can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.”

13. Adverting to the facts of this case, it transpires that a first information report bearing Case Crime No.0389/2022 came to be lodged against six named accused persons including the present revisionist by the first informant, Vijay. Upon conclusion of investigation, no charge sheet was submitted against the present revisionist. The statements of first informant, Vijay, mother of the deceased, Smt. Kiran and another brother of deceased, Atul were recorded under Section 161 Cr.P.C.,

wherein they have stated that the accused, Shiv Bhagwan and present revisionist also harassed the victim/deceased and she was also assaulted by Shiv Bhagwan and the present revisionist. Thereafter, on the basis of aforesaid statements, vide impugned order dated 24.02.2023, learned C.J.M. Sitapur has taken cognizance for the offence under Section 306 I.P.C. and summoned the present revisionist also including the other accused Pinku @ Parmanand and Shiv Bhagwan, which cannot be said to be illegal in view of the law laid down by Hon'ble Supreme Court in **Nahar Singh (supra)**, **Dharam Pal (supra)**, **Kishun Singh (supra)**.

14. Hon'ble Supreme Court in the case of **Prasad Shrikanth Purohit (supra)** in para no.77 has held as under :-

"The said statement of law reinforces the legal position that cognizance is always of the offence and not the offender and once the Magistrate applies his judicial mind with reference to the commission of an offence the cognizance is taken at that very moment."

15. In the case of **Bhagwant Singh (supra)** Hon'ble Supreme Court has held that when the report forwarded by the officer-in-charge of a police station to the Magistrate under sub-section 2(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things, (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further

investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156.

16. There cannot be any quarrel with the aforesaid authoritative exposition of law by Hon'ble Supreme Court in **Prasad Shrikanth Purohit (supra)** and **Bhagwant Singh (supra)**, however, in the humble opinion of this Court the same are distinguishable on facts of this case.

17. In view of the aforesaid discussion, this Court is of the considered opinion that there is no illegality or irregularity in the impugned order dated 24.02.2023 warranting interference by this Court. The instant criminal revision lacks merit and the same deserves to be dismissed.

18. Accordingly, the instant criminal revision is **dismissed**.

(2023) 5 ILRA 604

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 28.04.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Criminal Revision No. 968 of 2015

Dr. Arun Kumar Singhal ...Revisionist
Versus
Smt. Tarawati ...Opposite Party

Counsel for the Revisionist:
Sanjay Kumar Srivastava

Counsel for the Opposite Party:
Sanjay Kumar Yadav, Shashi Kant Tripathi

Criminal Law - Code of Criminal Procedure, 1973 - Section 397 - Calling for records to exercise powers of revision - Revisional jurisdiction - Opposite party, widow filed application u/s 125 Cr.P.C. on 18.01.2011 against present revisionist - Opposite party married with revisionist on 17.07.2007 - Revisionist contention - Opposite party had given 29.06.2006 as wrong date of death of husband - In Parivar Register, 29.09.2009 was mentioned - Marriage with revisionist would be ab-initio void, not maintainable - Due to inadvertence of counsel for revisionist, the death certificate could not be produced before trial court, hampered the case - Claimed, additional evidence in revision can be taken - Held, power envisaged u/s 399 (1) Cr.P.C. is analogous to provision of section 401 (1) Cr.P.C., therefore, the trial court can take additional evidence for examining regularity of any proceedings, propriety of findings, etc, passed by subordinate courts - Impugned order set aside - Matter transmitted back to court concerned for passing fresh order. (Para 6, 7, 9, 10, 21, 23)

Criminal Revision allowed. (E-13)

List of Cases cited:

1. Vinod Kumar Vs Mohrawati, MANU/UP/0308/1990, (Para 4)
2. MANU/UP/3033/2014, (Para 6, 7)

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. On 04.04.2023, this Court observed that if, the counsel for the opposite party will not remain present on the next date, the Court will proceed in absence of the opposite party.

2. Case called out. None present on behalf of the opposite party.

3. This Court is proceeding to hear the matter in the aforesaid circumstances.

4. Heard Sri Sanjay Kumar Srivastava, learned counsel for the revisionist, Sri Anirudh Kumar Singh, learned A.G.A. for the State and perused the material placed on record.

5. By means of the instant revision, the prayer has been made to allow the revision with cost after summoning the lower court record and set aside the impugned judgment and order dated 26.09.2015 passed by the trial court i.e. Principal Judge, Family Court, Ambedkar Nagar in Case no. 272 of 2013 Smt Tarawati Vs Dr Arun Kumar Singhal.

6. Learned counsel appearing for the revisionist submits that the opposite party filed an application under section 125 of Cr.P.C. on 18.01.2011, against the revisionist before the Judicial Magistrate, Ambedkar Nagar while alleging herself to be the widow of late Parshuram son of Ram Naresh, resident of Village Bela Persa, PS-Baskhari, Pargana Birhal, District-Ambedkar Nagar and also having a son with the wedlock of her and late Parshuram. He submits that the opposite party has shown herself to be married with the present revisionist on 17.07.2007, at her village Baskhari and this fact is also evident from the statement of the opposite party including the cross examination that

she allegedly performed marriage with the present revisionist on 17.07.2007.

7. He added that the date of death of the husband of opposite party has been shown as on 29.09.2006, which is the wrong date given by the opposite party as, the actual date of death of late Parshuram is 29.09.2009 which transpires from Parivar Register which is annexed as Annexure No. 1 with the supplementary affidavit dated 04.04.2023.

8. Further submission is that since the date of death of the husband of opposite party is 29.09.2009, therefore, the marriage with the present revisionist would be ab-initio void and if, once it becomes void, the application under section 125 is not maintainable on behest of the opposite party. He added that the additional evidence has been supplied through the supplementary affidavit before this Court wherein the copy of the death certificate has also been appended. He submits that taking the additional evidence, either this Court decide the matter or the same may be remitted back to the trial court to decide a fresh.

9. Adding his arguments he submits that in fact due to recklessness on the part of the counsel for the revisionist, the death certificate could not be produced before the trial court whereas, the same was in existence and non- submissions of the death certificate has hampered the fate of the case and the revisionist has been put into trouble.

10. Further submitted that the additional evidence in revision can very well be taken if the court is of the satisfaction that the same can change the nature of the order. In support of his

contention, he has placed reliance on the provision of section 401(1) of Cr.P.C.

11. Section 401(1) of Cr.P.C. is quoted here in under:-

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

12. Next submission is that likewise powers under section 401 of Cr.P.C., the analogous power has been given under section 399 (1) of Cr.P.C. thus, the power for taking additional evidence is also vest with the trial court.

13. In support of his contention, he has also placed reliance on a judgment reported in MANU/UP/0308/1990 Vinod Kumar v. Mohrawati and has referred the paragraph 4 of the aforesaid judgment.

14. Paragraph 4 of the judgment is quoted herein under:-

4. Section 399(1) of the Code of Criminal Procedure runs as follows:

"399. Sessions Judge's powers of revision (1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401.

(2) and (3)....."

This section deals with the power of the Sessions Judge in revision and clearly provides that powers of Sessions Court in revision may be the same as High Court and the Sessions Court can exercise the same powers as the High Court while disposing of the revision. Section 401(1) Cr.P.C. defines the revisional powers of High Court and it runs as under:-

"401. High Court's powers of revision --

(1) In the case of any proceeAppeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2) to (5)....."

This section provides that High Court may exercise any power conferred on a court of appeal by Sections 386, 389, 390 and 391, Cr. P.C. Section 391, Cr. P.C. provides that the appellate court may take further evidence if the appellate court thinks that additional evidence is necessary for the proper adjudication of the case. The appellate court further should record its reasons before permitting any party to adduce additional evidence. From the perusal of the above mentioned provisions of the Code of Criminal Procedure it is settled that the Court of Session has similar power as of High Court in revision and as High Court is authorised to take additional evidence in revision, therefore, the Sessions Court has also jurisdiction to take additional evidence in a revision. In the case of Darshan Lal v. Indra Kumar Mehta, reported in 1980 All Cri C 146, this Court took a view:-

"The Sessions Judge could examine that question in view of the powers

conferred on him by Sub-section (1) of Section 397 of the Code of Criminal Procedure. Further, under Sub-section (1) of Section 399 a Sessions Judge, while dealing with a revision, can exercise all or any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401. By this it would follow that if the High Court, while dealing with a revision can enhance the sentence, the Sessions Judge can ding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2) to (5)....."

This section provides that High Court may exercise any power conferred on a court of appeal by Sections 386, 389, 390 and 391, Cr. P.C. Section 391, Cr. P.C. provides that the appellate court may take further evidence if the appellate court thinks that additional evidence is necessary for the proper adjudication of the case. The appellate court further should record its reasons before permitting any party to adduce additional evidence. From the perusal of the above mentioned provisions of the Code of Criminal Procedure it is settled that the Court of Session has similar power as of High Court in revision and as High Court is authorised to take additional evidence in revision, therefore, the Sessions Court has also jurisdiction to take additional evidence in a revision. In the case of *Darshan Lal v. Indra Kumar Mehta*, reported in 1980 All Cri C 146, this Court took a view:--

"The Sessions Judge could examine that question in view of the powers conferred on him by Sub-section (1) of Section 397 of the Code of Criminal Procedure. Further, under Sub-section (1) of Section 399 a Sessions Judge, while dealing with a revision, can exercise all or any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401. By this it would follow that if the High Court, while dealing with a revision can enhance the sentence, the Sessions Judge can also do it. According to Sub-section (1) of Section 401 the High Court, while dealing with a revision, can exercise any of the powers conferred on an appellate court, by Section 386, of the Code. According to Clause (c) of Section 386 of the Code, the appellate court can, in an appeal for enhancement of sentence, alter the nature or the extent of the sentence so as to enhance or reduce the same. In view of this provision contained in Section 386, Cr. P.C. it should be held that High Court, while dealing with a revision, can enhance the sentence.

"Since the High Court can enhance the sentence while dealing with revision, the Sessions Judge can also do so."

No doubt in the case of *Darshan Lal* (supra) the question involved was whether Sessions Court has power to enhance the sentence or not but the Bench considered the provisions of Sections 397 and 401, Cr. P.C. and thereafter held that in revision, Sessions Court can exercise any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401, Cr. P.C. In view of the decision of *Darshan Lal* by a Bench of this Court in my opinion the case of *Smt. Zaitoon v. State of U.P.* 1987 All WC 640 is not a-good law. In another case of *Vedpal Singh v. State* reported in 1982 All Cri C

268 : (1982 Cri LJ Note 119) a single Judge of this Court took a view that the Sessions Judge can exercise power analogous to that of High Court while exercising revisional jurisdiction. The Sessions Judge could, therefore, examine the question of taking of additional evidence in view of the powers conferred on him by Sub-section (1) of Section 397, Cr. P.C. because the powers of Sessions Judge are analogous to those of the High Court defined under Sub-section (1) of Section 401, Cr. P.C. In view of these facts I am of the opinion that the Sessions Judge has jurisdiction to take additional evidence in revision. In the instant case the Sessions Judge while disposing of the application took the view that he has no jurisdiction to entertain the application for permission to adduce additional evidence in revision and, therefore, in my opinion, the order dated 7-10-1989 passed on the application moved by the applicant for permission to adduce additional evidence is not a correct order and it is, therefore, liable to be set aside".

15. Relying on the aforesaid ratio, he added that the coordinate Bench of this Court has held that the Session Judge can take the additional evidence in view of the powers conferred on him under sub-section (1) of section 397 of Cr.P.C. as the power under sub-section (1) of section 401 of Cr.P.C. is analogous.

16. He has further placed reliance on judgment reported in MANU/UP/3033/2014 and has also placed reliance on paragraphs six and seven of the aforesaid judgment and the same is quoted herein under:-

"6. This Court in the case of *Vinod Kumar Versus Mohrawai* reported in 1990 Criminal Law Journal 2068

(Lucknow Bench) has held that Court of Sessions has similar power as of High Court in revision and as High Court is authorised to take additional evidence in revision, therefore, the Sessions Court has also jurisdiction to take additional evidence.

7. Since powers conferred to the Sessions Judge are analogous to the powers of the High Court and there is provision under Sections 391 and 401 Cr.P.C. that additional evidence in criminal revision may be taken, therefore, after analysing the impugned order with the facts of the present case and also the case law cited here- in-above, this Court without going to this fact that applicant has not availed any other forum, this Court finds it to be a fit case for exercise of its extra ordinary powers under Section 482 Cr.P.C. Since impugned order is in clear violation of the legal provision and if it sustained, there would be a miscarriage of justice."

17. Placing reliance on the aforesaid judgments, he added that the case of the present revisionist is squarely covered with ratio of the judgment aforesaid and since the date of death of the husband of the opposite party has wrongly been intimated to the revisional court and taking the same as true, the judgment and order has been passed but, other wise the date of death of the husband is 29.09.2009 and if that is taken to be true, the marriage with the present revisionist would be void and thus, the application under section 125 of Cr.P.C. would not be maintainable at the first hand. He submits that this fact must change the nature of the judgment and therefore, the additional evidence is required to be taken and to be considered and the matter may be decided afresh. He thus, submits that the order impugned passed by the trial court

i.e. Principal Judge, Family Court, Ambedkar Nagar, dated 26.09.2015, in Case no. 272 of 2013 Smt Tarawat Vs Dr Arun Kumar Singhal may be set aside.

18. Learned A.G.A appearing for the State has opposed this case on the basis that the factual disputes are involved in this matter but, so far as the legal issue is concerned, he has no objection to the contention of learned counsel for the revisionist.

19. Having heard learned counsels for the parties and after perusal of material placed on record, it is evident that the husband of the opposite party, died on 29.09.2006. The learned counsel for the revisionist filed a supplementary affidavit thereby, appending the death certificate dated 29.09.2009 of the husband of opposite party, namely Parshuram, which clearly shows that the husband of the opposite party died on 29.09.2009 and admittedly this fact could not be placed before the trial court due to inadvertence of the counsel for the revisionist. The law is very clear on this point that the litigant would not be left to be suffered for inadvertence, mistake or ignorance on the part of his counsel. If it is found true that the date of death of the husband of opposite party no. 2 is actually 29.09.2009 and not 29.09.2006 then, certainly there must be change in the nature of judgment and order which has been earlier passed by the trial court.

20. When this court examines the powers of the sessions judge in revision as envisaged under section 399 (1) of Cr.P.C., it is abundantly clear that sessions judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of section 401 of Cr.P.C. Undoubtedly, the High Court has

ample power under section 401 (1) read with section 397 of Cr.P.C. to call for additional evidence to look into the correctness, legality or propriety of any finding, sentence or order recorded or passed.

21. In view of the aforesaid submissions and discussions, this Court is of the firm opinion that the power envisaged under section 399 (1) of Cr.P.C. is analogous to the provision of section 401 (1) of Cr.P.C. and therefore, the trial court can also take an additional evidence for examining the regularity of any proceedings, propriety of findings, legality or order passed by the subordinate courts. This controversy has also been settled in case of Vinod Kumar Sharma Versus Mohrawati and in case of Bhagwan Swaroop, which also covers the case of the present revisionist.

22. Resultantly, the impugned order dated 26.09.2015, is hereby set aside.

23. Matter is transmitted back to the court concerned for passing a fresh order after taking additional evidence, which will be submitted by the revisionist and after affording opportunity to the concerned parties in accordance with law.

24. The revisionist is directed to submit this order before the trial court within a period of forty five days from the date of this order and the trial court shall conclude the proceeding, in expedition thereafter.

25. All the issues are open before the trial court to decide afresh.

26. With the aforesaid observations, the instant revision is hereby **allowed**.

Criminal Law - Indian Penal Code, 1860 - Sections 307 & 504 - Code of Criminal Procedure, 1973 - Section 451 - Against seizure of property by police - The accused armed with rifle, started abusing informant and other persons, fired with his licensed rifle, in which informant escaped - Charge sheet - Licensed rifle taken into possession by police, deposited in treasury - Release Application - Rejected - Revisionist was valid licensee of impugned rifle - Held, Incharge (Arms/ADM (Administration) reported to concerned Magistrate that licence does not belong to same District therefore, it was not possible for authority to verify arms licence - In absence of any proceeding regarding confiscation and cancellation of rifle, it would be case property, release order may be passed - Prosecution may take snaps of rifle and preserve it as document for production in court - The Magistrate was empowered to impose some conditions while releasing rifle - Informant has not supported prosecution version - Impugned order quashed, release application allowed -

3. In brief, facts of the case are that Lakhma, opposite party no.2 lodged an FIR on 15.06.2020 with the allegations that accused Gyanendra has enmity with him due to altercation occurred two years ago. On 15.06.2020 at about 12:00 noon, the informant, Lakhma, Surendra, Lal Singh, Harveer, Manoj were sitting and watching the government work going on near the pond when the accused reached with rifle and started abusing him and when the informant prevented him, he fired upon him with his licensed rifle with the intention to kill him in which he escaped. On the above

facts the informant lodged the FIR for initiation of legal proceeding against him.

4. After investigation charge sheet had been submitted against the revisionist under Sections 307 and 504 IPC and his licensed rifle had been taken into possession by the police. The revisionist moved an application in the Court of ACJM on which a report had been called for and thereafter the concerned court rejected the release application on 20.07.2020 which is impugned herein.

5. The revisionist has challenged the impugned order on the grounds that it is illegal and unfair and has been passed ignoring the facts and law involved in the case even without applying judicial mind and without considering background of the case in hasty manner which is bad in the eyes of law. It has been held by the Apex Court that articles prone to natural decay shall be released in favour of the owner subject to certain conditions but the trial court rejected the release application in illegal and arbitrary manner. The FIR version is totally misconceived and has been lodged merely to solve the old pending enmity. The informant did not sustain any injury and is alleged to have escaped, hence the revision be allowed and the impugned order be set aside.

6. Learned counsel for the revisionist argued that virtually an FIR had been lodged by the wife of the revisionist namely Kavita Devi regarding the incident dated 25.10.2018 occurred at about 09:00 a.m. about which an FIR under Sections 394, 379, 511, 452 and 506 IPC had been lodged. The informant has lodged the present FIR to mount pressure upon the revisionist to compromise the previously lodged

criminal case and there is no truthfulness in the FIR.

7. The revisionist has also filed statement of PW-1, Lakhma i.e. informant through supplementary affidavit which shows that the revisionist had not fired upon the informant. He had not seen the revisionist firing upon him virtually. At the alleged place of occurrence there were several monkeys fighting with each other and a fire occurred for dispersing them. Some of the persons informed that the revisionist had fired upon him. He had not received any firearm injury and had also not seen the revisionist firing upon him. On the hearsay of villagers he had lodged the FIR. He himself had not written the complaint. Informant - opposite party no.2 has been declared hostile and he was cross-examined by the Government Advocate but even in such cross-examination he did not favour the prosecution case. In cross-examination by the defence he deposed that he is only 8th pass. The report had neither been written by him nor it had been read over to him. He had not received any injury and he was not medically examined. The revisionist had not abused him. The witness was also cross-examined by the court in which he deposed that at the time of alleged occurrence, the accused had no weapon with him. He could not say as to which person had written the complaint. He had only signed the complaint. On the day of occurrence he was not interrogated by the police. Day after the incident he was summoned for interrogation by the police and he had stated that an explosion had been made for dispersing the monkeys. He had lodged the complaint against the accused on the saying of some villagers.

8. From the above deposition of the informant it is very much clear that the informant opposite party no.2 has not supported the prosecution case in his statement.

9. From perusal of the record it transpires that the impugned licensed rifle has been taken into custody by the police and has been deposited in police malkhana (treasury). Before passing the impugned order, the concerned Magistrate had summoned the report from District Magistrate/Additional District Magistrate about which a report had been submitted on 17.07.2020 to the effect that the arms licence does not belong to District Bulandshahar, hence no proceeding for its cancellation is possible from the office of District Magistrate, Bulandshahar. It has also been reiterated that till 16.07.2020, no police report regarding confiscation of the impugned rifle had been received.

10. From perusal of record it transpires that the revisionist is the valid licensee of the impugned rifle and it is valid upto 24.05.2025.

11. A counter affidavit has been filed by the Sub-Inspector of Police Station Jahangirabad in which it has been stated that about the alleged offence, a criminal case is pending in the court, the impugned rifle has been used in commission of crime and a report has been submitted for cancellation of licence before the District Magistrate, Bulandshahar.

12. However, no copy of such report has been annexed with the counter affidavit filed on behalf of the State and it is very much clear from the version of said Sub-Inspector that till 16.07.2020 no report for confiscation of the impugned rifle had been sent by the concerned police station to the

office of District Magistrate. Incharge (Arms/ADM (Administration), Bulandshahar has also reported to the concerned Magistrate on 17.07.2020 that since the licence of the impugned rifle does not belong to District Bulandshahar, therefore, it is not possible for the authority at Bulandshahar to verify the arms licence. From perusal of photocopy of the arms licence it transpires that the arms licence for the impugned rifle had been issued by the ADM, Rajori, Jammu and Kashmir. Hence, if the police and administration of District Bulandshahar were of the view that on the basis of FIR, the arms licence of the accused must be concealed, it was their duty to approach the concerned authority to convey the whole facts for getting the licence cancelled and the rifle confiscated. There is no iota of evidence that any such step has been taken by the police or the administration of District Bulandshahar. Hence, this Court is of the view that in absence of any proceeding regarding confiscation and cancellation of the impugned rifle, the rifle would be treated to be case property about which a release order may be passed under Chapter XXXIV of the Code of Criminal Procedure. Section 451 CrPC deals with the custody and disposal of the case property during the pendency of the trial. For ready reference Section 451 CrPC reads as under:-

***"451. Order for custody and disposal of property pending trial in certain cases.-* When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after**

recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.- For the purposes of this section, "property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence."

13. In **Sunder Bhai Amba Lal Desai Vs. Gujrat State, (2002) 10 SCC 283** the Apex Court held that; (i) owner of the article would not suffer because of its remaining unused or by its misappropriation, (ii) court or the police would not be required to keep the article in safe custody, (iii) if the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the properly in detail, (iv) this jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

14. It is very much clear from the perusal of the guidelines propounded by the Apex Court that the impugned rifle is also an article of which value would be diminished and it would be decayed if the same is not released in favour of the valid licence holder. There is no other claimant of the impugned rifle. Till now no report has been submitted that the licence of the accused revisionist is not in accordance with law and he is not the rightful owner/licensee of the impugned rifle.

15. The Apex Court has held that decayable articles should be released in favour of the owner or possession holder keeping its photograph preserved for production as evidence in the court. In this case the prosecution may take the snaps of the impugned rifle and may preserve it as document for production in the court at the appropriate stage. The Magistrate was empowered to impose some conditions while releasing the rifle that the impugned rifle would be kept safely by the licensee and would not be transferred to any other person till the final disposal of the case or the appeal and it would be produced in the court as material evidence. Even the photographs taken so, may also be produced as material evidence before the concerned court.

16. It is also noteworthy that there is no ballistic expert report to establish that any FIR had been made from the impugned rifle at the time of the alleged commission of crime. The informant who is main victim of the case has not supported the prosecution version. Hence, considering the above all circumstances and law relating to the release of the property during the trial, this Court is of the view that the rejection order passed by the Magistrate is not sustainable and is liable to be quashed and the release application is liable to be allowed.

17. This criminal revision is, accordingly, allowed.

18. The impugned order dated 20.07.2020 passed by Additional Chief Judicial Magistrate, Court No.1, Bulandshahr regarding rejection of release of the rifle is quashed. The release application shall be decided afresh by the concerned court in the light of the above

observation. If the learned trial court proceeds to release the impugned rifle, before releasing the impugned rifle, the concerned Magistrate/SHO shall verify as to whether the revisionist is valid licensee of the impugned rifle or not. It shall also be verified that the impugned rifle had been purchased by the revisionist in accordance with law and that the revisionist has an upto date rifle licence on the date of release of the impugned rifle or not. If the revisionist succeeds in establishing the fact that he is the valid licensee, the impugned rifle had been purchased by him in accordance with law and he has valid upto date licence at the time of release of the impugned rifle, the impugned rifle mentioned above would be released in his favour if he further executes a personal bond and two sureties of the like amount to the satisfaction of the court concerned.

(2023) 5 ILRA 614

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 31.03.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 1578 of 2023

Chandrabhan & Ors. ...Revisionists

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:

Sri Jaysingh Yadav

Counsel for the Opposite Parties:

G.A.

Criminal Law - Indian Penal Code, 1860 - Section 308 - Code of Criminal Procedure, 1973 - Section 227 - Against rejection of discharge application - Contention by revisionist that FIR was lodged u/s 325,

323 & 504 IPC only - Injury report of injured reveals there was no serious injury - Section 308 & 506 IPC added in charge-sheet - Discharge application - Rejected - Persons of revisionist's side has suffered injuries and cross-case was registered against complainant side - Held, the revisionists-accused are named in FIR - Prosecution case was that accused hurled abuses wife of complainant and assaulted her, when some persons came to rescue, they were assaulted, causing injuries - One of injured has suffered serious head injury, his NCCT Brain Report shows extradural hemorrhage and fractures, which may be fatal - Both parties lodged report against each other and which party was aggressor, a matter of trial - Sufficient evidence against revisionist - No illegality in impugned order. (Para 2, 3, 5, 6)

Criminal Revision dismissed. (E-13)

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

1. Heard learned counsel for the revisionists and learned AGA for the State.

2. This criminal revision has been filed against the order dated 21.02.2023 passed by Additional Sessions Judge-I, Lalitpur in S.T. No.481 of 2022 crime no.189 of 2020 U/s 308/34, 325/34, 323/34, 504 & 506 IPC P.S. Mehrauni, District Lalitpur. By the impugned order, the learned court below has rejected the discharge application filed U/s 227 Cr.P.C. by the revisionist accused.

3. Learned counsel for the revisionist contended that FIR of this case was lodged U/s 325, 323 & 504 IPC only. The injury report of the injured reveals that there is no serious injury which may come in the purview of Section 308 ICP. The injury of Anshul is lacerated wound of size 3 cm

skin deep. So from this injury, no offence U/s 308 IPC is made out. Only one injured has suffered a fracture. All the injuries of remaining injured are simple in nature. So at the most, offence U/s 323, 325 & 504 IPC is made out. The Investigating Officer in improper manner has added section 308 & 506 IPC in the charge-sheet. The revisionist have filed an application 5 kha for discharge. It is also contended that persons of revisionist's side has also suffered injuries and the cross-case NCR No.200 of 2020 U/s 323 & 504 IPC was also registered against the complainant side. The real story is that several civil and revenue litigations are pending between the parties and due to this enmity, the complainant side has attacked the accused side. The complainant has suffered injuries while fleeing from the spot and they have got registered a false FIR. The learned court below without considering the averments made in the discharge application and the evidence available on record, has rejected the discharge application. The impugned order is unjust and improper and is not sustainable.

4. Learned AGA submitted that one of the injured Anshul has suffered head injury and his NCCT Brain Report shows extradural hemorrhage and fracture. Several other persons have also suffered injuries in this incident. So there is no ground to discharge the revisionist accused. From the evidence on record, offence U/s 323, 325, 308, 504 & 506 IPC is made out. There is no illegality in the impugned order.

5. The revisionists-accused are named in the FIR and prosecution case is that they hurled abuses to Smt. Ram Dulari the wife of the complainant and started to assault her, when Anshul, Narendra, Anantram,

Prabhudayal, Maherndra Kumar and Devendra came to rescue, then the accused persons also assaulted them with lathi-danda causing injuries. The injury reports of Narendra Kumar, Mahendra Kumar, Devendra Kumar, Prabhudayal, Smt. Ram Dulari and Anshul are part of the record. Injured Prabhudayal, Smt. Ram Dulari and Anshul has suffered head injuries. It also appears from the perusal of the record that injured Anshul was referred to medical college Jhansi and his NCCT Brain Report mentions extradural hemorrhage, sub arachnoid hemorrhage, FEW FOCI of hemorrhage contusions, associated fractures. His C.T. scan report also indicates non-displaced fracture at right temporal bone. So it is clear from the injury report of Anshul that he has suffered serious head injuries which may be fatal.

6. It also appears from the material on record that there are cross-versions. Both the parties have lodged report against each other and which party is aggressor, is a matter of trial. So this cannot be a ground for discharge.

7. Section 308 IPC provides as follows:

"Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

8. Section 308 IPC consists of two parts. The first part deals with the cases of

no injury while the second part reveals, cases in which injury has been caused. So what is material is intention or knowledge. Even in a no injury case, section 308 IPC may apply. It is settled law that at the stage of framing of charge only prima-facie case is to be seen. The remaining things are matter of trial and can be judged after evidence. While in this case one of the injured has suffered serious head injury. So there is sufficient evidence on record against the revisionist-accused on the basis of which charges in section mentioned in the charge-sheet can be made. So there is no sufficient ground to discharge.

9. The learned court below has narrated the averments of the discharge application, the facts of the case, the evidence available on record and after analyzing it, has come to the conclusion that there is no sufficient ground to discharge the accused and has rejected the discharge application. The impugned order is detailed and reasoned one. There is no illegality or infirmity in the impugned order.

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

(2023) 5 ILRA 616

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 29.03.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 3020 of 2022

**Deependra & Anr. ...Revisionists
Versus
State of U.P. & Ors. ...Opposite Parties**

Counsel for the Revisionists:

Sri Rahul Mehrotra

Counsel for the Opposite Parties:

G.A., Sri Satyaveer Singh

Criminal Law - Indian Penal Code, 1860 – Sections 323, 504, 354 Kha & 376/511 - POCSO Act, 2012 - Section 7/8 - Against summoning order - Allegation that accused assaulted complainant's minor daughter, causing her injuries - Charge sheet submitted against one accused - During trial, prosecution moved application u/s 319 Cr.P.C. to summon other named accused - Application allowed - Held, specific allegations that they committed offence with co-accused - Specific role has been assigned to them - Brother and nephew of complainant are named as eye witnesses - Her medico legal report corroborated allegations of FIR - The victim in her St.ment u/s 161 and 164 Cr.P.C. has corroborated allegations and complicity of revisionist with specific role - Complainant and two witnesses named in FIR supported allegations - The Investigating Officer on the basis of St.ments of independent witnesses regarding presence of accused at somewhere else has exonerated them - Case of attempt to rape - Her St.ment can't be ignored on the basis of St.ment of witnesses who have deposed that two of accused were not present at place of occurrence - Impugned order needs no interference. (Para 3, 6)

Criminal Revision dismissed. (E-13)

List of Cases cited:

1. Brijendra Singh Vs St. of Rajasthan, 2017 0 Supreme (SC) 411
2. Sudhir Vs St. of U.P. & anr. (Criminal Revision No. 415 of 2022, decided on 06.07.2022)
3. Hardeep Singh Vs St. of Punjab, AIR 2014 Supreme Court page 1400, (Para 98 and 99)
4. Rajendra Singh Vs St. of UP, A.I.R. 2007 SC 2786

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

1. Heard learned counsel for the revisionists, learned AGA for the State and learned counsel for opposite party no.2 the first informant.

2. This criminal revision has been filed against the order dated 20.05.2022 passed by Special Judge (Exclusive Court POCSO Act)/ Additional Sessions Judge, Etah in S.T. No.736 of 2021 (State vs. Himanshu) U/s 323, 504, 354 Kha, 376/511 IPC & 7/8 POCSO Act, P.S. Mirhachi, District Etah. By the impugned order, the learned court below on an application u/s 319 Cr.P.C. has summoned the revisionist Ravi alias Ravindra and Deependra to face trial with co-accused for offence U/s 323, 504, 354 Kha read with section 34, 376/511 IPC and 7/8 POCSO Act.

3. The FIR of this case was lodged on 20.05.2021 by father of the victim alleging therein that on 17.05.2022 her minor daughter aged about 13 years has gone out to throw garbage at the field. In the maize field, Ravi alias Ravindra, Deependra and Himanshu were lying in ambush and they caught his daughter with intention to commit rape. His daughter put resistance then all the three accused assaulted her causing her injuries. They also put her down and tried to disrobe her. On her cries Ram Avtar (the brother of the complainant) and Veer Pratap his nephew came at the spot. Seeing them all the three accused ran away. After investigation, charge sheet was submitted only against Himanshu. During trial, the complainant and victim were examined as P.W.-1 & P.W.-2 and another witness Ram Avtar as P.W.-3. Thereafter, the prosecution moved an application U/s 319 Cr.P.C. to summon the other named

accused of the FIR namely Ravi alias Ravindra and Deependra. The learned trial court by the impugned order, has allowed the application.

4. Learned counsel for the revisionist contended that during investigation, the Investigation Officer has recorded the statements of some independent witnesses who have totally denied the involvement of the revisionist in the alleged incident. Some of the villagers also submitted their affidavits to SSP stating the true facts of the case and these affidavits are also part of the case diary. After concluding the investigation, the Investigating Officer found that the revisionist were not involved in the alleged incident and omitted their names and charge-sheet was submitted only against main accused Himanshu. It is also contended that at the time of alleged incident the revisionist were not present at the place of incident. They were present at the house of one Ashok from 6:30 pm to 7:30 pm to attend the last rituals of the father of the Ashok and from where they returned to their respective homes. The involvement of the revisionist was not found in the alleged incident. the learned court below on the basis of statements of complainant P.W.-1 (the victim), P.W.-2 and other witness Ram Avtar (P.W.-3) came to the conclusion that the revisionist were also involved in the alleged incident and has summoned them by the impugned order exercising its power U/s 319 Cr.P.C. While passing the impugned order, the learned court below completely failed to take into consideration that no strong and cogent evidence was present against the revisionist and summoned them in a casual and cavalier manner. The learned court below also completely ignored and overlooked the evidence collected during investigation and has not considered them

at all at the time of passing the impugned order. The learned counsel placed reliance on the case laws of ***Brijendra Singh vs. State of Rajasthan 2017 0 Supreme (SC) 411*** and vide order dated 06.07.2022 of this court passed in ***criminal revision no.415 of 2022 (Sudhir vs. State of U.P. and another)***.

5. Learned counsel appearing for opposite party no.2 and learned AGA submitted that the revisionist-accused are named in the FIR with specific role assigned to them. The complainant, the victim and the eye witnesses named in the FIR have supported the allegations of the FIR in their statements recorded U/s 161 Cr.P.C. The victim has also supported the allegations of the FIR in her statement recorded U/s 164 Cr.P.C. The Investigating Officer ignoring the aforesaid cogent evidence only on the basis of statement of some so called independent witnesses has exonerated the revisionist in improper manner. The three witnesses examined by the prosecution during trial have again reiterated the prosecution version. So there is sufficient evidence against the revisionist. The learned trial court after considering the evidence and material on record has found that there is sufficient and cogent evidence and has passed the impugned summoning order. There is no illegality in it.

6. It is undisputed that the revisionist accused are named in the FIR. There are specific allegations that they also committed the offence with co-accused Himanshu. Specific role has been assigned to them in the FIR. Ram Avtar and Veer Pratap are named as eye witnesses of the incident. It is also alleged in the FIR that the victim has suffered injuries. The victim has been medically examined and her

medico legal report is is part of the record which further corroborates the allegations of the FIR. The victim in her statement recorded U/s 161 Cr.P.C. as well as U/s 164 Cr.P.C. has fully corroborated the allegations of the FIR and has stated about the complicity of the revisionist accused with specific role. The complainant and two witnesses named in the FIR have also supported the allegations of the FIR. The Investigating Officer only on the basis of the statements of some other witnesses regarding presence of accused at somewhere else has exonerated them. It is a case of attempt to rape. the victim has also suffered injuries. Hence, her statement cannot be taken lightly and ignored on the basis of statement of some other witnesses who have deposed that two of the accused (the revisionist) were not present at the place of occurrence. The Apex Court in the case of Hardeep Singh Vs. State of Punjab AIR 2014 Supreme Court page 1400 has prescribed the standard of evidence required for exercising powers under section 319 Cr.P.C. The relevant paras 98 and 99 are as follows:

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

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

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

7. The test laid down by the Apex Court for invoking powers under section 319 Cr.P.C. inter alia includes the principle that only when strong and cogent evidence occurs against a person the power should be exercised. The test to be applied is one which is more than prima facie Case, which is applied at the time of framing of charge. The Apex Court in Rajendra Singh versus State of UP A.I.R. 2007 SC 2786 has held that the statement of witnesses to the Investigating Officer under section one 161 Cr.P.C. cannot be relied upon in recording finding that accused sought to be tried could not have been present at the scene of occurrence. It is further held that it must appear to the court on the evidence that someone not arrayed as accused appears to have committed an offence. The court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence.

8. There is cogent evidence in the form of testimony of eye witness and injured witnesses. Applying the test laid down by the Apex Court on the present set of facts, it is clear that there is strong evidence then mere probability of the complicity of the revisionist accused and pass the test as laid down by the Apex Court which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to the extent that the evidence, if got un rebutted would lead to conviction.

9. The trial court in the impugned order has narrated the averments made in the application the prosecution case the evidence lead before it, the provision and proposition of law on the point and has analysed all the facts and evidence on record and has recorded the finding that there is sufficient ground to summon the revisionist for trial. The impugned order is detailed and reasoned one. It is just and proper. It need no interference. This criminal revision is liable to be dismissed.

10. Accordingly, the criminal revision is hereby **dismissed**.

(2023) 5 ILRA 619

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 28.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 3390 of 2022

**Smt. Neelam Devi & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties**

Counsel for the Revisionists:

Sri Sudhir Kumar Agarwal, Sri Satyawan Yadav

5. Brijendra Singh Vs St. of Raj., (2017) 7 SCC 706

Counsel for the Opposite Parties:
G.A., Sri Amaresh Yadava

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

Criminal Law - Code of Criminal Procedure, 1973 - Against summoning order - Daughter of complainant has died in unnatural circumstances within seven years of her marriage - FIR was lodged against husband with other family members - In FIR there are general allegations of demand of dowry and torture against all the accused persons - The I.O. submitted charge-sheet only against husband, who was in jail and exonerated remaining named accused persons on the ground that no evidence was found against them - During trial, prosecution moved application u/s 319 Cr.P.C. to summon other named accused - Application allowed - Evidence recorded during trial was nothing more than St.ment recorded u/s 161 Cr.P.C. - No additional evidence - One year before incident, deceased was living separately with her husband on the first floor of house - She was suffering from mental depression, tried to commit suicide on two occasions earlier - Her husband got her treated for her mental disease - Trial court has failed to appreciate entire facts, evidence available on record - Impugned order set-aside. (Para 2, 3, 7, 11)

Criminal Revision allowed. (E-13)

List of Cases cited:

1. Ramesh Chandra Srivastava Vs St. of U.P. & anr., 2021 0 Supreme (SC) 519

2. Sagar Vs St. of U.P. & anr., 2011 AIR (SC) 1420

3. Smt. Alka Vs St. of U.P. & anr. (Criminal Revision No. 1482 of 2019 decided on 13.5.2022)

4. Hardeep Singh Vs St. of Pun. & ors., AIR (2014) Supreme Court 1400

1. Heard learned counsel for the revisionists, learned counsel for the O.P. No. 2 and learned A.G.A. for the State.

2. This criminal revision is directed against the order dated 10.8.2022 passed by Additional Sessions Judge/F.T.C. No. 2, Azamgarh in S.T. No. 126 of 2018 (State Vs. Shashi Kant) Case Crime No. 367 of 2017, P.S. Kotwali, District Azamgarh. By the impugned order the learned trial court on an application of the prosecution, exercising powers under section 319 Cr.P.C. has summoned the revisionists-accused for trial.

3. The O.P. No. 2 lodged an FIR on 18.7.2017 alleging therein that the marriage of his daughter Hemlata was solemnized with Shashikant on 19.5.2015 and on the demand of in-laws Rs. 3 lac cash, one motorcycle, golden ring and various household articles were given in dowry but her husband Shashikant, parents-in-law Ram Asrey Chaudhary, Neelam Chaudhary and Devar Raja Chaudhary were not satisfied with the dowry and used to harass and torture her. They were demanding one golden chain and one lac cash as additional dowry and were threatening to oust her. They ousted her from their house after eight days of delivery. His daughter told him the entire facts on telephone and relative of the complainant kept her and got her treated. Thereafter, the complainant came and took her to Mumbai and got her treatment. After counselling he sent his daughter to her in-laws house but the accused persons again started to abuse and

torture her. Yesterday on 16.7.2017 he came to know that his daughter has been burnt and killed. After investigation charge-sheet was submitted only against Shashikant, husband of the deceased. Investigating Officer exonerated the remaining named accused persons in the FIR on the ground that no evidence is found against them. During course of trial Rambhawati Kannojiya, P.W.1 mother of the deceased and complainant Pancham Kannojiya, P.W. 2 were examined. The prosecution moved an application under section 319 Cr.P.C. to summon the other accused persons named in the FIR namely Ram Asrey Chaudhary, Neelam Chaudhary and Raja Chaudhary. The learned trial court by the impugned order has allowed the aforesaid application and summoned them.

4. Learned counsel for the revisionists contended that revisionists are innocent and have been falsely implicated. The O.P. No. 2 with malafide intention and ulterior motive moved application under section 319 Cr.P.C. on false and frivolous grounds only to harass them. Learned trial court while passing the impugned order has not considered the established principle of law that the power conferred under section 319 Cr.P.C. is not to be exercised in a routine manner and it should be used very sparingly and only if evidence has come on record which sufficiently establishes that the persons have committed the offence. Mere doubt about the involvement of the other persons on the basis of evidence led before the trial court is not enough to summon them under section 319 Cr.P.C. The power conferred under section 319 Cr.P.C. is an extra-ordinary power and should be used very sparingly. It may be exercised only if compelling reasons exist. Some positive evidence must have to be there and that evidence should point to the

specific guilt of the persons to be proceeded against. The learned trial court has failed to exercise its power in a judicious manner and wrongly and illegally summoned the revisionists-accused without cogent and credible evidence. The impugned order has been passed in a mechanical manner. It is further contended that deceased was suffering from mental agony and was under treatment which is clearly established from the medical documents. The revisionist no. 2 was on duty at the time of incident while revisionist no. 3 is Devar of the deceased and he is studying in B.A. final year. He has no concern with the deceased as well as her husband Shashikant in their day-to-day affairs. Learned counsel placed reliance on the following case laws:

1. Ramesh Chandra Srivastava Vs. State of U.P. and another 2021 0 Supreme (SC) 519

2. Sagar Vs. State of U.P. and another 2011 AIR (SC) 1420

3. Smt. Alka Vs. State of U.P. and another in Criminal Revision No. 1482 of 2019 decided on 13.5.2022

5. Learned A.G.A. and learned counsel for the O.P. No. 2 contended that revisionists-accused were named in the FIR. There are allegations against them also regarding harassment and torture for demand of dowry. The I.O. without any sufficient reason has exonerated them in investigation and filed charge-sheet only against the husband of the deceased who is in jail and his bail application has been rejected thrice. The complainant P.W. 2 and Rambhawati, P.W. 1 the parents of the deceased in their testimony before the trial court have fully corroborated the prosecution story as alleged in the FIR which clearly establishes the complicity of

the revisionists-accused. The learned trial court after considering the real facts and circumstances of the case and perusing the evidence available on record has legally summoned the revisionists. It is also contended that deceased was well educated and a graduate. She was not mentally disturbed. At the time of medical treatment as disclosed by the revisionists she was present at Mumbai which is established from the child card prepared at Mumbai. Thus, the medical description of mental care is forged and fabricated. It is further contended that there is sufficient and cogent evidence on record against the revisionists-accused. There is no illegality in the impugned summoned order.

6. It is not disputed that the daughter of the complainant-O.P. No. 2 has died in unnatural circumstances within seven years of her marriage. The FIR was lodged against husband Shashikant, parents-in-law Ram Asrey Chaudhary and Neelam Chaudhary and Devar Raja Chaudhary. In the FIR there are general allegations of demand of dowry and torture against all the accused persons. The I.O. conducted the investigation and submitted charge-sheet only against husband Shashikant. On the basis of evidence collected during course of investigation the I.O. reached to the conclusion that father-in-law Ram Asrey, mother-in-law Neelam Chaudhary and Devar Raja Chaudhary have been falsely implicated and there is no evidence against them. It is true that the complainant Pancham Kannojiya, P.W. 2 father of the deceased and Rambhawati Kannojiya, P.W. 1 mother of the deceased in their testimony before the trial court have reiterated the allegations of the FIR and implicated the revisionists-accused also but even in their statements there are general allegations against the revisionists-accused regarding

harassment and torture for demand of additional dowry.

7. The revisionists no. 1 and 2 are parents-in-law while revisionist no. 3 is Devar of the deceased. They were exonerated during investigation as their complicity was not found. The evidence recorded during trial is nothing more than the statement recorded under section 161 Cr.P.C. There is no additional evidence. During investigation the I.O. has collected the evidence that one year before the incident the deceased was living separately with her husband on the first floor of the house. She was also suffering from mental depression. She has tried to commit suicide on two occasions earlier. Her husband got her treated for her mental disease.

8. A Constitution Bench of Apex Court in **Hardeep Singh Vs. State of Punjab and others AIR (2014) Supreme Court 1400** has settled scope and ambit of Section 319 Cr.P.C. The relevant paras 98 and 99 are quoted below:

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

99. Thus, we hold that though only a prima face case is to be established from the evidence led before the court not necessarily tested on the anvil of cross-examination, it requires much stronger

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

9. The Apex Court in the case of **Brijendra Singh Vs. State of Rajasthan (2017) 7 SCC 706** in para no. 13 has observed as follows:

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

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

10. Considering the entire facts, evidence and material on record it appears that there is no strong and cogent reason to summon the revisionists-accused to face trial in exercise of powers under section 319 Cr.P.C. While deciding the application under section 319 Cr.P.C. the learned trial court has failed to appreciate the entire facts, evidence and other material available on record. The court below has also failed to record the degree of satisfaction which is required to summon an accused under section 319 Cr.P.C. The degree of satisfaction is not one of prima facie case as recorded to the court below. Consequently, trial court has failed to exercise its power in accordance with parameters laid down by the Apex Court in a catena of decisions. The impugned order is not sustainable in the eye of law and is liable to be set-aside.

11. The criminal revision is allowed. The impugned order dated 10.8.2022 passed by Additional Sessions Judge/F.T.C. No. 2, Azamgarh in S.T. No. 126 of 2018 whereby the application under section 319 Cr.P.C. has been allowed and the revisionists have been summoned to face trial is hereby set-aside.

(2023) 5 ILRA 624

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 11.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 3526 of 2022

Ashok Kumar & Anr. ...Revisionists

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:

Sri Vinay Kumar Pandey

Counsel for the Opposite Parties:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 323, 324, 325, 504 & 506 - Against summoning order - Specific allegations against accused that they along with other co-accused persons armed with lathi, danda and other weapons assaulted the complainant & ors. - Five persons received injuries - During trial, prosecution moved application u/s 319 Cr.P.C. - Ground, that in FIR nine persons were named while I.O. has submitted charge-sheet only against five accused persons - Under undue influence, IO has exonerated four persons - Application allowed - Contention - Opposite party want to settle criminal matters, revisionist have falsely implicated - Held, both witnesses (P.W. 1 complainant) and (P.W. 2 injured witness) have fully corroborated allegations of FIR

- Evidence of eye witness has greater evidentiary value, unless compelling reasons exist his St.ment can't be discarded - St.ments of witnesses recorded u/s 161, Cr.P.C. was not proper - It was sketchy, has no details of incident - To benefit accused, IO has recorded St.ments at his own - Trial Court rightly exercised powers - No illegality in impugned order. (Para 2, 3, 4, 7, 8, 9)

Criminal Revision dismissed. (E-13)

List of Cases cited:

1. Hardeep Singh Vs St. of Pun., AIR 2014 Supreme Court page 1400, (Para 98 and 99)
2. St. of M.P. Vs Man Singh, (2003) 10 SCC 414
3. Abdul Sayeed Vs St. of M.P., (2010) 10 SCC 259
4. St. of U.P. Vs Naresh, (2011) 4 SCC 324

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

1. Heard learned counsel for the revisionists, learned A.G.A. for the State and perused the record.

2. This criminal revision has been filed against the order dated 10.6.2022 passed by Additional Sessions Judge, Court No. 10, Mathura in S.T. No. 396 of 2016, under section 147, 148, 149, 323, 324, 325, 504 and 506 IPC (State Vs. Mahesh and others) Case Crime No. 152 of 2015, P.S. Chhata, District Mathura.

3. An FIR was lodged by O.P. No. 2 Smt. Taravati alleging therein that today on 23.4.2015 at about 7:00 a.m. Chetram S/o her Jeth has gone to attend the call of nature. When he was coming back then near the house of Mahesh, Ashok, Ashiwin, Ram Kishan, Mahesh, Bankey, Rajveer and

Yogesh holding lathi, danda and Farsa and Har Dayal holding licensee gun and Gajendra holding a country made pistol met him. Chetram ran towards his house and all the accused chased him and Har Dayal opened fire with his licensee gun and Gajendra fired with country made pistol. Chetram narrowly escaped and entered into his house and all the accused persons also entered into the house and on the cries and noise Ram Jeewan, Vijay, Km. Renu and Shaym came to rescue him. All the accused persons assaulted them with lathi, danda and farsa causing them serious injuries. Injured were medically examined. After investigation charge-sheet was submitted only against Mahesh, Ram Kishan, Rajveer, Bankey and Yogesh. During course of trial two prosecution witnesses Smt. Taravati P.W. 1 and Shyam Sunder P.W. 2 were examined. An application under section 319 Cr.P.C. was moved by the prosecution and it was alleged that in the FIR nine persons were named while I.O. has submitted charge-sheet only against five accused persons. The I.O. under undue influence has exonerated Ashok, Ashiwini, Har Dayal and Gajendra while all the accused persons have actively participated in the incident. During trial P.W. 1 Smt. Taravati eye witness and Shyam Sunder P.W. 2 injured witness have been examined and they have implicated the aforesaid accused also in the incident. On the aforesaid ground it was prayed that all the remaining accused persons be also summoned to face trial. The learned trial court after hearing the parties by the impugned order dated 16.6.2022 has allowed the application and summoned all the four accused persons exonerated by the I.O.

4. It is contended by the learned counsel for the revisionists that I.O. has

recorded the statements of complainant and injured witnesses. They have not taken the name of revisionists -accused. During course of investigation it was found that they have been falsely implicated and were not involved in the incident. On the aforesaid ground the I.O. exonerated them and has not submitted charge-sheet against them. The FIR has been lodged by the complainant on false and fabricated facts under the pressure of her wife and family members because there is some dispute between the parties. The revisionist nos. 1 and 2 are cousin. The husband of informant and his family members want to settle all the criminal matters and due to this reason they have falsely implicated all the revisionists. It is also contended that all the revisionists were exonerated by the I.O. on the basis of statements and evidence collected during course of investigation but same was not considered by the court below.

5. Learned A.G.A. submitted that revisionists are named in the FIR and there are also allegations against them that they have actively participated in the incident. They assaulted the complainant and others. Five persons have received injuries in this incident. The statements recorded by I.O. under section 161 Cr.P.C. is sketchy, without details of the incident. It is further contended that complainant and injured witnesses examined during course of trial have fully supported the prosecution version and from their statements the complicity of the revisionists-accused is fully established. So there is no illegality in the impugned summoning order.

6. The Apex Court in the case of **Hardeep Singh Vs. State of Punjab AIR 2014 Supreme Court page 1400** has prescribed the standard of evidence

required for exercising powers under section 319 Cr.P.C. The relevant paras 98 and 99 are as follows:

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

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

7. It is undisputed that revisionists-accused are named in the FIR and there are

specific allegations against them that they along with other co-accused persons armed with lathi, danda and other weapons after entering into the house of the complainant assaulted the complainant and others. Five persons have received injuries in this incident. P.W. 1 Smt. Taravati is the complainant while P.W. 2 Shyam Sunder is the injured witness. Both the witnesses have fully corroborated the allegations of the FIR which shows the complicity of the revisionists in the incident. The evidence of an eye witness has greater evidentiary value and unless compelling reasons exist his statement is not to be discarded lightly. The Apex Court in the cases of ***State of M.P. Vs. Man Singh (2003) 10 SCC 414, Abdul Sayeed Vs. State of M.P. (2010) 10 SCC 259 and State of Uttar Pradesh Vs. Naresh (2011) 4 SCC 324*** has laid-down the aforesaid proposition of law.

8. The statements recorded under section 161 Cr.P.C. of the witnesses is not proper. It is sketchy and has no details of the incident. It reflects that the I.O. just to benefit the accused has recorded the statements at his own in highly improper manner.

9. In the impugned order the learned trial court has narrated the entire facts, evidence and legal proposition and after analyzing all the material on record has recorded finding that there is sufficient evidence on record to summon the revisionists-accused. The evidence on record fulfill the standard prescribed for exercising powers under section 319 Cr.P.C. The learned trial court has rightly exercised the powers and on the basis of sufficient material has passed the summoning order. There is no illegality in the impugned summoning order.

10. The revision lacks merit and is hereby dismissed.

(2023) 5 ILRA 627

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 13.02.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 4176 of 2022

Bablu @ Dinesh Singh & Ors.

...Revisionists

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Revisionists:

Sri Anurag Vajpeyi, Sri Atharva Dixit, Sri Aushim Luthra, Sri Manish Tiwari (Sr. Advocate)

Counsel for the Opposite Parties:

G.A., Sri Abhishek Kumar, Sri Udai Chandani

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 302/149, 307/149, 323/149, 504 & 506 - Against summoning order - FIR was lodged against 16 named and several unnamed persons, alleging they attacked the complainant and his companions with weapons causing serious injuries - Charge-sheet submitted only against six accused persons, exonerating the revisionists-accused on the basis of independent witnesses - Prosecution filed application u/s 319 Cr.P.C. with averments that co-accused are involved in incident but they are not tried - Application allowed - Held, specific allegations against accused showing their complicity in incident - One person has died while several others (11 in number) received injuries - Complainant corroborated allegations of FIR in his St.ment u/s 161, Cr.P.C - Injured witnesses corroborated St.ment of complainant - Three eye witnesses St.d

presence of revisionists-accused at place of occurrence - St.ment of injured witness should be given due weightage in comparison to St.ment of other independent eye witnesses - Cogent evidence in form of testimony of injured witness - Trial court narrated entire facts, analysed all materials - No illegality in impugned order. (Para 2, 3, 8, 13)

Criminal Revision dismissed. (E-13)

List of Cases cited:

1. Hardeep Singh Vs St. of Pun., AIR (1998) SC 3148
2. Brijendra Singh Vs St. of Raj., AIR (2019) SC 2839
3. Periya Sami Vs S. Nalla Samy, (2019) 4 SCC 342
4. Sagar Vs St. of U.P., (2022) 6 SCC 389
5. S. Mohd. Ispahani Vs Yogendra Chaudhary & ors., (2017) 16 SCC page 226
6. Manjeet Singh Vs St. of Har. & ors., (2021) 0 AIR (SC) 4274
7. Kukhpal Singh Khaira Vs St. of Punjab (Criminal Appeal No. 885 of 2019 decided on 5.12.2022)
8. Sambhaji & ors. Vs St. of Maharashtra & anr., 2008 CrL.J. 1123
9. Rajindra Singh Vs St. of U.P. & anr., AIR 2007 Supreme Court 2786
10. Hardeep Singh Vs St. of Punjab, AIR 2014 Supreme Court page 1400, (Para 98, 99)
11. Brijendra Singh & ors. Vs St. of Raj., (2017) 7 SCC page 706, (Para 13)
12. Rajesh and ors Vs St. of Har., (2019) 6 SCC 368

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

1. Heard Sri Manish Tiwari, learned Senior Counsel assisted by Sri Aushim Luthra, learned counsel for the revisionists, Sri Udai Chandani, learned counsel for the O.P. No. 2 and learned A.G.A. for the State.

2. This criminal revision is directed against the order dated 6.9.2022 passed by Additional Sessions Judge/Special Judge (Gangster Act) F.T.C. (1st) Gautam Budh Nagar in S.T. No. 675 of 2015 under section 147, 148, 302/149, 307/149, 323/149, 504, 506 IPC (State of U.P. and another Vs. Gyani and others), P.S. Knowledge Park, District Gautam Budh Nagar. By the impugned order the learned trial court on application of prosecution under section 319 Cr.P.C. has summoned the revisionists-accused to face trial for offence under section 147, 148, 302/149, 307/149, 323/149, 504 and 506 IPC.

3. An FIR was lodged on 10.5.2015 at 15:20 hours by Mahesh Chandra against 16 named and several unnamed persons alleging therein that on 10.5.2015 the complainant with his brother Vijendra, uncle Ishwar Singh, Sonu @ Pushkar, Mahendra, Ramesh, Suresh, Karne @ Karam Singh, Naveen @ Kale, Sonu S/o Ramesh, Mintu @ Shyama Singh was ploughing his field situated at Hamlet Gulawali. At about 10:30 a.m. 50-60 persons in 15-16 vehicles and four tractors holding lathi, farsa, iron rod etc. came there and asked the complainant why they are working in their field. The complainant said that the field belongs to him. On this Lekhraj, Kanwar Singh, Shyam Singh, Anniraj, Komal, Nauraj, Ghanshyam, Jag Pravesh, Billoo, Gajraj, Malkhan, Pawan, Sukhpal, Mukesh Bindal and other unknown persons attacked the complainant and his companions with the weapons in

their hands causing serious injuries to them. Ishwar Singh, uncle of the complainant was attacked by Lekhraj, Sonu and Babloo with iron rod and farsa on his head and thereafter run over by the tractor. Receiving injuries he fell down and died in the hospital. All the accused persons wielding the weapons and opening fire went away from the spot in vehicles and tractors. The complainant and all other injured were taken to the hospital where they are under treatment. After investigation charge-sheet was submitted exonerating the revisionists-accused. During course of trial three witnesses were examined by the prosecution. Thereafter, an application under section 319 Cr.P.C. was moved by the prosecution with averments that FIR was lodged by Mahesh Chandra against 16 accused persons including Babloo @ Dinesh Singh, Ghanshyam, Shyam Singh, Malkhan Singh, Pawan Kumar and Kanwar Singh. They are also involved in the incident but they are not being tried. The prosecution witness Mahesh, P.W. 1 and Mahendra Singh, P.W. 2 in their statements under section 161 Cr.P.C. and also in their deposition before the court have stated about the complicity of the aforesaid accused in the incident and there is sufficient evidence against them. A prayer was made to summon them under section 319 Cr.P.C. The learned trial court after hearing the parties by the impugned order has allowed the aforesaid application and has summoned the revisionists-accused.

4. Learned counsel for the revisionists contended that initially 16 accused persons were implicated by name in the FIR. During investigation the name of another accused Gyani was introduced as the main accused and the role of running over Ishwar Singh by tractor was assigned to him while in the FIR Gyani was not named and no

role was assigned to him. No crush injury has been found on the body of Ishwar Singh in the postmortem. In the FIR it is alleged that Ishwar Singh was taken to hospital where he died but during investigation the prosecution changed this version and alleged that Ishwar Singh died on the spot which is major deviation, changing the place of occurrence. During trial the prosecution witnesses have omitted the name of co-accused Jag Prakash, Billoo, Navraj, Sukhpal and Mukesh while their names are specifically mentioned in the FIR as well as in the statements under section 161 Cr.P.C. of the witnesses and even the affidavits filed by them. Learned counsel submitted that the above facts show that prosecution has changed his version time to time and has come-forth with a pick and choose move. It also reflects that the entire prosecution case is nothing but a sham. It is further contended that the Investigating Officer has recorded the statements of number of independent eye witnesses and they have not implicated the revisionists-accused, rather they have stated about their false implication by the prosecution due to enmity and land dispute. Even the injured witnesses Dhan Singh and Karan Singh in their statements under section 161 Cr.P.C. have not supported the prosecution version in respect of the revisionists-accused. They have stated that they have not seen the revisionists-accused, they did not identify them, they have heard about their presence. On the basis of the statements as well as other material on record the Investigating Officer submitted the charge-sheet only against six accused persons namely Sonu, Lekhraj, Abhiraj, Komal, Gajraj and Gyani. The Investigating Officer came to conclusion that there is no conclusive evidence against the revisionists and exonerated them. However, investigation was transferred to

the crime branch but no evidence whatsoever was brought forth against the revisionists in particular. It is further submitted that sufficient eye witness testimony has been collected by the Investigating Officer, which establishes that revisionists were not present at the place of occurrence and were not part of the alleged incident. Their names have been brought forth only due to rivalry and in order to wreck vengeance. The version of the FIR is highly improbable. The first informant himself has changed his version from time to time. P.W. 3 Investigating Officer has explained as to on what basis the revisionists were exonerated. After recording testimony of P.W. 2 the first informant with malafide intention to harass and humiliate the revisionists filed application U/s 319 Cr.P.C. The co-accused have filed a detailed objection against it. Learned trial court without considering the grounds of objection in perfunctory manner passed the impugned order. Learned counsel further submitted that the trial court has failed to consider the guidelines of the Apex Court while summoning an accused under section 319 Cr.P.C. as laid down in the case of **Hardeep Singh Vs. State of Punjab AIR (1998) SC 3148, Brijendra Singh Vs. State of Rajasthan AIR (2019) SC 2839 and Periya Sami Vs. S. Nalla Samy (2019) 4 SCC 342** and has passed the impugned order in a very lackadaisical manner. The impugned order has been passed only on the basis of reiterated version of the statements under section 161 Cr.P.C. The learned trial court has failed to give reasons as to why exoneration by the Investigating Officer should be denied. The Apex Court has held that to summon an accused under section 319 Cr.P.C. the evidence which has been tested once during the course of investigation should not be the same. There

need to be something more, and only then powers under section 319 Cr.P.C. should be exercised. Learned court below has failed to appreciate the settled legal position and in a cursory manner has summoned the revisionists even though no cogent evidence was available. The learned trial court has failed to record the degree of satisfaction required, rather it has observed that a prima facie case is made out which is against the settled principle of law. The impugned order is absolutely illegal. The learned counsel in addition also placed reliance on the following case laws:

1. Sagar Vs. State of U.P. (2022) 6 SCC 389

2. S. Mohd. Ispahani Vs. Yogendra Chaudhary and others (2017) 16 SCC page 226

5. Learned counsel for the O.P. No. 2 and learned A.G.A. submitted that accused are named in the FIR. There are clear and specific allegations against them showing their complicity in the incident. One person has lost his life while 11 others have suffered injuries. The complainant himself is an injured. He and other injured witnesses have constantly in their statements under section 161 Cr.P.C. have implicated the revisionists accused describing their role in the incident. The Investigating Officer without any cogent reason has exonerated them only on the basis of statement of some so called independent witnesses. It is also contended that Investigating Officer has also collected mobile detail calls which further confirms the presence of the revisionists-accused at the place of occurrence at the relevant point of time but despite of this in collusion with the revisionists-accused the Investigating Officer exonerated them. The two witnesses Mahesh, P.W. 1 and Mahendra,

P.W. 2 produced before the trial court are injured witnesses. They have again corroborated the allegations of the FIR and previous statements recorded under section 161 Cr.P.C. They have stated that revisionists-accused were present at the place of occurrence and have participated in the incident. So there is strong and cogent evidence on record on the basis of which the learned trial court has passed the impugned order. Learned counsel also placed reliance on the following case laws:

(i) Manjeet Singh Vs. State of Haryana and others (2021) 0 AIR (SC) 4274

(ii) Kukhpal Singh Khaira Vs. State of Punjab in Criminal Appeal No. 885 of 2019 decided on 5.12.2022

(iii) Sambhaji and others Vs. State of Maharashtra and another 2008 Crl.L.J. 1123

(iv) Rajindra Singh Vs. State of U.P. and another AIR 2007 Supreme Court 2786

6. The Apex Court in the case of **Hardeep Singh Vs. State of Punjab AIR 2014 Supreme Court page 1400** has prescribed the standard of evidence required for exercising powers under section 319 Cr.P.C. The relevant paras 98 and 99 are as follows:

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

court that such power should be exercised and not in a casual and cavalier manner."

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

7. In the case of **Brijendra Singh and others Vs. State of Rajasthan (2017) 7 SCC page 706** the Apex Court has reiterated the principles laid down in Hardeep Singh's case. The relevant para no. 13 is quoted below:

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated: power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a

person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The *prima facie* opinion which is to be formed requires stronger evidence than mere probability of his complicity."

8. It is undisputed that the revisionists are named in the FIR. There are specific allegations against them showing their complicity in the incident. One person has died while several others (11 in number) have received injuries in the incident. According to prosecution case the complainant is himself as an eye witness of the incident. He has corroborated the allegations of the FIR in his statement recorded by Investigating Officer during investigation. Injured witnesses have also corroborated the statement of complainant

and allegations of FIR implicating the revisionists-accused. Three eye witnesses are also named in the FIR. They have also stated about the presence of revisionists-accused at the place of occurrence. The Investigating Officer has exonerated the revisionists-accused on the basis of statements of other eye witnesses. During trial the complainant and another injured witness have been examined. They have again corroborated the allegations of the FIR showing the complicity of the revisionists-accused in the incident. It is settled law that the testimony of an injured witness is on a high pedestal and can not be ignored or discarded lightly but for cogent reasons. Therefore, the statement of injured witness should be given due weightage in comparison to the statement of other independent eye witnesses recorded by the Investigating Officer and on the basis of which he has exonerated the revisionists-accused. So there is cogent evidence in form of testimony of injured witness. It is made clear that this observation will not influence the trial court in appreciation of evidence at final stage. The other arguments assailed by the learned counsel for the revisionists in respect of contradictions and discrepancies are matter of trial.

9. The test as laid down by the Apex Court for invoking powers under section 319 Cr.P.C. inter alia includes the principle that only when strong and cogent evidence occurs against a person the power under section 319 Cr.P.C. should be exercised. The test to be applied is one which is more than prima facie case, which is applied at the time of framing of charge.

10. In **Rajesh and ors vs.State of Haryana, (2019) 6 SCC 368** wherein informant named 10 persons for attempt to

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

11. So applying the test laid down by the Apex Court on the present set of facts, it is clear that there is strong evidence, than mere probability of the complicity of the accused in the form of testimony of injured witnesses and it pass the test as laid down by the Apex Court which is more than prima-facie case as exercised at the time of framing of charge but short of satisfaction to an extent that the evidence if goes un rebutted would led to conviction.

12. It is correct that the learned court below has used the words prima facie but that can not be a ground to set-aside the impugned order. The learned trial court may not have used the appropriate words but it is clear that it has analysed the evidence and other material on record. It

has also considered the legal proposition and thereafter has exercised its power under section 319 Cr.P.C. This court has to judge the correctness, legality and propriety of the impugned order.

13. The learned trial court has narrated the entire facts, analysed all the materials. Being satisfied about the complicity of the revisionists has summoned them. There is no illegality or infirmity in the impugned order. it needs no interference.

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

(2023) 5 ILRA 633
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE GAJENDRA KUMAR, J.

Habeas Corpus No. 729 of 2022

Shivbodh Kumar Mishra @ Shiv Bodh Mishra ...Petitioner

Versus

Union of India & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Vimlendu Tripathi

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

Criminal Law - Prevention of Illegal Traffic in Narcotic Drug and Psychotropic Substance Act, 1988 - Section 3(1) - Against detention order dated 04.03.22 - Constitution of India, 1950 - Articles 22(2) - On 25.4.22, petitioner had gone to attend date fixed in trial case in District Court, illegally arrested - The police brought him to Police Station and

thereafter admitted him to District Jail on 27.4.22, in compliance of detention order passed - No other case was registered except two cases in which he was arrested but bailed out - Argument, report of sponsoring authority was never shared with him as to when and on what date the detaining authority took a decision of preventive detention - Held, non supply of material by sponsoring authority, petitioner was not in a position to give representation - No direct 'live and proximate link' between action of petitioner and detention order - Not a single word has been whispered in detention order that even after being bailed out was regularly in touch with his sources or mobilising them -Impugned order set-aside.

Writ Petition Allowed. (E-13)

List of Cases cited:

1. Sushanta Kumar Banik Vs St. of Tripura & ors., 2022 LiveLaw (SC) 813
2. Ashok Kumar Vs Delhi Administrative and ors, (1982) 2 SCC 403
3. Ahmedhussain Shaikhussain @ Ahmed Kalio Vs Commissioner of Police, Ahmedabad & anr., (1989) 4 Supreme Court Cases 751
4. Heisnam Chaoba Singh Vs The U.O.I.& ors., 2021 SCC Online Cal 2691

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri Vimlendu Tripathi, learned counsel for the petitioner; Shri Krishna Agarawal, learned counsel for respondent nos.1, 2 & 3 and also learned Additional Government Advocate for respondent nos.4 and 5. We have gone through the entire materials brought before us.

2. Pleadings have been exchanged between the parties and the matter is ripe

for final submission by the respective learned counsels.

3. Instant Habeas Corpus Writ Petition by above named petitioner, who is invoking constitutional remedy under Article 226 of the Constitution of India, whereby the petitioner Shivbodh Kumar Mishra @ Shiv Bodh Mishra has sought the following prayer :-

“issue a Writ of Habeas Corpus commanding all the respondents to release the petitioner from his illegal detention in pursuance of the detention order dated 04.03.2022 (Annexure No.1) passed by respondent no.3 under section 3(1) of the PITNDPS Act, 1988 and to set the petitioner at liberty forthwith, and may further be pleased to quash the impugned order dated 04.03.2022 passed by the respondent no.3 of the writ petition.”

4. Thus, from the above prayer, it is clear that petitioner has sought a command and direction from this Court to release him from illegal detention pursuant to order passed by the respondent no.3 dated 04.03.2022 u/s 3(1) of “Prevention of Illegal Traffic in Narcotic Drug and Psychotropic Substance Act, 1988” (for the sake of brevity hereinafter referred to as ‘PITNDPS Act’) and the petitioner may be set at liberty forthwith after quashing the order impugned dated 04.03.2022.

FACTUAL BACKGROUND :-

5. Before entering into the merits of the case, it is imperative to have a bird’s eye view to the controversy involved and the alleged criminal antecedents of petitioner, which are as follows :-

(I) On 04.01.2016 the Zonal Director, NCB Lucknow after receiving a

tip from his sources that 4-5 persons coming from Bihar on a truck, bearing registration No.HR-55-J-2062 and a Mahindra Scorpio car bearing registration No.BR-03-P-8311, are likely to deliver a consignment of illegal ‘Ganja’ to the petitioner near Nawabganj Bypass situated at Allahabad Lucknow Road around 01.00 in the day on 04.01.2016. On receiving this information, a team consisting of NCB officials intercepted the aforesaid vehicle and recovered 312.045 kgs of Ganja. In this operation total 8 persons were nabbed, though the petitioner was sitting in Mahindra Scorpio Car No.BR-03-P-8311. Accordingly, a criminal case was filed by NCB Lucknow having Criminal Case No.42 of 2016, u/s 8, 20, 29 of N.D.P.S. Act before the District & Session Judge, Allahabad on 29.6.2016.

It is contended by learned counsel for petitioner that after great deal and efforts, the petitioner was eventually let loose on bail by this Court vide order dated 05.03.2020 while allowing his Third Bail Application No.3604 of 2020 and thereafter the petitioner was bailed out after completing the necessary formalities, furnishing the bail bonds and sureties.

(II) After being released on bail, the petitioner started attending the court’s proceeding and co-operating with the trial of Crl. Case No.42 of 2016. On 25.10.2020 he was again apprehended along with three other persons while travelling on a Swift Desire car along with Surajpal Soni, Vijay Kesarwani and Sanjay Kesarwani. After being searched out, a total quantity of 170 kgs of Ganja was recovered. In respect of this incident, an FIR was lodged on 25.10.2020 as Case Crime No.177 of 2020, u/s 8 & 20 of NDPS Act, Police Station Mahewaghat, District Kaushambi.

It is interesting to mention here that, petitioner again preferred a Bail

Application No.83 of 2020 in aforesaid case crime which was allowed by the Additional Sessions Judge (POCSO Act), Kaushambi vide order dated 18.12.2020.

6. These aforementioned are only two cases in which the petitioner was arrested and later on was bailed out on 05.03.2020 and 18.12.2020 respectively. Except above mentioned two cases, there is no other cases to the credit of petitioner.

7. It has been strenuously argued by learned counsel for the petitioner that after being released on bail vide order dated 18.12.2020, the petitioner has never indulged into any offence, much less than the cases of NDPS Act, till he was bombarded by impugned detention order dated 04.03.2022, signed by Shri Ravi Pratap Singh, Joint Secretary, Government of India, Ministry of Finance, Department of Revenue (PITNDPS Unit) u/s 3(1) of the PITNDPS Act, 1988.

8. On this score, Shri Vimlendu Tripathi, learned counsel has hammered his submission by making a mention that except aforementioned two cases in which the petitioner was bailed out lastly on 18.12.2020 till the impugned order is passed on 04.03.2022, there was no material with respondent authorities which could justify their conduct for proceeding against the petitioner under the PITNDPS Act. It is further contended by learned counsel that the petitioner is rendering fullest cooperation before the trial court, but for the reasons best know to the respondent authorities, off late at unknown time and date they have proceeded in a clandestine fashion in order to book the petitioner under the aforesaid preventive Act. There is no justification on the part of respondent

authorities to justify their instant action under PITNDPS Act.

9. In para-12 of the petition, it has been mentioned that on 25.4.2022 when the petitioner had gone to attend the date fixed in aforementioned case in District Court Allahabad, where he was illegally arrested from the District Court Allahabad itself. The police brought the petitioner to Police Station Saraiakil, District Kaushambi and thereafter admitted him to District Jail, Lucknow in the night of 27.4.2022.

10. On this factual background, learned counsel for the petitioner has contended that a person who is being arrested on 25.4.2022, was booked to District Jail, Lucknow in the night of 27.4.2022 after two days of his alleged arrest, that too at District Jail, Lucknow. This is a gross violation of Section-4 of PITNDPS Act, which speaks that a detention may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973. Thus, there is no justification coming forward about the delay of two days after the factual arrest of petitioner and not producing him before the concerned Magistrate within 24 hours and thereafter dumping him to the District Prison at Lucknow.

11. Yet another issue raised by learned counsel for the petitioner, is that the Joint Secretary, Government of India, specially empowered u/s 3(1) of PITNDPS Act, has passed the order for detaining the petitioner illegally on 4.3.2022 and keep him in District Jail, Lucknow. This order of detention is a blanket and baseless, without containing any ground of detention which was served upon the petitioner only after

seven weeks i.e. on 27.4.2022 for the reasons best known to the authorities concerned.

12. As mentioned above, the arrest was effected pursuant to the order dated 4.3.2022 passed by the Joint Secretary, Government of India; but as late as on 27.4.2022 a copy of detention order along with the 'so-called' grounds of detention were served upon the petitioner. Submitted by counsel that this detention order dated 4.3.2022 came out of blue and petitioner remain clueless as to what went wrong after 18.12.2020, when he was bailed out. The petitioner could not think in his wildest dream that the authorities were preparing the papers/documents to book him under PITNDPS Act in a clandestine way.

13. As mentioned above, after the release of petitioner on bail on 18.12.2020, there is not a single case to the credit of petitioner. Thus, factually speaking, from the date when the petitioner was released on bail i.e. 18.12.2020 up to the date of passing of impugned detention order i.e. 04.03.2022, there is no material on record to justify the respondent authorities to initiate preventive proceeding under the PITNDPS Act, that too, after delay of almost one year and four months. On this premise, it has been argued by learned counsel for the petitioner that there is no near proximity or legal justification to initiate the present proceeding under the Act of 46 of 1988. It is further asserted by the learned counsel for the petitioner that after the lapse of considerable time, all of a sudden the respondent authorities woke up from slumber and on 4.3.2022 pasted the detention order u/s 3(1) of PITNDPS Act on the back of the petitioner.

14. Learned counsel for the petitioner has drawn attention of the Court to Ground

No.2, on that basis the detention order F.No.U-11011/05/2022-PITNDPS dated 4th March, 2022 has been issued against the petitioner. For ready reference ground no.2 of the detention order is being reproduced as under :

“2. There are intelligence inputs that you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra are again indulging in trafficking of narcotics drugs after you were released from the jail. It clearly shows that you are a habitual offender and not going to mend your ways but continue to be in drug trafficking. You have deep involvement and have continued propensity for trafficking of narcotics and Psychotropic Substances.”

15. After a plain reading of aforementioned ground, learned counsel for the petitioner hammered his submission, that simply after referring to the previous credentials of two cases against the petitioner, the detention order has been passed. This ground contains a lot of gray areas which has been exploited against the petitioner for curtailing his rights of personal liberties and his freedom, guaranteed in Part-III of the Constitution of India. The ground that 'his deep involvement and continued propensity for trafficking of narcotics and Psychotropic Substances' goes haywire, when there is no criminal credentials of the petitioner, after his release on bail i.e. 18.12.2020. The provisions of Section 3(1) of PITNDPS Act are not only words but it carries deep rooted significance. The satisfaction of the authorities must be based on concrete and tangible grounds and his satisfaction must be subjective satisfaction. Only using the expression "satisfaction" in the detention order loses its significance, if it is not based on tangible evidence or there is no

proximity or live link between the alleged offence of the petitioner and the preventive detention order.

16. It is next contended by learned counsel for the petitioner that this ground of detention is not accompanied by the alleged report of sponsoring authority i.e. NCB, Lucknow, which forms the very basis of the illegal detention of petitioner, which has been knitted and likely to go to shambles. Yet another significant aspect of the issue is the alleged ground of detention, it is supposed to be based on the complete material relied by detaining authority. If the very basis of detention is missing, relying upon which the sponsoring authority passed an order of detention and allegedly furnishes the 'so called' grounds of detention, then to expect that the petitioner would give an effective representation, is simply a dream and would be stark contrast of basic tenets of Natural Justice. However, after guessing the so-called grounds, a representation was got prepared by the petitioner relying upon the limited material in the shape of ground and same was placed on 13.5.2022 to the authority concerned. Interestingly, said representation of the petitioner was rejected by respondent no.2 and was duly communicated by means of a memorandum dated 3.6.2022, whereby the petitioner was informed that his representation dated 13.5.2022 was outrightly rejected by the detaining authority without assigning any good reason for the same.

17. On 5.6.2022, a copy of order dated 3.6.2022 issued by the subordinate of respondent no.1, informing the petitioner that his representation has been rejected by the detaining authority vide order dated 3.6.2022.

18. On 4.7.2022 the petitioner was informed that the date of hearing fixed

before the Advisory Board pursuant to Section 9 (b) of PITNDPS Act was 7.7.2020 at 3.00 p.m., whereby the petitioner was produced and the matter was heard, but on 18.7.2022 he was informed that vide order dated 15.7.2022 the Advisory Board has opined to the effect that there is sufficient cause for detaining of the petitioner, and in fact the Advisory Board has confirmed the order of detention for a period of one year from the date of detention dated 27.4.2022.

19. By way of writ petition it was argued by learned counsel for the petitioner that sponsoring authority i.e. NCB Lucknow no report in that regard was enclosed with the grounds of detention, hence, the petitioner was complete at loss as how and when the detaining authority came into the knowledge of the fact in the case by which mode either orally or writing and the material provided by the sponsoring authority to the detaining authority to initiate a proceeding of preventive detention of petitioner under PITNDPS Act, 1988. The report of the sponsoring authority was never shared with the petitioner as to when and on what date the detaining authority took a decision of preventive detention of petitioner. All these are the grey areas which touches the root of the controversy in which the petitioner finds himself at complete loss and an effective opportunity of hearing to him. In addition to this, the applicant has unable to demonstrate that there is no live link between his two antecedents and the proposed/ impugned preventive detention.

20. The Court has an occasion to peruse the grounds of detention dated 4.3.2022 (Annexure-2 to the petition) in which it finds reference to an earlier credentials of the petitioner as shared by

NCB, Lucknow Zonal Unit and its pending proceedings. The relevant grounds mentioned in the grounds of detention dated 4.3.2022 are as under :

“2. There are intelligence inputs that you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra are again indulging in trafficking of narcotics drugs after you were released from the jail. It clearly shows that you are a habitual offender and not going to mend your ways but continue to be in drug trafficking. You have deep involvement and have continued propensity for trafficking of narcotics and Psychotropic Substances.

3. In view of the facts mentioned above, I have no hesitation in arriving at the conclusion that you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra through your above acts engaged yourself in prejudicial activities of illicit traffic of narcotics and psychotropic substances, which poses serious threat to the health and welfare not to the citizens of this country but to every citizen in the world, besides deleterious effect on the national economy. The offences committed by you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra are so interlinked and continuous in character and are of such nature that these affect security and health of the nation. The grievous nature and gravity of offences committed by you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra in well-planned manner clearly establishes your continued propensity and inclination to engage in such acts of prejudicial activities. Considering the facts of the present case mentioned in foregoing paras, I have no hesitation in arriving at the conclusion that there is ample opportunity for Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra i.e. you to repeat the above serious prejudicial acts.

Hence, I am satisfied that in the meantime you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra should be immobilised and there is a need to prevent you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra from engaging in such illicit traffic of narcotic drug and psychotropic substances in future by detention under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances (PITNDPS) Act, 1988.

4. In view of the overwhelming evidences discussed in foregoing paras, detailing how you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra have indulged in organising the illicit trafficking of Narcotic Drugs and Psychotropic substances as well as have a high propensity to engage in this illicit activity, it is conclusively felt that if you are not detained under section 3(1) of the PITNDPS Act, 1988, you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra would continue to so engage yourself in possession, purchase, sale, transportation, storage, use of narcotics and psychotropic substances illegally and handling the above activities, organizing directly in the above activities and conspiring in furtherance of above activities which amount to illicit trafficking of psychotropic substances under section 2(e) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances (PITNDPS) Act, 1988 in future also. I am, therefore, satisfied that there is full justification to detain you i.e. Shri Shivbodh Kumar Mishra @ Shiv Bodh Mishra under section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 with a view to preventing you i.e. Shri Shiv Bodh Kumar Mishra @ Shiv Bodh Mishra from engaging in above illicit traffic of narcotics and psychotropic substances specified under scheduled to the NDPS Act, 1985.

5. *Considering the magnitude of the operation, the chronicle sequence of events, the well-organized manner in which such pre-judicial activities have been carried on, the nature and gravity of the offence, the consequential extent of investigation involved including scanning/examination of papers, formation of grounds, I am satisfied that the nexus between the dates of incident and passing of the Detention Order as well as object of your detention has been well maintained.*

6. *I consider it to be against public interest to disclose the source of information at the relevant paragraphs of the grounds of detention above.”*

21. On a careful perusal of these grounds, of which the sources kept in secret under the garb of “public interest”, it has been argued by the learned counsel for petitioner that when there is no criminal activities after his release on bail from 18.12.2022, then instant proceeding under PITNDPS Act, 1988 is nothing but a vague justification of an old proverb “*give a dog bad name and hang him*”. The only sin is that the petitioner is facing two criminal cases of NDPS Act and he is facing the trial for the same. The grounds, could be safely termed as using of hyperbolic expressions and high sounding words, there is virtually nothing against the petitioner to brand him habitual offender.

22. Per contra, Shri Krishna Agrawal, learned counsel for the respondent no.1, 2 and 3 has filed detailed counter affidavit, sworn by Shri Bhagwan Sahai Meena, Under Secretary, PITNDPS Devision, Department of Revenue, Ministry of Finance, Government of India, New Delhi. In paragraph 4 of the counter affidavit it is mentioned that the records pertaining to the present case and *after consulting the*

Sponsoring Authority i.e. NCB Lucknow Zonal Unit this counter affidavit is being filed. Thus it is evident that the sponsoring authority and detaining authority were hand in glove with each other.

It clearly indicates that the deponent of this case was well aware of the proceedings initiated and at the end of NCB, Lucknow Zonal Unit it was further mentioned in paragraph 7 of the counter affidavit that the Detaining Authority has relied upon the documents/material evidences supplied by the sponsoring authority, after arriving at their subjective satisfaction on 4.3.2022 a letter was issued under Section 3(1) of PITNDPS Act by Ravi Pratap Singh, Joint Secretary, Government of India directing him to detain in the District Prison Lucknow U.P. in order to prevent the petitioner from engaging in illicit traffic in narcotic drugs and psychotropic substances. The aforesaid detention order along with grounds of detention, relied upon the documents and list of documents were served upon the petitioner physically within prescribed period on 27.4.2022 at District Prison Lucknow where petitioner was detained pursuant to the detention order passed by the competent authorities and its acknowledgment was received in the Ministry on 29.4.2022. On 5.5.2022 the U.P. Advisory Board (Detentions) have heard the petitioner in person, the Sponsoring Authority and the officers of the Ministry and had opined that “there is sufficient cause for the detention of the detenue”. Based on the opinion of the Advisory Board the Ministry confirmed the detention order vide order dated 15.7.2022 fixing the period of detention for one year from the date of detention w.e.f. 27.4.2022.

23. In paragraph 8 of the counter affidavit it was submitted that the petitioner

was detained by P.S.- Mahewaghat on 25.4.2022 in respect of execution of detention order dated 4.3.2022. Thereafter, the aforesaid detention order along with grounds of detention were served physically to the petitioner on 27.4.2022.

This is the own admission of the deponent that after two days of his alleged illegal detention its material was furnished to petitioner. During this period, petitioner was not produced before any Magistrate as contemplated under Article 22(2) of the Constitution of India.

24. In paragraph 13 of the counter affidavit, the deponent of the counter affidavit states that the competent authorities on the basis of the material supplied by the sponsoring authority and applying mind and also recording the subjective satisfaction has passed the order for detaining the petitioner as a preventive measure. Since the petitioner was not available at his house and upon the knowledge of aforesaid order through his family members, he absconded and the local police arrested him and thereafter booked him to District Prison Lucknow in compliance of the detention order passed by respondent no.3.

25. In paragraph 17 of the counter affidavit it has been alleged that the petitioner is a habitual offender and is continuously involved in trafficking of Ganja and thus in order to protect the public at large from the said illegal trafficking in future the detention order was passed. However, in paragraph b & c of the counter affidavit, it has been mentioned that since the petitioner was not available at his home and he sneaked away, but eventually nabbed by P.S. Mahewaghat on 25.4.2022 and was served with the

grounds of detention and other allied documents on 27.4.2022.

26. In paragraph (i) it has been clearly mentioned that the work schedule of Detaining Authority need not to be disclosed and it has been alleged that whatever time has been consumed was for the purposes of better verification, scrutiny and examination of material placed before the Detaining Authority to record his subjective satisfaction. The detaining authority acted promptly and vigilantly and issued order of detention after arriving at his subjective satisfaction.

27. On these pleadings, learned counsel for the petitioner submits that after being released on bail the petitioner was duly cooperating with the process of law and pursuing his family responsibilities while residing at his permanent place as mentioned above. He never sneaked away or absconded as alleged in the counter affidavit. As mentioned above, he was very much present during 4.3.2022 to 25.4.2022 at his residence, but the authorities were sleeping over the matter for seven good weeks and woke up and pasted the impugned detention order on 25.4.2022. On 25/4/2022 the petitioner visited District Court Allahabad for attending the date fixed in above noted case crime no.42 of 2016 and soon after attending the court proceeding he was arrested pursuant to the detention order under Section 3(1) of PITNDPS Act and was taken away to Police Station Saraiakil, District Kaushambi, where he was detained and thereafter he was transported to District Jail Lucknow in the night of order dated 26.4.2022. He was never produced before any competent Magistrate during this two days which is violation of the provisions provided for the execution of warrant of arrest under the Criminal Procedure Code.

At the cost of repetition it was argued that the detention order was never appended with or contained the alleged report of sponsoring authority i.e. NCB Lucknow or the material relied upon them for their alleged subjective satisfaction. Respondent no.3 in his point no.6 of the grounds, kept the source of information under his sleeves and did not disclose the same. On account of non supply of complete material the petitioner found himself unable to represent himself against the impugned detention order, however with limited means and anticipating those grounds, the petitioner got one representation prepared and submitted the same on 13.5.2022. This is the most crucial aspect of the issue that the petitioner is not in knowledge as to how and when detaining authority has come to knowledge of the material relied upon by the sponsoring authority and the material available on the record, by which the sponsoring allegedly formed their subjective satisfaction.

LEGAL DISCUSSION :

28. After hearing the submissions advanced by contesting parties and perusing the pleadings/grounds taken by them, the Court finds it proper and imperative to reproduce the ‘Statement of Object and Reasons’ for enactment of ‘The Prevention of Illegal Traffick in Narcotic Drugs and Psychotropic Substances Act, 1988’ which reads thus :

“In recent years, India has been facing a problem of transit traffic in illicit drugs. The spillover from such traffic has caused problems of abuse and addiction. This trend has created an illicit demand for drugs within the country which may result in the increase of illicit cultivation and manufacture of drugs. Although a number

of legislative, administrative and other preventive measures, including the deterrent penal provisions in the Narcotic Drugs and Psychotropic Substances, Act, 1985, have been taken by the Government, the transit traffic in illicit drugs had not been completely eliminated. It was, therefore, felt that a preventive detention law should be enacted with a view to effectively immobilising the traffickers. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 provides for preventive detention in relation to smuggling of drugs and psychotropic substances, but it cannot be invoked to deal with persons engaged in illicit traffic of drugs and psychotropic substances within the country. It was, therefore, felt that a separate legislation should be enacted for preventive detention of persons engaged in any kind of illicit traffic in narcotic drugs and psychotropic substances. Accordingly, the President promulgated the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 on 4th July, 1988.”

The arguments of respective counsels have to be tested in the light of abovementioned object and reasons of enactment. Any action on the part of authorities namely sponsoring authority or detaining authority or Advisory Board has to be in consonance with the aforesaid objective and reasons and has to be strictly adhered because it relates to the individual’s own freedom, life and liberty, which cannot be negotiated.

29. Learned counsel for the petitioner in order to buttress his contentions has relied upon the Hon’ble Apex Court’s decision in **Sushanta Kumar Banik vs. State of Tripura and others, 2022 LiveLaw (SC) 813,** whereby the Hon’ble Apex Court

have allowed the appeal on the following grounds :

(I) Delay in passing the order of detention from the date of proposal thereby snapping “live and proximate link” between the prejudicial activities and the purpose of detention and failure on the part of detaining authority in explaining such delay in any manner.

(II) The detaining authority remain oblivion of the fact that both the criminal cases relied upon by the sponsoring authority/detaining authority for the purposes of passing the order of detention the appellant-detainue was ordered to be released on bail by the special court. The detaining authority also remain oblivion as this material and vital fact of the detainue being released on bail in both the cases was suppressed, rather not brought on notice of detaining authority by the sponsoring authority at the time of proposal to pass appropriate order for preventive detention.

30. In this regard learned counsel for the petitioner submits that taking the strength from “live and proximate link between the prejudicial activities and purpose of detention” it has been contended by the counsel that there are only two cases to the credit of petitioner and in both of these cases he has been bailed out on 5.3.2020 and 18.12.2020 respectively. Since thereafter not a single case to the credit of the petitioner. The Court wonders that how the authorities would justify their detention order unless they would depict that there is ‘live and proximate link’ between the act done and passing of the alleged detention order. No doubt, the petitioner is facing prosecution in both the cases and the alleged detention order was passed on 4.3.2022 after lapse of about one

year and 3-4 months. During this period, not a single case has been registered against the petitioner either in any offences of I.P.C. or NDPS Act has been registered against the petitioner. It is fuhrers submitted that there are only two cases against the petitioner for which he is facing prosecution and in the absence of any ‘live and proximate link’ between the alleged release of petitioner on bail in December, 2020 till passing of detention order on 4.3.2022, makes entire proceeding vitiated on this score. The sponsoring authority must justify that the petitioner is offender and as soon as he would come out in the affinity of his accomplices he would again indulge into the same activities. In the grounds of detention, except a bald averment that Shivbodh Kumar Mishra @ Shivbodh Mishra would again indulged into the trafficking of narcotics drugs if he would be released from jail, is nothing but a device crafted by the sponsoring authority to dump a person in jail for ever. It is further mentioned in the detention order the detaining authority has not whispered about the source of information in the light of public interest give a free hand to the sponsoring/ detaining authority to pass any order of detention. At the cost of repetition, no doubt the petitioner was indulged into the two cases is NDPS Act but this would not going to justify the pasting of preventive detention order in the backdrop of aforesaid two cases. There has to be a concrete tangible material on record so as to justify the aforesaid detention order.

31. In the instant case, the petitioner has not been provided any document relying upon the sponsoring authority has prepared his report or as to when the sponsoring authorities have started preparing the report for forwarding the same to the detaining authority. All these

vital aspects of the issue remain under the carpet of secrecy which is prejudicial to the interest of petitioner. It is binding and statutory duty to share all documents material of which the sponsoring authority has formed opinion to proceed against the petitioner under the PITNDPS Act, without which the entire detention order gets vitiated.

32. As mentioned above, in **Ashok Kumar vs. Delhi Administrative and ors, (1982) 2 SCC 403** the Hon'ble Supreme Court has observed that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from doing.

33. In view of above object of the preventive detention, it becomes very imperative on the part of the detaining authority as well as the executing authorities to remain vigilant and keep their eyes skinned but not to turn a blind eye in passing the detention order at the earliest from the date of the proposal and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority would defeat the very purpose of the preventive action and turn the detention order as a dead letter and frustrate the entire proceedings.

34. The adverse effect of delay in arresting a detenu has been examined by this Court in a series of decisions and this Court has laid down the rule in clear terms that an unreasonable and unexplained delay in securing a detenu and detaining him vitiates the detention order. In the decisions we shall refer hereinafter, there was a delay in arresting the detenu after the date of

passing of the order of detention. However, the same principles would apply even in the case of delay in passing the order of detention from the date of the proposal. The common underlying principle in both situations would be the "live & proximate link" between the grounds of detention & the avowed purpose of detention.

35. In the case of **Sushanta Kumar Banik** (supra) the Hon'ble Apex Court has also held as under :

"18. Chinnappa Reddy, J. speaking for the Bench in Bhanwarlal Ganeshmalji v. State of Tamil Nadu, (1979) 1 SCC 465, has explained as follow:

*"It is further true that there must be a **"live and proximate link"** between the grounds of detention alleged by the detaining authority and the avowed purpose of detention namely the prevention of smuggling activities. We may in appropriate cases assume that the link is "snapped" if there is a long and unexplained delay between the date of the order of detention and the arrest of the detenu. In such a case, we may strike down an order of detention unless the grounds indicate a fresh application of the mind of the detaining authority to the new situation and the changed circumstances. But where the delay is not only adequately explained but is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the "link" not snapped but strengthened."*

(Emphasis supplied)

19. Sabyasachi Mukharji, J. (as the learned Chief Justice then was) in Shafiq Ahmed v. District Magistrate, Meerut and Ors., (1989) 4 SCC 556, having regard to the fact that there was a delay of two and a half months in detaining

the petitioner (detenu) therein, pursuant to the order of detention has concluded that "there was undue delay, delay not commensurate with the facts situation in that case and the conduct of the respondent authorities betrayed that there was no real and genuine apprehension that the detenu was likely to act in any manner prejudicial to public order. The order, therefore is bad and must go". However, the learned Judge observed that "whether the delay was unreasonable depends on the facts and circumstances of each case."

20. It is manifestly clear from a conspectus of the above decisions of this Court, that the underlying principle is that if there is unreasonable delay between the date of the order of detention & actual arrest of the detenu and in the same manner from the date of the proposal and passing of the order of detention, such delay unless satisfactorily explained throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently render the detention order bad and invalid because the "live and proximate link" between the grounds of detention and the purpose of detention is snapped in arresting the detenu. A question whether the delay is unreasonable and stands unexplained depends on the facts and circumstances of each case."

36. In yet another case of Ahmedhussain Shaikhhussain @ Ahmed Kalio VS. Commissioner of Police, Ahmedabad and another, (1989) 4 Supreme Court Cases 751, the Hon'ble Apex Court has observed thus :

"10. We may now refer to two decisions of this Court under the present Act. In the case of Abdul Razak Abdul

Wahib Sheikh vs. Shri S.N. Sinha, 'Commissioner of Police, Ahmedabad & Anr., (1989) 2 SCC 222; 1989 SCC (Cri) 326, it has been held that the detaining authority must disclose in a case where the detenu is already in jail that there is cogent and relevant material constituting fresh facts to necessitate making of an order of detention. In that case, as here, the detenu was in jail in connection with a criminal case and the order of detention was served on him in jail. The detenu's mere complicity in earlier incidents was not considered adequate and the detention under the Act was set aside. In the case of Ramesh v. State of Gujarat & Ors., (1989) 4 SCC 124, an order of detention under the Act was under challenge. The Court found that referring to incident which constituted the subject-matter of an earlier order of detention vitiated the impugned order.

(11)

(12) Disclosure of adequate facts to enable a full and adequate representation to the Preventive Detention Board is one of the positive guarantees within the scope of Article 22(5) of the Constitution. In A.K. Roy's case, [1982] 1 SCC 271 a Constitution Bench of this Court indicated that fullest disclosure of material should be made to enable the representation to be effective. In the present case the grounds which we have extracted show that the allegations are more or less vague and have the effect of making it difficult for the petitioner to make an adequate representation."

37. Thus, from the above discussion it is abundantly clear that on account of non supply of material by sponsoring authority the petitioner was not in a position to give effective representation. Secondly, there is no direct 'live and proximate link' between the action of petitioner and the

detention order passed by the detaining authority. In the ground of detention order, not a single word has been whispered that the petitioner even after being bailed out was regularly in touch with his sources or mobilising them.

38. The petitioner was bailed out on 18.12.2020 and since then there is no criminal antecedents reported to his credit. He is already attending the proceedings of the court and cooperating with the trial in two cases before the trial court concerned and now whimsically the respondent authorities nabbed the petitioner under Section 3(1) of PITNDPS Act allegedly preventing him from the unknown unheard forthcoming offence which the petitioner is said to have been planning.

39. In this regard the Court has the occasion to lay its hands on a judgment of Calcutta High Court in the case of **Heisnam Chaoba Singh vs. The Union of India and others in Criminal appeal No.1184 of 2022, 2021 SCC Online Cal 2691**, whereby the Hon'ble Apex Court has held that preventive detention would normally regard as anathema to liberty. Personal liberty of an individual is precious, invaluable and to be jealously secured and protected. The word "preventive" is different from 'punitive' as said by Lord Finley in **R.V. Haliday reported in 1917 AC 260**. The law of preventive detention operate harshly on the accused and, therefore, it should be strictly construed and should not be used merely to clip the wings of the accused who has involved in the criminal prosecution. Freedom from arbitrary arrest is a basic human right recognised over the years. This right has been preserved and respected whenever there has been cases of preventive detention unless there were

compelling necessity or reasons. The courts have upheld the sanctity of the personal liberty and placed it over all other rights. In cases of habeas corpus there is a principle which "is one of the pillars of liberty", that in English Law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act. It would be contextually useful to quote the following paragraphs of aforesaid judgment, herein below :

"28. It may appear to be strange that amongst the loudest critics who were members of the independent movement and might have suffered preventive detention in British India without even being tried or convicted, however, were in favour of inserting preventive detention in the Constitution and thereafter in various legislation authorising detention without trial. The sweeping power given to executive to arrest and detain a person for months together without even seeking the confirmation of the advisory board, however, has now been diluted due to various judicial pronouncements which uphold the constitutional rights of detenu notwithstanding the right of the detaining authority to issue order for preventive detention and similar legislation setting a time limit for such consideration.

29. Sardar Ballavbhai Patel, the first Home Minister of independent India moving the Bill which culminated in the preventive detention Act 1950 told parliament that it was directed against persons "whose avowed object is to create disruption, dislocation and tamper(ing) with communication, to suborn loyalty and make it impossible for normal Government based on law to function.

30.

31. Justice Vivian Bose a crusader of personal liberty in his

dissenting judgment in *S. Krishnan Kothe v. State of Madras* reported at AIR 1951 SC 301 in the context of the validity of the Preventive Detention (Amendment) Act 1951. observed:

"I cannot bring myself to believe that the framers of our Constitution intended that the liberties guaranteed should be illusory and meaningless or that they could be toyed with by this person or that. They did not bestow on the people of India a cold, lifeless, inert mass of malleable clay but created a living organism, breathed life into it and endowed it with purpose and vigour so that it should grow healthily and sturdily in the democratic way of life, which is the free way. In the circumstances, I prefer to decide in favour of the freedom of the subject. I am not speaking technically at the moment. I am viewing it broadly as the man in the street would. I am placing myself in the position of the detenu and looking at it through his eyes. The niceties of the law do not matter to him. He does not care about grammar. All that matters to him is that he is behind the bars and that Parliament has not fixed any limit in his kind of case and that local authorities tell him that they have the right to say how long he shall remain under detention. I cannot bring myself to think that this was intended by the Constitution".

32.

33. The catena of decisions relied upon by the learned Counsel for the petitioner and Addl. Solicitor General would show that the courts have tried to balance between the personal liberty and the necessity for curtailment such freedom or liberty. One would argue that when a person has committed acts which are punishable as crime be detained under the garb of preventive detention. It is quite arguable that a detention can never be

proper as the very object of the detention keeping the culprit behind bars can be achieved by any ordinary criminal court by convicting him for offence. However, the concept that emerged that while the object of a trial and a conviction is punitive the object of detention without trial is preventive.

.....

39. Preventive detention is an exceptional mechanism compromising on the personal liberty of individuals. Therefore, the legal qualification of preventive detention laws ought to be interpreted strictly and preventive detention should not be permissible unless it absolutely qualifies all the necessary legal facets. The Hon'ble Courts have acknowledged the gravity and repercussions of preventive detention laws. Preventive detention is a tool in isolation which operates to curtail a person's personal liberty. Preventive detention is more excessive than normal measures of arrest, hence preventive detention cannot be misconstrued to be a direct alternative to the normative criminal prosecution. The Indian legal jurisprudence already has a set of pre-existing criminal law legislations which caters to the culpability of various modes of offences. Preventively detaining any person is an exclusive measure and operates separately than the Indian Penal Code or Code of Criminal Procedure. Therefore, preventive detention as a measure ideally should be utilised when the other existing criminal laws are inadequate and the preventive detention is squarely falling within the intention of the legislature to implement preventive detention. The Hon'ble Courts have looked down upon the practice of detaining a person under preventive detention when such person has been enlarged on bail in the same case. The intention with which

courts have made such an observation is to ensure that preventive detention is not used as an added tool to curtail judicial decisions allowing bail of a person. The Hon'ble Supreme Court in Vijay Narain Singh v. State of Bihar (1984) 3 SCC 14 observed the following:

"It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court."

40. *The preventive detention laws in India are a colonial legacy and have a great potential to be abused and misused. Laws that have the ability to confer arbitrary powers to the state, must in all circumstances, be very critically examined, and must be used only in the rarest of care cases. In cases of preventive detention, where the detenue is held in arrest not for a crime he has committed, but for a potential crime he may commit, the courts must always give every benefit of doubt in favour of the detenue, and even the slightest of errors in procedural compliances must result in favour of the detenue.*

41. After having gone through the aforementioned judgments of Hon'ble Apex Court and having considered the contentions raised by learned counsel for the respective parties, we have no hesitation to say that the impugned detention order dated 4.3.2022 and the

grounds are de hors the provisions of law, and therefore, the impugned detention order dated 4.3.2022 and the grounds dated 04.03.2022 on which the detention order was passed, are hereby set aside and consequently the petitioner is set at liberty forthwith, if he is not wanted in any other case.

42. The instant Habeas Corpus Writ Petition stands **ALLOWED**. All the concerned parties shall be given a copy of this order as per rules.

43. We make it clear that the observations made in this order are only for the purpose of deciding the instant habeas corpus and shall not affect the trials pending against the petitioner before the court concerned. Trial courts are directed to proceed and decide the case on its own merits, unaffected by any observation made in this order.

(2023) 5 ILRA 647
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE GAJENDRA KUMAR, J.

Habeas Corpus No. 810 of 2022

Rangesh Yadav **...Petitioner**
Versus
Superintendent of District Jail, Azamgarh & Ors. **...Respondents**

Counsel for the Petitioner:

Sri Chandrakesh Mishra, Sri Abhishek Kumar Mishra, Sri Daya Shankar Mishra (Sr. Advocate)

Counsel for the Respondents:

G.A., A.S.G.I., Sri Patanjali Mishra, Sri Satyendra Tiwari, Sri Kameshwar Singh

Criminal Law - National Security Act, 1980 - Section 3(2) - U.P.Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 2/3 - Constitution of India, 1950 - Articles 22(5) - Against detention order dated 25.07.22 - Representation - Rejected - Allegation against petitioner was that certain people purchased liquor from the license shop of petitioner which was adulterated, consumed by seven people, became blind and died - Already in jail since 23.02.22 - Held, act allegedly committed by petitioner on 20.02.22 did not cause a disturbance of public order, as it did not disturb the society to the extent of causing a general disturbance of public tranquility - Single act of sale of adulterated country made liquor was not suggestive of a repetitive tendency on the part of petitioner to act likewise in future - Directions accordingly Impugned order quashed. . (Para 39)

Writ Petition Allowed. (E-13)

List of Cases cited:

1. Ichhu Devi Choraria Vs U.O.I.& ors., 1980 AIR 1983
2. Mohinuddin @ Moin Master Vs District Magistrate, Beed & ors., 1987 AIR 1977
3. St. of U.P. Vs Kamal Kishore Saini, 1988 AIR 208
4. M. Ahamedkutty Vs U.O.I., 1990 SCR (1) 209
5. Inamul Haq Engineer Vs Superintendent, Division/District Jail, Azamgarh, 2001 Cri.L.J. 4398
6. Lallan Goswami Ajayn Vs Superintendent, Central, 2002 (45) ACC 1089
7. Brijbasi Pathak Vs St. of U.P.& ors., 1985 (suppl.) ACC 273

8. Mrs. T. Devaki Vs Government of T.N. & ors., 1990 AIR 1086

9. Smt. Angoori Devi for Ram Ratan Vs U.O.I.& ors., 1989 AIR 371

10. Ram Manohar Lohia Vs St. of Bihar & anr., AIR 1966 SC 740

11. Sant Singh Vs District Magistrate & ors., 2000 CriLJ 2230

12. Ram Kripal Singh Vs St. of U.P. & ors., 1986 CriLJ 1437

13. Jitendra Nath Biswas Vs The St. Of W.B. AIR 1975 SC 1215

14. Banka Sneha Sheela Vs The St. of Telangana & ors., (2021) 9 SCC 415

15. SK. Serajul Vs St. of W.B.I, AIR 1975 Supreme Court 1517

16. Jagan Nath Biswas Vs The St. of W.B, AIR 1975 Supreme Court 1516

17. Md. Sahabuddin Vs The District Magistrate 24 Parganas & ors., 1975 CRI. L.J. 1499

18. Rajammal Vs St. of T. N. & anr. AIR 1999 SC 684

19. Kundanbhai Dulabhai Shaikh Vs Distt. Magistrate, Ahmedabad And Ors

20. Raj Kishore Prasad Vs St. of Bihar And Ors. AIR 1983 SC 320

21. Rama Dhondu Barode Vs Saraf, Commissioner of Police & Ors.

22. Syed Mehtab Vs Supdt. Central Jail, Naini, Aftab Ahmad Vs District Magistrate, Gonda & ors. 2002 (45) ACC 422

23. Bhanu Sharan Vs Superintendent, Central Jail, Naini, Allahabad & ors. 2002 (45) ACC 599

24. Vishal @ Panda Vs District Magistrate, Mainpuri & ors. 2004 (50) ACC 928

25. Virendra Kumar Nayak Vs The Superintendent of Naini

26. Smt. Khatoon Begum Etc. Vs U.O.I. and Ors. 1981 AIR 12077, 1981 SCR (3) 137

27. Vijay Kumar Vs St. of J & K & ors. 1982 AIR 1023, 1982 SCR (3) 522

28. Sk. Abdul Munna Vs St. of W.B. 1974 0 Supreme (SC) 118

29. Rabindra Kumar Ghosel Vs St. of W.B. 1975 0 Supreme (SC) 12

30. Vijay Kumar Misra Vs Superintendent, District Jail, Gorakhpur 2002 0 Supreme (All) 792

31. Mallada K Sri Ram Vs Stat of Telangana & ors. 2022 0 Supreme (SC) 394

32. Satyapriya Sonkar Vs Superintendent, Central Jail, Naini LAWS (ALL)-1999-10-11

33. St. of U.P. Vs Kamal Kishore Saini 1987 0 Supreme (SC) 833

34. Baby Devassy Chully alias Bobby Vs U.O.I. & ors., (2013) 4 SCC 531

35. Arun Ghosh Vs West Bengal, 1970 SC 1228

36. Alijan Miya Vs District Magistrate, 1983 SC 1130

37. K.K. Saravana Vs St. of T.N., (2008) 9 SCC 89

38. Kamarunnissa Vs U.O.I. & anr., AIR 1991 SC 1640

39. Devesh Chourasia Vs The District Magistrate, Jabalpur and Ors., (WP No. 10177/2021)

40. Pankaj Vs St. of U.P. & ors., 2016 1 Crimes (HC) 8

41. Ayya alias Ayub Vs St. of U.P. & Anr., AIR 1989 SC 364

42. Vijay Narain Singh Vs St. of Bihar (1984) 3 SCC 14

43. Rekha Vs St. of T.N., (2011) 5 SCC 244

44. Dr Ram Manohar Lohia Vs St. of Bihar (1966) 1 SCR 709

45. Pushkar Mukherjee Vs St. of W.B. (1969) 1 SCC 10

46. Shyamal Chakraborty Vs Commissioner of Police, Calcutta (1969) 2 SCC 426.

47. In Dr Ram Manohar Lohia case (1966) 1 SCR 709

48. Ali Jaan Miyan Vs District Magistrate

49. Shalini Soni Vs U.O.I.

50. Mehrunissa Vs St. of Mah. (1981) 2 SCC 709

51. Mohd. Zakir Vs Delhi Administration (1982) 3 SCC 216

52. Khudiram Das Vs St. of W. B. I (1975) 2 SCC 81

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

1. Heard Shri Daya Shankar Mishra, learned Senior Advocate, assisted by Shri Chandrakesh Mishra and Shri Abhishek Mishra Advocates, learned counsel appearing for the petitioner, Shri Patanjali Mishra and Sri Satyendra Tiwari, learned Additional Government Advocate for the State-respondents (1) Superintendent, District Jail, Azamgarh, (2) District Magistrate, Azamgarh and (3) State of Uttar Pradesh and Mr. Kameshwar Singh, learned counsel representing Central Government.

2. Pleadings between the contesting parties were exchanged and the matter is ripe for final submissions.

3. After hearing the counsels for the contesting parties on the earlier occasion on 21.04.2023, the Court has allowed the

petition, directing the authorities to release the petitioner forthwith, if not wanted in any other case, though detailed judgment would follow. The operative portion of our order reads thus :

"Heard Sri Daya Shankar Mishra, learned Senior Counsel assisted by Sri Chandrakesh Mishra and Sri Abhishek Kumar Mishra, learned counsels appearing for the petitioner, Sri Patanjali Mishra and Sri Satyendra Tiwari, learned A.G.A. representing State as well as Sri Sanjay Kumar Srivastava holding brief of Sri Kameshwar Singh, learned counsel representing Central Government.

The pleadings have been exchanged between the parties and the matter is ripe for final submissions.

We have heard the parties at length and after hearing the parties, we are of the considered opinion that the present petition is liable to be allowed and accordingly, stands allowed. The order impugned dated 25.07.2022 is hereby set-aside.

Reasons to be followed later on.

The petitioner-Rangesh Yadav is hereby set at liberty.

The Jail Superintendent, Azamgarh is directed to release the petitioner forthwith, if he is not wanted in some other cases."

4. By the instant judgement we are giving detailed judgement.

The instant Writ Petition under Article 226 of the Constitution of India has been filed by the petitioner- Rangesh Yadav, who is in custody in District Jail, Azamgarh, through his brother, seeking issuance of a Writ of Habeas Corpus challenging his detention under an order dated 25.07.2022 passed under Section 3

(2) of the National Security Act, 1980 and the entire consequential proceedings and continued detention as being illegal and unconstitutional and a prayer has been made to issue writ of Habeas Corpus under Article 226 of Constitution of India commanding the respondents to release the petitioner from their alleged illegal custody.

5. The detention order dated 25.07.2021 states that the District Magistrate, Azamgarh has been satisfied that it has become necessary to pass a detention order under Section 3 (2) of the N.S.A. Act, 1980 to prevent the petitioner from acting in any manner which would be prejudicial to the maintenance of 'public order'. The grounds of detention are contained in a separate communication of the same date issued by the District Magistrate, Azamgarh which narrates the incident which led to the passing of the detention order. A first information report dated 21.02.2022, being Case Crime No. 39 of 2022, under section 272, 273, 302, 34 I.P.C. & Section 60 (A) of U.P. Excise Act was lodged at P.S. Ahraula, District Azamgarh by Vijay Sonkar against the petitioner and other co-accused namely Suryabhan, Puneet Kumar Yadav, Rambhoj and Ashok Kumar Yadav with the allegation that his father Jhabbu Sonkar purchased country made liquor (देसी शराब) from the shop of the petitioner Rangesh Yadav on 20.02.2022 and after consuming it, his father has fallen ill and thereafter become blind and his condition started deteriorating. He was admitted in hospital but eventually he died on 21.02.2022, during the course of treatment. When the complainant returned to village with dead body of his father, he came to know that co-villager Ramkaran Bind has also died due to consumption of liquor purchased

from the shop of the petitioner- Rangesh Yadav .

6. The second F.I.R. being Case Crime No. 40 of 2022, under section 272, 273 IPC & section 60 (A) of U.P. Excise Act was lodged by the Excise Inspector at P.S. Ahraula against the petitioner and other unknown accused, who were involved in the business of adulterated country made liquor (Hooch).

7. On the ground of the same incident, a third F.I.R. being Case Crime No. 60 of 2022, dated 22.02.2022, under section 272, 273, 34, 302 IPC & section 60 (A) of U.P. Excise Act was lodged by one Rajendra Prasad Yadav against the petitioner and co-accused namely Suryabhan, Puneet Kumar Yadav, Rambhoj and Ashok Yadav with the allegation that his brother become serious. He also became blind and for the purpose of treatment he was admitted in the hospital on 21.02.2022 but he died during the course of treatment.

8. An another F.I.R. under section 3(1) of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 as Case Crime No. 97 of 2022 at P.S. Ahraula was lodged against the petitioner and other co-accused on 07.04.2022.

9. The impugned detention order dated 25.07.2022 was passed after three months mentioning that by virtue of exercising the power conferred under section 3(3) of National Security Act, 1980 (Act No.65/1980), Rangesh Yadav who is in Jail, as undertrial in Case Crime No.39 of 2022, under section 272, 273, 302, 34 IPC & section 60 (A) of U.P. Excise Act, P.S. Ahraula, District Azamgarh and Case Crime No. 97 of 2022, under section 3(1) of Uttar Pradesh Gangsters and Anti-Social

Activities (Prevention) Act, 1986, P.S. Ahraula, District Azamgarh is retained in the custody of Superintendent, District Jail, Azamgarh as an ordinary prisoner. In grounds of detention it is stated that as a fallout of the alleged incident there is a sense of terror and anguish among the people and children were not being sent to schools, shops were being closed, additional police force has been deployed and tremendous publicity is being given in newspapers, general public has a perception that if people are fallen ill by consuming liquor from licensed shop and if petitioner is released from Jail he would indulge in some illegal acts, which would adversely impact on the normal tempo of general public. The offence committed by the petitioner, by virtue of involving in the business of adulterated country made liquor (Hooch), which resulted into death of seven people, the other people got afraid and panicky, the public order was disturbed and tranquility of the locality was disturbed. There is every likelihood that in the event the petitioner is bailed out, as his counsel and family members are trying hard, the petitioner after coming out of jail would have play in the society.

10. It has been averred in the writ petition that petitioner is a law-abiding citizen and has no criminal history to his credit. The District Magistrate of Azamgarh has mechanically and in an arbitrary manner signed the detention order dated 25.07.2022. The petitioner has been in District Jail, Azamgarh, since 23.02.2023. The petitioner has never done any act in violation of the maintenance of public order. On 25.07.2022 there was no possibility/probability of getting out on bail of the petitioner nor the subjective satisfaction of District Magistrate, Azamgarh, therefore, order dated

25.07.2022 is illegal and unconstitutional and liable to be set-aside. Case Crime No. 97 of 2022 under section 3(1) of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 was registered against the petitioner on 07.04.2022 and bail application thereunder was rejected on 19.05.2022. No second bail application has been moved in the court nor was any bail application moved in Hon'ble High Court. The District Magistrate Azamgarh did not consider this aspect of the case thus the impugned detention order is a punitive one therefore liable to be quashed and set-aside.

11. There is no cogent and reliable evidence against the petitioner in Case Crime No. 39 of 2022, Case Crime No. 40 of 2022, Case Crime No. 60 of 2022 and Case Crime No. 97 of 2022, this important fact has not been considered at any level. In the bail applications in Case Crime No. 40 of 2022 and Case Crime No. 60 of 2022, defence plea was taken regarding false implication and non-complicity of the petitioner, but bail applications, affidavits and annexures have not been forwarded by the sponsoring authority as well as the recommending authority to the District Magistrate, Azamgarh, thus the District Magistrate, Azamgarh, has been deprived of considering the same for subjective satisfaction, nor the same was forwarded to the State Government as well as to the Central Government for the consideration. The petitioner has been provided only the copy of the index of the bail application in Case Crime No. 39 of 2022, bail application (first four pages) and letter dated 18.06.2022 of the office of Government Advocate of Hon'ble High Court along with detention order dated 25.07.2022. Affidavits and annexures with the bail applications have not been

furnished to the petitioner nor have been sent to the State Government as well as Central Government for their perusal.

12. There is no evidence regarding the purchase of liquor from the licensed shop and the same was taken and was drunk by those persons who are alleged to have died, fallen ill and became blind. Shri Mishra, learned counsel submits that at least half a dozen deshi liquor shops in that area. Sponsoring authority and recommending authority have relied on news items in local newspapers which is not admissible in evidence. The petitioner has been deprived of effective representation as he has not been provided with important and relevant documents. A request has also been made through representation dated 06.08.2022 for the same.

13. Petitioner has also made request for the aid of legal friend and legal practitioner at the time of hearing but the same was not considered, while the sponsoring authority and recommending authority were represented by legal officers/practitioners, which is violation of Article 14 and 21 of the Constitution of India. Against the detention order dated 25.07.2022 through District Jail, Azamgarh representation dated 13.08.2022 was sent to the State Government, Central Government and Advisory Board, Lucknow but the same has been rejected in an arbitrary manner which is the violation of Constitutional Right and Procedural safeguards.

14. The representation dated 13.08.2022 of the petitioner was not expeditiously disposed off but decided with negligence and laches being violative of Article 22(5) of the Constitution of India. The second representation dated

25.08.2022 was sent through speed post to State Government as well as Central Government of which no information has been sent back to the petitioner. The provisions of sections 3(2), 3(3), 3(5), 8, 10, 12, 14 of National Security Act and Article 14, 19, 21, 22(5) of the Constitution of India have not been complied with. Thus the impugned detention order is liable to be quashed/ set-aside.

15. On behalf of Superintendent, District Jail, Azamgarh, counter affidavit has been filed by Sri Ranjit Kumar Singh stating that the petitioner was admitted in District Jail, Azamgarh on 23.02.2022. In pursuance of remand orders in Case Crime No. 39 of 2022, Case Crime No. 40 of 2022, Case Crime No. 60 of 2022 and remand order dated 15.04.2022 in Case Crime No. 97 of 2022. While the petitioner was in judicial custody in the aforesaid cases the said detention order dated 25.07.2022 along with grounds of the detention with all relevant materials was received in the office of the District Jail, Azamgarh on 25.07.2022 and the same was served on the petitioner on the same day. The petitioner was also informed to submit the representation at the earliest to the District Magistrate Azamgarh/detaining Authority within 12 days or before approval of the detention order whichever was earlier.

16. The aforesaid detention order was approved by the State Government on 02.08.2022, the communication of which was received on 03.08.2022 and the same was informed on the same day i.e. 03.08.2022. The petitioner submitted a first representation in two sets on 06.08.2022 which was sent to the Office of District Magistrate, Azamgarh on the same day. The aforesaid first representation was rejected on 09.08.2022, the communication of which was received on 10.08.2022 and

the same was informed to the petitioner on the same day. The petitioner again submitted a second representation in four sets on 14.08.2022 as to the Advisory Board, Home Department, Government of India, New Delhi and Home department, Government of Uttar Pradesh, Lucknow. The aforesaid second representation dated 14.08.2022 was rejected by the State Government on 29.08.2022, communication of which was received on 30.08.2022 and the petitioner was informed on the same day. The aforesaid representation dated 14.08.2022 was also rejected by the Central Government on 24.08.2022 the communication of which was received on 26.08.2022 and the petitioner was informed on the same day. The petitioner submitted third representation in three sets on 26.08.2022 to the Home Department, Government of India, New Delhi and Home Department Government, of Uttar Pradesh, Lucknow. The aforesaid third representation was rejected by the State Government on 30.09.2022, the communication of which was received on 01.10.2022 and the petitioner was informed on the same day. The aforesaid third representation was rejected by the Central Government on 15.09.2022 and the communication of which was received on 15.09.2022 and the petitioner was informed on the same day.

17. The information regarding hearing before the Advisory Board, Lucknow was received on 17.08.2022 and the petitioner was informed with regard to the date, time and place fixed before the Advisory Board at Lucknow on the very same day. The petitioner was also informed regarding his right of hearing through next friend (non-advocate), but no such request was made. Hence, petitioner was transferred to Lucknow on 21.08.2022 to produce himself

before Advisory Board, Lucknow on the date of hearing i.e. on 22.08.2022. After the report of Advisory Board, Lucknow the said detention order was confirmed on 02.09.2022 by the State Government initially for the period of three months from the date of detention i.e. from 25.07.2022. The communication of which received on 03.09.2022 and the petitioner was informed on the very same day. At present the petitioner is in custody in District Jail, Azamgarh under the National Security Act as well as in Case Crime No. 39 of 2022, Case Crime No. 40 of 2022, Case Crime No. 60 of 2022 and Case Crime No. 97 of 2022.

18. On behalf of District Magistrate, Azamgarh counter affidavit has been filed by Vishal Bhardwaj in which it is stated that the detention order and grounds of detention dated 25.07.2022 has been passed by the answering respondent while exercising power under 3(3) of National Security Act. A first information report dated 21.02.2022 in Case Crime No. 39 of 2022 registered by one Vijay Sonkar regarding the death of his father Jhabba Sonkar as a result of consumption of country made liquor purchased from the licensed shop of the petitioner and one other co-villager Ramkaran Bind has also died due to consumption of country made liquor purchased from the shop of the petitioner in which chargesheet has been filed. Another FIR in Case Crime No. 40 of 2022 was also filed for the involvement of the petitioner in the business of adulterated country made liquor in which chargesheet has been filed. Yet another FIR in Case Crime No. 60 of 2022 was filed against the petitioner and co-accused in which chargesheet has been filed. Bail application filed by the petitioner before the learned court below in Case Crime No. 39 of 2022

was rejected on 07.04.2022. The petitioner filed bail application before the Hon'ble High Court. Notice of which was given to the office of Government Advocate High Court of Allahabad on 18.06.2022. Yet another FIR was filed on 07.04.2022 against the petitioner and other co-accused under section 3(1) of UP Gangster and Anti-Social Activities (Prevention) Act 1986 in Case Crime No. 97 of 2022.

19. Due to offence committed by the petitioner public order was disturbed and tranquility of the locality of the petitioner was disturbed and there was immense possibility of release of the petitioner as his bail application was pending before the Hon'ble High Court, therefore, the Station House officer/ sponsoring authority submitted his report to the Superintendent of Police, Azamgarh, through concerned Circle Officer and recommended for initiating the proceedings against the petitioner under National Security Act. The Circle Officer forwarded the report to the Additional Superintendent of Police (rural), Azamgarh, on the same day who forwarded the same to the Superintendent of Police, Azamgarh, on 19.07.2022. The Superintendent of Police, Azamgarh, sent his report dated 21.07.2022 to the District Magistrate, Azamgarh. The answering respondent/detaining Authority after going through the entire material available on record, report of the sponsoring authority and recording his subjective satisfaction passed the detention order dated 25.07.2022 exercising power under section 3(3) of National Security Act. Thereafter, the detention order and grounds of detention dated 25.07.2022 along with relevant records were supplied to the petitioner through Jail, Authorities on 26.07.2022. The petitioner along with other co-accused one was involved in illegal

business of adulterated country made liquor and by consuming it seven people died as such activities of the petitioner are prejudicial to the society. Information was given on 17.08.2022 to the petitioner with regard to the opportunity of hearing before UP Advisory Board, Lucknow. The appearance of the petitioner before UP Advisory Board, Lucknow was made for hearing on 22.08.2022.

20. On behalf of State Government of UP counter affidavit has been filed by Sabhapati Bind in which it is stated that detention order dated 25.07.2022, grounds of detention and all other relevant documents forwarded by the District Magistrate, Azamgarh vide order dated 25.07.2022 was received by the State Government on 28.07.2022. The State Government approved the order of detention on 01.08.2022 the same was communicated to the District Authorities on 02.08.2022 within 12 days from the date of detention order as required under section 3(4) of the Act. A copy of detention order, grounds of detention and all other relevant documents, received from the District Magistrate were also sent to the Central Government by the State Government as required under section 3(5) of the Act and provisions of the aforesaid sections of the Act have been fully complied with. A copy of petitioner's representation dated 06.08.2022 along with parawise comments was received on 11.08.2022, State Government sent a copy of the representation with parawise comments thereon to the Central Government, New Delhi through speed post and to the Advisory Board, Lucknow with separate letters both dated 11.08.2022. The State Government after due consideration rejected the representation finally on 23.08.2022 the information of which was

sent to the District Authorities on 24.08.2022. Representation of the petitioner has been dealt with expeditiously at every stage of the Government. Copy of the petitioner's second representation dated 14.08.2022 along with parawise comments was received on 18.08.2022. The State Government sent copy of representation and parawise comments thereon to the Central Government and the same was finally rejected on 26.08.2022, informing the same was communicated by radiogram dated 29.08.2022, the representation has been dealt with expeditiously at every stage by the State Government. U.P. Advisory Board, Lucknow vide its letter dated 17.08.2022, informed by State Government that the case of the petitioner would be taken up for hearing on 22.08.2022 and directed that the petitioner be informed that if he desires to attend the hearing before U.P. Advisory Board, Lucknow, along with his next friend (non-Advocate), he could do so and be allowed to take his next friend (non-advocate) along with him. The fact was accordingly communicated to the petitioner through the District Authorities by the State Government. The petitioner appeared for personal hearing before the Advisory Board, Lucknow, on 22.08.2022 the date fixed. The UP and Advisory Board, Lucknow, on the said date fixed, heard the petitioner in person and submitted its report to the State Government that there is sufficient cause for the preventive detention of the petitioner under the National Security Act 1980. The aforesaid report was received well within seven weeks from the date of the detention of the petitioner as provided in section 11(1) of the Act. The copy of the petitioner's representation dated 30.08.2022 was sent to the Central Government with parawise comments and was examined and finally rejected by the State Government on

14.09.2022. The information of which was duly communicated to the petitioner and the representation of the petitioner has been dealt with expeditiously at every stage by the State Government.

21. A counter affidavit has been filed by Smt. Meena Sharma on behalf of the Union of India also stating that copy of the representation dated 06.08.2022 of the detainee was sent to the ministry by the State Government and the same was duly considered and not acceded by the Central Government. Accordingly, the detainee along with Authorities concerned were informed vide wireless message dated 24.08.2022. Details of the processing of the representation has also been given in the counter affidavit. Representation dated 13.08.2022 and 26.08.2022 were duly considered and the request regarding revocation of the detention order dated 25.07.2022 passed by the District Magistrate, Azamgarh was not acceded by the Central Government. The detainee along with Authorities concerned were informed vide wireless message dated 23.09.2022. Details of the processing of the representation has also been given in the counter affidavit. Due to absence of provisions in the Act for consideration of 2nd and 3rd representation, the Deputy Secretary was of the view not to entertain these representation for consideration of the Union Home Secretary, thereafter, with comments sent the file to the Joint Secretary on 07.09.2022. After due examination, representations dated 13.08.2022 and 26.08.2022 were rejected and sent the file back to the Joint Secretary on 22.09.2022 and the detainee and the Authorities concerned were informed vide wireless message dated 23.09.2022. Representations of the detainee were dealt with promptly and efforts were made to

examine the matter with utmost care and caution with promptitude, hence, there was no wilful and deliberate delay in disposal of the representations on part of the answering respondent. Action of the respondent no.4 has been in accordance with the provisions of National Security Act, 1980 and no rights of the detainee have been infringed.

22. The detention order has been challenged by means of the instant writ petition mainly on several grounds. The first ground of challenge is that the alleged incident was an offence against individuals which affected "law and order", but it does not affect "public order" so as to attract the provisions of Section 3(2) of the NSA, 1980. The second ground of challenge is that the incident which took place on 20.02.2022 is a stale incident which has no proximity with the detention order and the invocation of the provisions of the NSA, 1980 after a long delay on 25.07.2022 was neither warranted nor justified. The third ground of challenge is that copies of the entire relevant material referred to and relied upon in the detention order have not been provided to the petitioner. The petitioner has been provided only the copy of the index of the bail application in Case Crime No. 39 of 2022, bail application (first four pages) and letter dated 18.06.2022 of the office of Government Advocate of Hon'ble High Court along with detention order dated 25.07.2022. Affidavits and annexures with the bail application have not been furnished to the petitioner nor they have been sent to the State Government as well as Central Government for their perusal. The copies of the report of the District Magistrate and that of the Advisory Board, Lucknow were not provided to the petitioner as also comments on the said applications have not been provided to the petitioner in violation

of the principles of natural justice, which renders the detention order unsustainable in law. The fourth ground of challenge is that petitioner has not been given aid of legal friend/legal practitioner at the time of hearing despite a request made for the same. The fifth ground of the challenge is that State Government as well as Central Government have not dealt with representation made by the petitioner with expedition which is the violation of Constitutiona safeguards provided in favour of the petitioner. Lastly the detention order has been assailed on the ground that on 25.07.2022, i.e. on the date of passing of the detention order, the petitioner was already in custody and he had not even filed an application for bail in Case Crime No. 97 of 2022 under the U.P. Gangsters and Anti-Social Activities (Prevention) Act and there was no possibility of the petitioner acting in any manner prejudicial to the maintenance of public order and in these circumstances, the provisions of Section 3(2) of the NSA, 1980 are not attracted and the detention order is unsustainable in law.

23. In support of his submissions, Shri Daya Shankar Mishra, learned Senior Advocate has placed reliance on the judgments in the cases of **Ichhu Devi Choraria Vs. Union of India and others, 1980 AIR 1983, Mohinuddin @ Moin Master Vs. District Magistrate, Beed and others, 1987 AIR 1977, State of U.P. Vs. Kamal Kishore Saini, 1988 AIR 208, M. Ahamedkutty Vs. Union of India, 1990 SCR (1) 209, Inamul Haq Engineer Vs. Superintendent, Division/District Jail, Azamgarh, 2001 Cri.L.J. 4398, Lallan Goswami Ajayn Vs. Superintendent, Central, 2002 (45) ACC 1089, Brijbasi Pathak Vs. State of Uttar Pradesh and others, 1985 (suppl.) ACC 273, Mrs. T.**

Devaki Vs. Government of Tamil Nadu and others, 1990 AIR 1086, Smt. Angoori Devi for Ram Ratan Vs. Union of India and others, 1989 AIR 371, Ram Manohar Lohia Vs. State of Bihar and another, AIR 1966 SC 740, Sant Singh Vs. District Magistrate and others, 2000 CriLJ 2230, Ram Kripal Singh Vs. State of U.P. And others, 1986 CriLJ 1437, Jitendra Nath Biswas vs. The State Of West Bengal AIR 1975 SC 1215, Banka Sneha Sheela Vs. The State of Telangana and others, (2021) 9 SCC 415, SK. Serajul Vs. State of West Bengal, AIR 1975 Supreme Court 1517, Jagan Nath Biswas Vs. The State of W.B, AIR 1975 Supreme Court 1516, Md. Sahabuddin Vs. The District Magistrate 24 Parganas and others, 1975 CRI. L.J. 1499, Rajammal vs. State of Tamil Nadu And Another AIR 1999 SC 684, Kundanbhai Dulabhai Shaikh vs. Distt. Magistrate, Ahmedabad And Ors, Raj Kishore Prasad vs. State of Bihar And Ors. AIR 1983 SC 320, Rama Dhondu Barode vs. Saraf, Commissioner of Police & Ors., Syed Mehtab vs. Supdt. Central Jail, Naini, Aftab Ahmad vs. District Magistrate, Gonda and others 2002 (45) ACC 422, Bhanu Sharan vs. Superintendent, Central Jail, Naini, Allahabad and others 2002 (45) ACC 599, Vishal @ Panda vs. District Magistrate, Mainpuri and others 2004 (50) ACC 928, Virendra Kumar Nayak vs. The Superintendent of Naini, Mohar Ali vs. State of U.P., Smt. Khatoon Begum Etc. Etc. vs. Union of India and Ors. 1981 AIR 12077, 1981 SCR (3) 137, Vijay Kumar Vs. State of J & K & Others 1982 AIR 1023, 1982 SCR (3) 522, Sk. Abdul Munnaaf vs. State of W.B. 1974 0 Supreme (SC) 118, Rabindra Kumar Ghosel vs. State of W.B. 1975 0 Supreme (SC) 122, Vijay Kumar Misra

vs. Superintendent, District Jail, Gorakhpur 2002 0 Supreme (All) 792, Mallada K Sri Ram vs. Stat of Telangana & Ors. 2022 0 Supreme (SC) 394, Satyapriya Sonkar vs. Superintendent, Central Jail, Naini LAWS (ALL)-1999-10-11, State of U.P. vs. Kamal Kishore Saini 1987 0 Supreme (SC) 833.

24. Opposing the writ petition, Shri Patanjali Mishra and Shri Satyendra Tiwari, learned A.G.A. have submitted that there is no thumb rule that the preventive detention can be ordered only if a bail application is pending. Its genesis lies under Article 22 of the Constitution of India. However, normally preventive detention is ordered only when a bail application is pending. As the petitioner was already in custody in several criminal cases, instant proceedings under the NSA, 1980 was invoked.

25. He has submitted that whether the case involves a threat to maintenance of "public order" or "law and order" depends upon the facts of each case and the order of preventive order has to be passed by the detaining Authority on the basis of his subjective satisfaction in this regard. Mr. Patanjali has submitted that the incident took place by which the public at large suffered the cons of consumption of adulterated liquor and resultantly several people lost their lives. Out of fear and terror caused by the anti-social activities of the petitioner and co-accused, the parents refrained from sending their kids to schools and nearby shops were closed, therefore, it involves breach of public order and not merely a law and order. He has submitted that the detention order under NSA, 1980 can be passed in any of the following conditions: (a) if the accused is not in

custody or when he is in custody (b) the detaining authority is satisfied that he may be enlarged on bail (c) where no bail application is pending.

26. Sri Patanjali Mishra has further submitted that even if the Court comes to the conclusion that the relevant material was not provided to the petitioner, it would not affect the validity of the detention order because the detention order has been passed on many grounds and not on one. Section 5 A of the NSA, 1980 provides that the detention order shall not be deemed to be invalid or inoperative merely because one or some of the grounds for passing the detention order is vague, non-existent, not relevant, not connected or not proximately connected with such person or invalid for any other reason, whatsoever. There is a live and proximate link between the incident and the detention order passed after recording the subjective satisfaction based on the material collected and forwarded by the sponsoring Authority to the detaining Authority. The impugned order is valid, there is no illegality therein as the mandatory procedure as envisaged in the Constitution as well as N.S.A. Act has been complied with in letter and spirit.

27. Sri Patanjali Mishra has placed reliance on judgments rendered in **Baby Devassy Chully alias Bobby Vs. Union of India and others, (2013) 4 SCC 531, Arun Ghosh Vs. West Bengal, 1970 SC 1228, Alijan Miya Vs. District Magistrate, 1983 SC 1130 and K.K. Saravana Vs. State of Tamil Nadu, (2008) 9 SCC 89 and Kamarunnissa Vs. Union of India and another, AIR 1991 SC 1640.**

28. Shri Kameshwar Singh, learned counsel appearing for the Central

Government has advanced his submissions opposing the writ petition and he has tried to justify the detention order. He has further submitted that representations submitted and forwarded on behalf of the detenu have decided and rejected without laches and negligence with expedition. He has placed reliance on **Devesh Chourasia Vs. The District Magistrate, Jabalpur and Ors., WP No. 10177/2021** in The High Court of Madhya Pradesh (Indore Bench) Decided On: 24.08.2021 and **Pankaj Vs. State of U.P. and others, 2016 1 Crimes (HC) 8.**

29. The question of personal liberty of a person is sacrosanct and State Authority cannot be permitted to take it away without following the procedure prescribed by law, otherwise it would be violative of the fundamental rights guaranteed under Articles 21 and 22 of the Constitution of India.

Article 21 of The Constitution Of India 1949 is as follows :-

21. Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22 of the Constitution provides specific protections to undertrials and detainees in India. The framers of the Constitution, who were also our freedom fighters, were conscious of founding a polity that secured civil and political freedoms to its citizens. Dr B. R. Ambedkar, while proposing the article, noted the necessity of retaining the concept of preventive detention "in the present circumstances of the country". However, the discontinuity from the colonial regime lay in the introduction of strict countervailing measures that ensured that "exigency of liberty of the individual is not

placed above the interests of the State" in all cases.

The specific provisions relating to preventive detention under Article 22 were framed in the following terms:

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless --

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe--

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any

law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

The text of Article 22 enshrines certain procedural safeguards, many of which are otherwise available in the Cr.P.C. In elevating these safeguards to a constitutional status, the framers imposed a specific "limitation upon the authority both of Parliament as well as State Legislature to not abrogate" rights that are fundamental to India's constitution. Dr Bakshi Tek Chand, a conscientious dissenter to preventive detention in peaceful times, proposed a further safeguard in the provision of a right to make representation to the detenu, which was eventually accepted by the Constituent Assembly as a reasonable compromise. Therefore, preventive detention in independent India is to be exercised with utmost regard to constitutional safeguards.

This history of the framing of Article 22 is critical for the judiciary's evaluation of a detenu's writ petition alleging, inter alia, a denial of the timely consideration of his representation. Therefore the failure of the Central Government and the State Government to consider his representation of the detenu in a timely manner is most relevant.

Article 22(5) of the Constitution mandates that (i) the authority making the order shall "as soon as may be" communicate the grounds on which the order has been made to the person detained; and (ii) the detaining authority shall afford to the person detained "the earliest

opportunity of making a representation against the order" Clause 5 of Article 22 incorporates a dual requirement: first, of requiring the detaining authority to communicate the grounds of detention as soon as may be; and second, of affording to the detenu "an earliest opportunity" of making a representation. Both these procedural requirements are mutually reinforcing. The communication, as soon as may be, of the grounds of detention is intended to inform the detenu of the basis on which the order of detention has been made. The expression "as soon as may be" imports a requirement of immediacy.

The communication of the grounds is in aid of facilitating the right of the detenu to submit a representation against the order of detention. In the absence of the grounds being communicated, the detenu would be left in the dark in regard to the reasons which have led to the order of detention. The importance which the constitutional provision ascribes to the communication of the grounds as well as the affording of an opportunity to make a representation is evident from the use of the expression "as soon as may be" in the first part in relation to communicating the grounds and allowing the detenu "the earliest opportunity" of availing of the right to submit a representation. Article 22(5) reflects a keen awareness of the framers of the Constitution that preventive detention leads to the detention of a person without trial and hence, it incorporates procedural safeguards which mandate an immediacy in terms of time. The significance of Article 22 is that the representation which has been submitted by the detenu must be disposed of at an early date. The communication of the grounds of detention, as soon as may be, and the affording of the earliest opportunity to submit a representation

against the order of detention will have no constitutional significance unless the detaining authority deals with the representation and communicates its decision with expedition.

30. As the detention order dated 25.07.2022 is passed under the provisions of National Security Act, the Objects and Reasons behind passing of the Act is also relevant for the purpose of scrutiny and examination of the impugned order, which reads as follows :

"The National Security Act, 1980 was enacted to provide for preventive detention in certain cases and for matters connected therewith. The statement of objects and reasons reflects the circumstances which prevailed upon the Parliament to enact the law. These were : "In the prevailing situation of communal disharmony, social tensions, extremist activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitation on different issues, it was considered necessary that the law and order situation in the country is tackled in a most determined and effective way. The anti-social and anti-national elements including secessionist, communal and pro-caste elements and also other elements who adversely influence and affect the services essential to the community pose a grave challenge to the lawful authority and sometimes even hold the society to ransom. Considering the complexity and nature of the problems, particularly in respect of defence, security, public order and services essential to the community, it is the considered view of the Government that the administration would be greatly handicapped in dealing effectively with the same in the absence of powers of preventive detention. The

National Security Ordinance, 1980, was, therefore, promulgated by the President on September 22, 1980. Subject to a modification, the Bill seeks to replace the aforesaid ordinance. The modification relates to the composition of Advisory Boards and is for providing that the Chairman of an Advisory Board shall be a person who is, or has been, a Judge of a High Court and the other members of the Advisory Board may be persons who are, or have been, or are qualified to be appointed as Judges of a High Court."

31. The provisions of the NSA subscribe to the mandate of Article 22(5). Section 3(4) contains a requirement that once an order of detention has been made, the officer making the order must forthwith report the fact to the State Government, together with the grounds on which the order has been made and other particulars which have a bearing on the matter. No such order should remain in force for more than twelve days, unless it has been approved by the State Government. In the meantime, this period is subject to the proviso which stipulates that where the grounds of detention are communicated by the officer after five days (under Section 8) but not later than ten days from the date of the detention, sub-section (4) will apply as if the words fifteen days stands substituted for twelve days. Upon the State Government either making or approving the order under Section 3, it is under a mandate under Section 3(5) to report the fact to the Central Government within seven days, together with the grounds on which the order has been made and other necessary particulars.

32. Section 8 of the NSA contains statutory provisions governing the

disclosure of the grounds of detention. Section 8 is in the following terms:

8. Grounds of order of detention to be disclosed to persons affected by the order.--(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than [ten days] from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government. (2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

As noticed earlier, Article 22(5) of the Constitution provides for the communication of the grounds on which the order of detention has been made by the detaining authority "as soon as may be". Section 8(1) uses the expression "as soon as may be", qualifying it with the requirement that the communication of grounds should ordinarily not be later than five days and, in exceptional circumstances, for reasons to be recorded in writing not later than ten days from the date of detention. Section 8(1) also embodies the second requirement of Article 22(5) of affording to the detenu the earliest opportunity of making a representation against the order to the appropriate government.

Section 10 mandates a reference to the Advisory Board constituted under the provisions of Section 9:

10. Reference to Advisory Boards.--Save as otherwise expressly provided in this Act, in every case where a detention order has been made under this Act, the appropriate Government shall,

within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it under section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer mentioned in sub-section (3) of section 3, also the report by such officer under sub-section (4) of that section." Under Section 10, the appropriate government has to place the grounds on which the order of detention has been made within three days from the date of detention of the person together with a representation, if any, made by the person affected by the order. The Advisory Board, under the provisions of Section 11, has to submit its report to the appropriate government within seven weeks from the date of detention order after considering the relevant materials. It may call for further information from the appropriate government, or any person, or even the person concerned if they desire an opportunity to be heard in person.

Action on the report of the Advisory Board falls within the ambit of Section 12:

12. Action upon the report of the Advisory Board.--

(1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of a person, the appropriate Government shall revoke the detention

order and cause the person concerned to be released forthwith.

When the Advisory Board has reported that in its opinion there is a sufficient cause for the detention of a person, the appropriate government may approve an order of detention and continue the detention of the person for such period as it thinks fit. On the other hand, where the Advisory Board reports that in its opinion there is insufficient cause for detention, the appropriate government shall revoke the detention order and cause the person to be released forthwith.

Section 14 provides for the revocation of detention orders in the following terms:

14. Revocation of detention orders.--

(1) Without prejudice to the provisions of section 21 of the General Clauses Act, 1897 (10 of 1897), a detention order may, at any time, be revoked or modified,--

(a) notwithstanding that the order has been made by an officer mentioned in sub-section (3) of section 3, by the State Government to which that officer is subordinate or by the Central Government;

(b) notwithstanding that the order has been made by a State Government, by the Central Government.

(2) The expiry or revocation of a detention order (hereafter in this sub-section referred to as the earlier detention order) shall not [whether such earlier detention order has been made before or after the commencement of the National Security (Second Amendment) Act, 1984 (60 of 1984) bar the making of another detention order (hereafter in this sub-section referred to as the subsequent detention order) under section 3 against the same person:

Provided that in a case where no fresh facts have arisen after the expiry or revocation of the earlier detention order made against such person, the maximum period for which such person may be detained in pursuance of the subsequent detention order shall, in no case, extend beyond the expiry of a period of twelve months from the date of detention under the earlier detention order.

In terms of clause (a) and (b) of sub-section (1) of Section 14, both the State Government and the Central Government have the power to revoke an order of detention.

33. We shall now proceed to analyse the facts of the present case. At the outset, we would like to note that our analysis is limited to the grounds of challenge made by the appellant and the detention order dated 25.07.2022 passed by the District Magistrate/ Detaining Authority, the extension orders passed and the rejection of the first representations made by the appellant.

In **Ayya alias Ayub v. State of U.P. & Anr.**, AIR 1989 SC 364, this Court held that the law of preventive detention is based and could be described as a "jurisdiction of suspicion" and the compulsion of values of freedom of democratic society and of social order sometimes might compel a curtailment of individual's liberty.

Whether subjective satisfaction of the detinue authority and detention order can be subjected to the judicial scrutiny, it has been held by the Apex Court in **Vijay Narain Singh Vs. State of Bihar (1984) 3 SCC 14**, which is as follows :-

"the view that "those who are responsible for the national security or for the maintenance of public order must be

the sole judges of what the national security or public order requires" It is too perilous a proposition. Our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter in such matters. Preventive detention is considered so treacherous and such an anathema to civilised thought and democratic polity that safeguards against undue exercise of the power to detain without trial, have been built into the Constitution itself and incorporated as Fundamental Rights. There are two sentinels, one at either end. The Legislature is required to make the law circumscribing the limits within which persons may be preventively detained and providing for the safeguards prescribed by the Constitution and the courts are required to examine, when demanded, whether there has been any excessive detention, that is whether the limits set by the Constitution and the Legislature have been transgressed. Preventive detention is not beyond judicial scrutiny.

In **Rekha v. State of T.N., (2011) 5 SCC 244**, a three-Judge Bench of this Court spoke of the interplay between Articles 21 and 22 as follows:

"13. In our opinion, Article 22(3)(b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in Jail, for a long period without recourse to a lawyer and without a trial.

"29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however,

Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal."

30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the instant case the charge against the detainee is of selling adulterated country made liquor after consumption of which seven innocent people lost their lives. Surely, there are ample provisions in IPC as well as Exice Act etc. to deal with such a situation, hence, in the opinion of the Court the detention order in question is unsustainable in law.

20. Keeping in mind the aforesaid dictum of the Hon'ble Supreme Court, we proceed to examine the grounds of challenge to the validity of the detention order dated 25.07.2022. The first ground of challenge is that the alleged incident was an offence against individuals which affected "law and order", but it does not affect "public order" so as to attract the provisions of Section 3 (2) of the NSA, 1980.

34. **Dr Ram Manohar Lohia v. State of Bihar (1966) 1 SCR 709 ; Pushkar Mukherjee v. State of W.B. WP No. 179 of 1968, decided on November 7, 1968 : (1969) 1 SCC 10 and Shyamal**

Chakraborty v. Commissioner of Police, Calcutta WP No. 102 of 1969, decided on August 4, 1969 : (1969) 2 SCC 426. In Dr Ram Manohar Lohia case [(1966) 1 SCR 709] this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its affect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act.

It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society.

In Dr Ram Manohar Lohia case examples were given by Sarkar and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its affect upon the community. The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it

affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another."

35. The petitioner is alleged to have committed the offence by selling adulterated country made liquor, consuming the same seven people died. There is nothing on record to suggest that the petitioner had inclination or tendency to commit the same offence in future also. It is true that we cannot sit in appeal over the satisfaction of the detaining authority but the satisfaction of the detaining authority must be based on material on the basis of which a reasonable person could come to the same kind of satisfaction. The material which was taken into account by the detaining authority in the instant case relates to a single incident of sale of adulterated country made liquor. There was no material before the detaining authority, nor any such material has been placed before the Court to suggest that the petitioner if not detained would have indulged into similar activities of sale of adulterated country made liquor.

36. The law which has emerged from the precedents on this point is that public order is said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the

degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order or a disturbance to public order. It means therefore that the question whether a person has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society, which depends the facts of each particular case.

37. Applying the principles which emerge from the aforesaid precedents to the facts of the present case, we find that the allegation against the petitioner is that certain people purchased liquor from the license shop of the petitioner which was adulterated one, consuming the same seven people became blind and during treatment they died. Therefore, the offence was directed against individuals and not against the society. The alleged act directed against individuals was in violation of law, which obviously disturbed the order in the locality for some time. This conduct may be reprehensible and punishable, for which the petitioner is being prosecuted and tried in accordance with the penal statutes. But it does not add up to the situation where it may be said that the community at large was disturbed by the petitioner's act and there was a breach of public order or likelihood of a breach of public order.

38. Moreover, the detention order contains a bald averment that in case the petitioner comes out on bail, he may again indulge in crime but neither there is any reasonable basis to record this apprehension nor is there any averment that the apprehended activity would be prejudicial to public order and, therefore, it is necessary to detain him with a view to

prevent him from acting in any manner prejudicial to the maintenance of public order. This power can be exercised only if the detaining authority on the basis of the past prejudicial conduct of the detenu is satisfied about the probability of the detenu acting similarly in future. This means that the past activity of the detenu on the basis of which such a prognosis is made must be reasonably suggestive of a repetitive tendency or inclination on the part of the detenu to act likewise in future, which is clearly missing in the present case.

39. Therefore, in our opinion, the act allegedly committed by the petitioner on 20.02.2022 did not cause a disturbance of public order as it did not disturb the society to the extent of causing a general disturbance of public tranquility and the single act of sale of adulterated country made liquor was not suggestive of a repetitive tendency or inclination on the part of the petitioner to act likewise in future so as to justify invocation of powers under Section 3 (2) of the NSA, 1980. The order of preventive detention passed under Section 3 (2) of the Act is unsustainable for this reason.

40. Now we proceed to examine the second ground of challenge, i.e. that the incident which took place on 20.02.2022 is a stale incident which is not proximate to the time when the detention order was passed on 25.07.2022 and there was no live link between the alleged prejudicial activity and the purpose of detention and for this reason, the invocation of the provisions of the NSA, 1980 after a long delay of about 5 months was neither warranted nor justified.

41. Sri. D. S. Misra, learned Senior Advocate appearing for the petitioner has placed reliance on the following dictum of

the Hon'ble Supreme Court in the case **Ali Jaan Miyan Vs. District Magistrate, Dhanbad: -**

".....when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily explained such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the casual connection has been broken in the circumstances of each case."

42. In the instant case, the offence was committed on 20.02.2022 and the detention order was passed on 25.07.2022. No explanation is forthcoming in the return while the petitioner has been continuously in jail since 23.02.2022. In these circumstances, we are of the opinion that the live link between the alleged incident and the detention order is snapped and there is no proximity between the crime committed and the order of detention."

43. In **Shalini Soni v. Union of India**, the Hon'ble Supreme Court while examining the validity of a detention order held as follow:-

".....It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote....."

44. In the present case, the incident in question took place on 20.02.2022, the

petitioner was arrested on 23.02.2022, he was lodged in Jail, on 23.02.2022 and he was continuing to be in custody till now, meaning thereby the petitioner was already in jail on the date on which the impugned order of prevention was passed. The incident which occurred on 20.02.2022, i.e. about 5 months prior to passing of the detention order, is certainly a stale incident which is not proximate to the time when the detention order dated 25.07.2022 was passed and there was no live link between the alleged prejudicial activity and the purpose of detention and the invocation of the provisions of the NSA, 1980 against the petitioner after a long delay of about five months was neither warranted nor justified.

45. The next ground of challenge to the detention order is that copies of the entire material referred to and relied upon for the detention order have not been provided to the petitioner. None of the affidavits and grounds of bail relating to Case Crime Nos. 40 of 2022 and 60 of 2022 which have been mentioned in the detention order coupled with grounds of detention order dated 25.07.2022 have not been provided to the petitioner. Petitioner has been provided with only the copy of the index of the bail application in Case Crime No.39 of 2022, bail application (4 pages) and letter dated 18.06.2022 of the office of Government Advocate of Hon'ble High Court along with detention order dated 25.07.2022. Affidavits and annexures with the bail application have not been furnished to the petitioner nor they have been sent to the State Government as well as Central Government for their perusal. The copies of the report of the District Magistrate and that of the Advisory Board, Lucknow were not provided to the petitioner as also comments on the said applications have not been provided to the petitioner, which vitiates the detention order.

46. An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is clear that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The "grounds" must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the "grounds" must be supplied to the detenu as part of the "grounds". It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to clause (6) of Article 22 in order to constitute compliance with clause (5) of Article 22. One of the primary objects of communicating the grounds of detention to the detenu is to enable the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention. There can therefore be no doubt that on a proper construction of clause (5) of Article 22, it is necessary for the valid continuance of

detention that subject to clause (6) of Article 22, copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. If this requirement of clause (5) of Article 22 read with Section 3 sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void.

47. It is immaterial whether the detenu already knew about their contents or not. In **Mehrunissa v. State of Maharashtra [(1981) 2 SCC 709]** it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in Jail, and has no access to his own documents. In **Mohd. Zakir v. Delhi Administration [(1982) 3 SCC 216]**, it was reiterated that it being a constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention *pari passu* the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of constitutional safeguards enshrined in Article 22(5).

48. In **Khudiram Das v. State of West Bengal [(1975) 2 SCC 81]** this Court held that where the liberty of the subject is

involved it is the bounden duty of the court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and that the subject is not deprived of his personal liberty otherwise than in accordance with law. The constitutional requirement of Article 22(5), is that all the basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to making the detention order must be communicated to the detenu so that the detenu may have an opportunity of making an effective representation against the order of detention:

49. It is, therefore, not only the right of the court, but also its duty as well, to examine what are the basic facts and materials which actually in fact weighed with the detaining authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the detaining authority that it has taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence its satisfaction. The court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or materials, apart from those admitted by it, which could have reasonably influenced the decision of the detaining authority and for that purpose, the court can certainly require the detaining authority to produce and make available to the court the entire record of the case which was before it. That is the least the court can do to ensure observance of the requirements of law by the detaining authority.

50. In the present case, the petitioner was arrested on 23.02.2022 and he was lodged in Jail, on the same date and he was

continuing to be in custody till now, the date on which the impugned order of detention was passed he was already in custody. Although the detention order makes a reference to Case Crime No. 39 of 2022, Case Crime No. 40 of 2022, Case Crime No. 60 of 2022 and Case Crime No. 97 of 2022. But he has been supplied with only copy of index of bail application in Case Crime No. 39 of 2022, bail application (4 pages) and letter dated 18.06.2022 of the Office of Government Advocate of High Court along with detention order dated 25.08.2022. Other papers along with the affidavits and annexures of the bail application have not been supplied with. The Court has to bear in mind that the petitioner is in Jail, and has no access to his own documents. It is immaterial whether the petitioner knew about the facts of Case Crime Nos. and the contents of his bail application or not. The bail application contained the grounds for bail and it has been referred to by the detaining authority. Therefore, the Court is unable to accept the submission of Sri Patanjali Mishra that the aforesaid documents were not relevant material and non-supply of the same would not have any legal effect on the order of detention. Therefore, the non-supply of the vital and important documents to the petitioner, vitiates the detention order and its legal consequence is bound to follow.

51. The fourth ground of challenge is that despite the request made by the petitioner he is not being given the aid of legal friend/ legal practitioner. It has been specifically averred in the petition that he has made a request for legal friend and legal practitioner at the time of hearing before Advisory Board, Lucknow, but the same has not been considered. In the counter affidavit of District Magistrate/

detaining Authority and the State Government there is no denial of the fact that they have not availed the facility of legal practitioner at the time of hearing before the Advisory Board, Lucknow, though there is no order of Advisory Board, Lucknow available on record which might have been placed by the State Government or by District Magistrate/ detaining Authority. In absence of the same it can convently be inferred that State Government and the District Magistrate/ detaining Authority availed the facilities of legal practitioners while the petitioner was deprived of the same despite specific request made for the same through the first representation made to the Authorities concerned. Thus, there is a violation Article 14 of the Constitution of India which vitiates the impugned detention order.

52. Fifth ground of the challenge of the detention order is that under the Constitution as well as NSA Act there are certain safeguards which have to be observed while dealing with the representation made by the petitioner on the part of the State Government and the Central Government. In the counter affidavit filed on behalf of the State Government mention that representation dated 06.08.2022 of the petitioner was received on 11.08.2022 and the same was rejected after consideration on 23.08.2022, second representation dated 24.08.2022 was rejected on 26.08.2022. The representation dated 30.08.2022 was examined and finally decided on 14.09.2022. In the counter affidavit of the Central Government it is stated that representation dated 06.08.2022 was not acceded and information of which was given on 24.08.2022. Representation dated 13.08.2022 and 26.08.2022 were duly considered and were rejected and

information was sent vide wireless message dated 23.09.2022. From the aforesaid counter affidavit, there appears no plausible explanation of delay on the part of the Central Government of the period between 17.08.2022 to 24.08.2022. The representation of petitioner dated 06.08.2022 was rejected by the State Government on 23.08.2022 of which there is no plausible explanation available on record. Therefore, unexplained delay on the part of the Government in dealing with representation made by the petitioner is violative of Constitutional safeguards provided to the petitioner in this regard, and the detention order vitiates on this ground also.

53. Now we come to the last ground of challenge to the detention orders that on 25.07.2022, i.e. on the date of passing of the detention order, the petitioner was already in custody and he had not even filed an application for Bail in Case Crime No. 97 of 2022 under the U. P. Gangsters and Anti-Social Activities (Prevention) Act and there was no possibility of the petitioner acting in any manner prejudicial to the maintenance of public order and in these circumstances, the provisions of Section 3 (2) of the NSA, 1980 are not attracted and the detention order is unsustainable in law.

54. It is clear that if a person concerned is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised. From a perusal of Apex Court's pronouncements, it is clear that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on

the basis of reliable material placed before him (a) that there is real possibility of his being released on bail and, and (b) that on being so released he would in all probability indulge in prejudicial activity; and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in his behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question the same before a higher Court.

55. Keeping in view the fact that the petitioner was already in Jail, in a case under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, that he had not filed an application for bail in the aforesaid case before the Hon'ble High Court and that even when he would file an application for bail, he would not be released on bail unless (a) the Public Prosecutor is given an opportunity to oppose the application for such release, and (b) the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail, it cannot be accepted that there was any material for recording the satisfaction of the detaining authority that with a view to preventing the petitioner from acting in any manner prejudicial to the maintenance of public order it was necessary to detain the petitioner under the NSA, 1980. The satisfaction that it is necessary to detain the petitioner for the purpose of preventing him from acting in a manner prejudicial to the maintenance of public order is thus, the basis of the order under section 3 (2) of the NSA, 1980 and this basis is clearly absent in the present case. Therefore, the detention

order dated 25.07.2022 is unsustainable in law on this ground also.

56. In view of the aforesaid discussion, the present Writ Petition is allowed. The impugned order dated 25.07.2022 passed by the District Magistrate, Azamgarh ordering detention of the petitioner Rangesh Yadav under Section 3 (2) of the NSA, 1980 is hereby **quashed**. The Respondents are commanded to release the petitioner from detention under the aforesaid order dated 25.07.2022 forthwith if not wanted in any other case.

(2023) 5 ILRA 671

REVISIONAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 05.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 23 of 2023

Amarnath Gupta

...Revisionist

Versus

Smt. Usha Sharma

...Opposite Party

Counsel for the Revisionist:

Sri Rohan Gupta

Counsel for the Opposite Party:

Sri Prakhar Tandon

A. Civil Law - Code of Civil Procedure, 1908-Section 115 - Transfer of Property Act, 1882-Section 106- Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972-Section 21- Eviction-Maintainability of-Co-owner whether being a family member or not has full right to file suit for eviction in case not objected by other co-owners-Partition of property in dispute is not necessary requirement for filing a suit for eviction so far as tenant is concerned-It is only between co-owners and in the present

case, co-owners are having no dissent on point of filing of suit for eviction nor having any dispute of partition-Only requirement for filing of suit for eviction is about relationship of landlord and tenant and service of notice- in the present case, undisputedly, till date, no partition has taken place in accordance with sale deed executed on 29.01.2019-In the sale deed, consent of co-owner is not recorded for filing of suit for eviction and nothing is mentioned about the tenancy-Suit for eviction is maintainable.(Para 1 to 44)

B. Ownership imports three essential rights, namely, right to possession, right to enjoy and right to dispose. If an owner is wrongly deprived of possession of his property he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All coowners have equal rights and co-ordinate interest in the property, though their shares may be either fixed or indeterminate. Every co-owner has a right to enjoyment and possession equal to that of the other co-owner or co-owners. Each co-owner has, in theory interest in every infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with others. (Para 23)

The revision is dismissed. (E-6)

List of Cases cited:

1. Abdul Hamid Vs Bhuwaneshwar Prasad (1950) AIR Nagpur 18
2. B.P. Pathak, Vs Dr.Ryazuddin (1976) AIR M.P. 55
3. NalakathSainuddin Vs Koorikadan Sulaiman (2002) 6 SCC 1
4. Kochkunju Nair Vs Koshy Alexander & ors. (1999) 3 SCC 482
5. Ramdas Vs Sitabai & ors. (2009) SCC 444

6. Khalil Ahmad Vs Anis Ahmad Civil Revision No. 500 of 2012

7. Nizamuddin Vs Smt. Bushara Khatoon & ors. Writ A No. 5091 of 2013

8. Subhash Chandra @ Thru karta & anr.. Vs Ajay Gupta Civil Revision No. 55 of 2013

9. U.P. St. Handloom Corp. Ltd. & anr.. Vs Smt. Rashmi Arora S.C.C. Revision No. 544 of 2014

10. Smt. Kasthuri Radhakrishnan & ors. Vs M. Chinnian &Anr.(2016) 0 SCC 87

11. Vagha Vs Manilal (1935) AIR Bom. 262

12. B.P. Pathak Vs Dr. Riyazuddin & ors. (1976) AIR MP 55

13. Mohinder Prasad Jain Vs Manohar Lal Jain Civil Appeal No. 1263 of 2006

14. Rajendra Prasad & ors. Vs DJ, Alld. & ors. 64 ALR 879 (ALL)

15. FGP Ltd Vs Saleh Hooseini Doctor & anr.. (2009) SCC Online SC 1643

16. Sheel Chand Jain Vs Arun Kumar Tadiya & ors. (2014) 103 ALR 303

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

1. Heard Sri Rohan Gupta, learned counsel for the revisionist and Sri Prakhar Tondon, learned counsel for the opposite party.

Present revision has been filed with the following prayers:

"It is, therefore, Most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the aforesaid revision and set aside the impugned order dated 07.02.2023 and the consequential decree dated 14.02.2023, passed by the Additional District Judge,

Court No. 08, Kanpur Nagar in O.S. No. 73 of 2019; failing which the Revisionist shall suffer irreparable loss and injury."

It is also prayed that the Hon'ble Court may kindly be pleased to stay the effect and operation of the impugned order dated 07.02.2023 and the consequential decree dated 14.02.2023, passed by the Additional District Judge, Court No. 08, Kanpur Nagar in O.S. No. 73 of 2019."

2. Since, only legal question is involved in this matter, therefore, with the consent of parties without inviting for affidavits, the matter is being decided at the admission stage itself.

3. Learned counsel for the revisionist submitted that revisionist-defendant was a tenant of Sri Kailash Nath Agarwal and after the death of Sri Kailash Nath Agarwal, his property was inherited by his two sons, viz, Sri Pankaj Agarwal and Sri Rakesh Kumar Agarwal. Thereafter, the revisionist-defendant became tenant of Sri Pankaj Agarwal. Pankaj Agarwal has sold out half of the portion of the building, which was in his share to Smt. Usha Sharma, i.e. plaintiff-opposite party, who is not a family member of Sri Pankaj Agarwal.

4. He next submitted that after execution of sale deed dated 29.01.2019, plaintiff-opposite party has filed S.C.C. Suit for eviction of house in question after giving notice to revisionist-defendant under Section 106 of Transfer of Property Act, 1882(hereinafter, referred to as, 'Act of 1882').

5. He next submitted that after execution of sale deed dated 29.01.2019, partition of property in question has not taken place and without partition, it cannot

be ascertained as to which part of the property, opposite party-co-owner is having right to enter upon, in case of being ranked outsider and not a family member. Plaintiff-opposite party is having no right to enter upon into the property in dispute without partition, therefore, for filing the suit for eviction, the first action required on the part of plaintiff-opposite party is to file a partition suit and obtain possession of property in question and then file a suit for eviction.

6. He next submitted that plaintiff-opposite party is a co-owner, but an outsider, therefore, she cannot file suit for eviction without consent of another co-owner, i.e. Rakesh Kumar Agarwal, who is co-owner and also in occupation of half portion of the property. He also submitted that without obtaining possession over the purchased part of the property, she cannot file suit for eviction and in the present case, undisputedly, till date, no partition has taken place in accordance with sale deed executed on 29.01.2019. In the sale deed, consent of co-owner, i.e. Rakesh Kumar Agarwal is not recorded for filing of suit for eviction and nothing is mentioned about the tenancy.

7. In support of his contention, Sri Rohan Gupta, learned counsel for the revisionist-defendant has placed reliance upon judgment of High Court of Bombay in the matter of **Abdul Hamid Vs. Bhuwaneshwar Prasad: AIR 1950 Nagpur 18**, judgment of High Court of Madhya Pradesh in **B.P. Pathak, Vs. Dr. Ryazuddin: AIR 1976 Madhya Pradesh 55**, followed by the Apex Court in the case of **Nalakath Sainuddin Vs. Koorikadan Sulaiman: (2002) 6 SCC 1**, judgment of Apex court in the matter of **Kochkunju Nair Vs. Koshiy Alexander and Others: (1999) 3 SCC 482**

and **Ramdas Vs. Sitabai And Others: (2009) Supreme Court Cases 444.**

8. He lastly reiterated that, once it is undisputed that plaintiff-opposite party-co-owner is not a family member, no consent of another co-owner for filing the suit for eviction, no explanation about the tenancy, no partition took place, therefore, no suit for eviction may be filed.

9. Per contra, Sri Prakhar Tondon, learned counsel for the opposite party has opposed the submission made by learned counsel for the revisionist and submitted that there is no dispute on the point that plaintiff-opposite party is a co-owner of the house in question. He also submitted that notice dated 12.07.2019 under Section 106 of the Act of 1988 has been served upon the revisionist-defendant with specific averment of ownership, which was not denied in its reply dated 16.07.2019 by revisionist-defendant.

10. He also submitted that even in the written submission, co-ownership has been very well accepted. Therefore, once the notice is sufficient, landlord-tenant relationship is accepted, suit is very well maintainable on behalf of co-owner.

11. In support of his contention, learned counsel for the opposite party placed reliance upon judgments of this Court in Civil Revision No. 500 of 2012 (**Khalil Ahmad Vs. Anis Ahmad**), Writ A No. 5091 of 2013 (**Nizamuddin Vs. Smt. Bushara Khatoon and Others**), Civil Revision No. 55 of 2013 (**Subhash Chandra huf Thru karta And Anr. vs. Ajay Gupta**) and S.C.C. Revision No. 544 of 2014 (**U.P. State Handloom Corporation Ltd. And Anr. Vs. Smt. Rashmi Arora**).

12. He next submitted that, so far as contention of learned counsel for the revisionist-defendant that co-owner, being the outsider cannot file suit for eviction is concerned, is having no substance as not based upon any Rule or law laid down by the Court.

13. He firmly submitted that co-owner has full right to file suit for eviction under the Act of 1882 and even after filing of suit, revisionist-defendant has never taken this objection in written statement and further co-owner, i.e. Sri Rakesh Kumar Agarwal has also never filed any impleadment opposing the suit for eviction filed by the plaintiff-opposite party. Once, revisionist-defendant has not taken this objection in his written statement and also not produced any evidence showing dissent of co-owner (Sri Rakesh Kumar Agarwal) from the plaintiff-respondent, this plea cannot be accepted.

14. In support of his contention, he placed reliance upon the judgment of Apex Court in **Tmt. Kasthuri Radhakrishnan & Ors. Vs. M. Chinniyar & Anr.: 2016 0 Supreme(SC) 87** and submitted that in this case, Apex Court is of the firm view that the co-owner is having full right to file suit for eviction. Therefore, there is no illegality in the order impugned and revision is liable to be dismissed.

15. He also pointed out that in the sale deed dated 29.01.2019, it is clearly mentioned that lessor has given full right of mutation to plaintiff-opposite party in present as well as in future, therefore it includes right to file suit for eviction also. In light of that, the contention of learned counsel for the revisionist that in sale deed, nothing has been mentioned about the consent and tenancy, cannot be accepted.

16. I have considered rival submissions made by learned counsel for the parties and perused the record as well as judgments relied upon by the counsel for the parties.

17. Undisputed facts of case is that earlier revisionist-defendant was a tenant of Sri Kailash Nath Agarwal and after his death, his property was inherited by his two sons, viz, Sri Pankaj Agarwal and Sri Rakesh Kumar Agarwal. Pankaj Agarwal has sold out half of the property, which was in his share, to Smt. Usha Sharma, plaintiff-opposite party vide sale deed dated 29.01.2019. Smt. Usha Sharma, plaintiff-opposite party has, thereafter, filed S.C.C. Suit No. 73 of 2019 after giving notice to revisionist-defendant under Section 106 of Act of 1882. Sri Rakesh Kumar Agarwal, another son of Lt. Sri Kailash Nath Agarwal and co-owner of the property in dispute has never raised any objection for filing of suit for eviction by plaintiff-opposite party, who became a co-owner of the property in dispute after purchasing the share of Sri Pankaj Agarwal.

18. The main issue before the Court is to decide as to whether in case the plaintiff-opposite party is not a family member, she can file a suit for eviction without consent of another co-owner or not.

19. The first judgment relied upon by the learned counsel for the revisionist is **Abdul Hamid (Supra)**, which says that in case of joint hindu family, a notice is sufficient by the Manager, but here the argument of learned counsel for the revisionist is that plaintiff-opposite party is not a family member, therefore she has no right to file a suit for eviction. Relevant paragraph of the said judgment is quoted hereinbelow:

"5. In a recent decision in - 'Vagha v. Manilal', AIR 1935 Bom. 262, Broomfield J. held that where the landlord's rights belong jointly to several persons, a suit to eject a tenant can only be brought by all the co-owners suing jointly as plaintiffs. In - 'Krishna Bhima v. Laxmibai', AIR 1938 Bom. 316 the question which arose for decision was whether a notice given by a manager of a joint Hindu family was sufficient to terminate the tenancy and there, while the decision in - 'Blaji Bhikaji v. Gopal', 3 Bom. 23 was relied on, it was said that such a notice was sufficient to terminate the tenancy. This case is different from the present because here it has not been alleged and shown that the notice given by the plaintiff was on behalf of himself and the heirs of Ghulam hussain. In the circumstances, I hold that the suit was rightly dismissed."

20. This judgment is not applicable in the case of the revisionist-defendant for the very simple reason that the issue before the Court was different in this case. The issue was as to whether a manager of joint hindu family can send a notice to terminate tenancy or not and here the case is as to whether a co-owner not being a family member can file a suit for eviction or not. Therefore, this judgment is of no use in the present controversy.

21. The Second judgment relied upon by the learned counsel for the revisionist is **B.P. Pathak(Supra)**, a judgment of High Court of Madhya Pradesh, which has also been affirmed by the Apex court in the matter of **Nalakath Sainuddin(Supra)**. Relevant paragraphs of the said judgment are quoted hereinbelow:

"23. In **B.P. Pathak Vs. Dr. Riyazuddin & Ors.**, AIR 1976 MP 55, a

Division Bench of the High Court of Madhya Pradesh consisting of Chief Justice P.K. Tare and Justice Shiv Dayal (later, Chief Justice), took the view on an illuminating survey of judicial opinion that a transferee of a part of leased property acquires "all the rights" of the lessor in respect of that part as if it alone had comprised the lease and a new relationship is created between the transferee and the lessee. The section creates a statutory attornment substituting, but retaining the same effect of, the contractual attornment. Title of the assignee is complete on execution of the deed of assignment and is not postponed till the notice of the assignment. The Division Bench repelled the submission that since the lessor could not have terminated the tenancy of a part of the demised premises by a notice to quit, he cannot transfer the premises in part and confer such a right on the transferee. The Division Bench held that the right of ejectment is inherent in ownership. Therefore, by virtue of Section 109 of T.P. Act such transferee is entitled to evict the tenant from the part transferred to him not only when the lease had been determined before the transfer but also if it is determined after the transfer in any of the circumstances mentioned in Section 111. Thus he can terminate by a quit notice the lease in respect of the property transferred to him.

24. The Division Bench decision came up for consideration by a Full Bench of the same High Court in Sardarilal Vs. Narayanlal, AIR 1980 MP 8. Chief Justice G.P. Singh, speaking for the Full Bench, approved the statement of law in B.P. Pathak's case and held that Section 109 of T.P. Act confers a right on the owner to effect a severance of a lease by his unilateral act and tenancy over a part of the

property leased can be determined by the transferee."

22. From the perusal of the abovesaid judgment, it is apparently clear that at no point of time, right of co-owner has been questioned, so far as filing of suit for eviction is concerned rather the Court has held that right of ejectment is inherent in the ownership. Therefore, this judgment does not come in the rescue of revisionist-defendant, but favours the opposite party-plaintiff.

23. The third judgment relied upon by the learned counsel for revisionist-defendant is **Kochkunju Nair (Supra)**. Relevant paragraph of the said judgment is quoted hereinbelow:

"9. Ownership imports three essential rights, namely, right to possession, right to enjoy and right to dispose. If an owner is wrongly deprived of possession of his property he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All coowners have equal rights and co-ordinate interest in the property, though their shares may be either fixed or indeterminate. Every co-owner has a right to enjoyment and possession equal to that of the other co-owner or co-owners. Each co-owner has, in theory interest in every infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with others. (vide *Mitras Co-ownership and Partition, Seventh Edn.*)"

24. From the perusal of above said paragraph of the judgment, it is clear that the above case deals with the essential

rights of ownership and it has been held that other co-owner has a right to enjoyment of possession equal to that of other co-owner/co-owners. Here, the dispute is not between two co-owners, but between an undisputed co-owner and a tenant. Argument of learned counsel for the revisionist-defendant, that co-owner being an outsider cannot file a suit for eviction, is not getting any support from the above judgment rather it is helping the plaintiff-opposite party by holding that each co-owner has equal right to enjoyment of possession.

25. The fourth judgment relied upon by the learned counsel for the revisionist-defendant is **Ramdas (Supra)**, which is of no use in the present case as it may occupy the filed in case there is dispute between two co-owners, but here is a dispute is between an undisputed co-owner and a tenant.

26. Learned counsel for the opposite party-plaintiff has placed reliance on the judgment of **U.P. State Handloom Corporation Ltd (Supra)**. Relevant paragraph of the said judgment is quoted hereinbelow:

"In the case of Modh Haneef vs. Sunil Tuli AIR 2009 ALL (NOC) 2180, it has been held that where the relationship of landlord and tenant stand proved and the tenancy is determined under section 106 of the Transfer of Property Act, nothing more is required for decreeing the suit for eviction in respect of building which is not covered by the provisions of U.P. Act No. 13 of 1972 when the notice of determination of tenancy is valid and is duly served."

27. From the perusal of the above said judgment, it clearly transpires that that once

landlord-tenant relationship stands proved and tenancy is determined under Section 106 of the Act of 1882, nothing more is required. In the present case, landlord-tenant relationship is not disputed neither service of notice is insufficient.

28. The same ratio of law was followed by this Court in **Nizamuddin (Supra)**, **Khalil Ahmad (Supra)** and **Subhash Chandra (Supra)**.

29. The another issue, which was argued by the learned counsel for the revisionist-defendant is that a co-owner being an outsider has no right to file a suit for eviction without the consent of other co-owner.

30. This matter was also for consideration before the Apex Court in **Civil Appeal No. 1263 of 2006: Mohinder Prasad Jain Vs. Manohar Lal Jain**. Relevant paragraph of the said judgment is quoted hereinbelow:

"7. Having heard the learned counsel for the parties we are satisfied that the appeals are liable to be dismissed. It is well settled that one of the co-owners can file a suit for eviction of a tenant in the property generally owned by the co-owners. (See Sri Ram Pasricha v. Jagannath [(1976) 4 SCC 184] and Dhannalal v. Kalawatibai [(2002) 6 SCC 16], SCC para 25.) This principle is based on the doctrine of agency. One co-owner filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co-owners. The consent of other co-owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement. In the present case, the suit

was filed by both the co-owners. One of the co-owners cannot withdraw his consent midway the suit so as to prejudice the other co-owner. The suit once filed, the rights of the parties stand crystallised on the date of the suit and the entitlement of the coowners to seek ejectment must be adjudged by reference to the date of institution of the suit; the only exception being when by virtue of a subsequent event the entitlement of the body of co-owners to eject the tenant comes to an end by act of parties or by operation of law"

"8. A suit filed by a co-owner, thus, is maintainable in law. It is not necessary for the coowner to show before initiating the eviction proceeding before the Rent Controller that he had taken option or consent of the other co-owners. However, in the event, a co-owner objects thereto, the same may be a relevant fact. In the instant case, nothing has been brought on record to show that the co-owners of the respondent had objected to eviction proceedings initiated by the respondent herein. The submission of the learned counsel for the appellant to the effect that before initiating the proceedings, the appellant was required to show that he had experience in running the business in Ayurvedic medicine, has to be stated to be rejected. There is no law which provides for such a pre-condition. It may be so where a licence is required for running a business, a statute may prescribe certain qualifications or pre-conditions without fulfilment whereof the landlord may not be able to start a business, but for running a wholesale business in Ayurvedic medicine, no qualification is prescribed. Experience in the business is not a pre-condition under any statute. Even no experience therefor may be necessary. If the respondent has proved his bona fide requirement to evict the appellant herein for his own purpose,

this Court may not, unless an appropriate case is made out, disturb the finding of fact arrived at by the Appellate Authority and affirmed by the High Court."

31. From the perusal of the said judgment, it is apparently clear that in this matter, the Court has taken a firm view that a co-owner has full right to file suit for eviction in case not objected by other co-owner.

32. This Court has again considered the same issue in the matter of **Rajendra Prasad and others Vs. District Judge, Allahabad and others: 64 ALR 879 (ALL)**. Relevant paragraphs of the said judgment are quoted hereinbelow:

"6. The revision of the tenant has been allowed by the impugned judgment solely on the ground that one co-owner could not bring a suit against the tenant and therefore, it was not maintainable. This Court is of the view that the reason for which the revisional court has allowed the revision is clearly against the settled position of law. A suit for eviction of tenant can be brought by one of the co-owner. A co-owner is as much an owner of the property as any sole owner of a property is. The Hon'ble Supreme Court has held in the case of *Sri Ram Pasricha Vs. Jagannath and others* reported in (1976) 4, S.C.C. 184 as quoted hereunder :-

"Para 27. Jurisprudentially, it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place. It is, therefore, not possible to accept the submission that the plaintiff who is admittedly the landlord

and co-owner of the premises is not the owner of the premises within the meaning of Section 13 (1) (f). It is not necessary to establish that the plaintiff is the only owner of the property for the purpose of Section 13 (1) (f) as long as he is a co-owner of the property being at the same time as the acknowledged landlord of the defendants."

7. The aforesaid case related to the provisions of the West Bengal Premises Tenancy Act 1956 wherein section 13 (1) (f) contained the words "if he is the owner" with respect to requirement of the premises by the landlord for his own occupation. In the case of *M/s India Umbrella Manufacturing Co. (Supra)* the Hon'ble Supreme Court while considering the situation where both the co-owners filed the suit and midway one of the co-owners withdrew his consent, it was held that one of the co-owners can file a suit for eviction of a tenant in the property generally owned by the co-owners. Paragraph no.6 of the judgment is quoted hereunder :

"Having heard the learned counsel for the parties we are satisfied that the appeals are liable to be dismissed. It is well settled that one of the co-owners can file a suit for eviction of a tenant in the property generally owned by the co-owners. (See *Sri Ram Pasricha V. Jagannath and others, Dhannalal vs. Kalawatibai and others*). This principal is based on the doctrine of agency. One co-owners filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co-owners. The consent of other co-owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and suit was filed in spite of their disagreement. In the present case, the suit was filed by both the co-owners. One of the co-owners cannot withdraw his consent midway the suit so as to prejudice the other

co-owners. The suit once filed, the rights of the parties stand crystallized on the date of the suit and the entitlement of the co-owners to seek ejectment must be adjudged by reference to the date of institution of the suit; the only exception being when by virtue of a subsequent even the entitlement of the body of co-owners to eject the tenant comes to an end by act of parties or by operation of law."

8. From the above it is clear that a co-owner can bring a suit for eviction of the tenant unless it was shown that the other co-owners were not agreeable to the ejectment of the tenant.

9. U.P. Act No. 13 of 1972 has not given the definition of owner but landlord has been defined in Section 3 (j) as quoted here under :-

"landlord" in relation to a building means a person to whom its rent is or if the building, were let would be, payable, and includes, except in clause (g), the agent or attorney, of such person."

10. Rule 15 of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Rules 1972 requires that an application for release of the premises should be signed by all the landlords. This question has since been settled by a decision of a Full Bench of this Court in the case of *Gopal Dass and another Vs. Ist A.D.J. reported in (198) (1) ARC 281* wherein this Court held in paragraph 17 as quoted hereunder :-

"So far as the applicability of this Rule to the present case is concerned, there is no problem. Murlidhar Shah who has brought the action for eviction of the premises in question is undoubtedly the landlord. He has signed the application. He alone is competent to sign the application. However, we may point out that the requirement of Rule 15 (2) that an application for release of premises owned

by co-owners should be signed by all co-owners would be invalid. One co-owner is competent to maintain an action for eviction of the tenant of the entire premises, since he can be considered as a landlord within the meaning of Section 3 (j) of the Act. One Co-owner alone would be competent to sign such an application.""

33. Considering various judgments, this Court is of the same view that a co-owner has full right to file suit for eviction, in case objection has not raised by other co-owner.

34. This issue was again before the Apex Court in the matter of **FGP Limited Vs. Saleh Hooseini Doctor and Another: 2009 SCC Online SC 1643**. Relevant paragraphs of the said judgment are quoted hereinbelow:

"37. It has been urged by the learned counsel for the appellant that in the Suit which has been filed by the respondents they have not asserted that they are filing it as coowners but they have claimed that they are filing it as executors/executrix. So they cannot now meet the challenge of maintainability of the Suit on the ground that it was filed by the respondents as coowners. It is not possible to accept the aforesaid contention in the facts of this case. This Court is of the opinion that if the status of the respondents as co-owners of the property transpires clearly from the admitted facts of the case, they cannot be denuded of the said status at the instance of some objections by the tenants. Normally, a tenant's right to question the title of a landlord is very limited in view of rule of law which is codified in Section 116 of the Indian Evidence Act.

44. The principles which have been affirmed in *Mohinder Prasad Jain (supra)* are that one co-owner filing a suit

for eviction against the tenant does so on his own behalf in his own right and as an agent of the other coowners. In this matter, the consent of other co-owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement. (See para 10 page 727 of the report). It is nobody's case here that other co-owners are objecting to the filing of the suit in question."

35. In this case, the Apex Court is of the same view that a co-owner has full right for filing a suit for eviction unless objected for doing so by the other co-owner.

36. The same issue was also subject matter before this Court in **Sheel Chand Jain Vs. Arun Kumar Tadiya and Others: (2014) 103 ALR 303**. Relevant paragraphs of the said judgment are quoted herein below:

"9. However, one aspect left open for consideration, was a situation where some of the co-owners want to continue the tenant contrary to relief claimed by one co-owner, instituting proceeding.

10. Both the above decisions have been considered and followed in *Pal Singh Vs. Sunder Singh and others*, AIR 1989 SC 758. The Court, however, explained the situation and said other co-owner when did not object to eviction, one co-owner can maintain an action for eviction, even in absence of other co-owners. This is evident from para 10 of the judgment where the Court said:

"This in our opinion falls within the ratio of *Kama Goel v. B.P. Pathak (supra)* where this Court clearly held that when the other co-owner did not object to the eviction one co-owner could maintain an action for eviction even in the absence

of other co-owner. Here also Smt. Sham Kaur and her heirs did not object to the claim for eviction made by the respondents herein. In that view of the matter and in the circumstances of this case, we are of the opinion that the ratio of the said case will apply and this suit will be maintainable even in the absence of all the owners to the eviction proceedings."

11. The dictum in Sri Ram Pasricha (*supra*) was followed in Subhendu Prosad Roy Choudhury and others Vs. Kamala Bala Roy Choudhury and others, AIR 1978 SC 835 in the context of quit notice given by one co-owner (landlord) to tenant and the Court said:

"Even assuming that notice was not given on behalf of one of the co-owner landlords, the decision of this Court is Sri Ram Pasricha v. Jagannath and Ors. Would show that yet the notice was good and valid."

12. A Division Bench of this Court followed the above dictum in Rang Nath Vs. State of U.P., 1984 ARC 642 and the correctness of aforesaid decision was considered by Full Bench in Gopal Das and another Vs. Ist Additional District Judge, Varanasi and others, AIR 1987 All 261. The Full Bench approved dictum laid down in Rang Nath (*supra*) by observing in para 11 as under:

"11. In view of these decisions, there can, therefore, be little doubt as to the maintainability of the action for eviction brought by one co-owner without impleading the other co-owners. The view taken in Devi Charan's case 1980 UPLT NOC 143 cannot be said to have laid down the correct law and it is overruled. The view taken in Ranga Nath's case (1984 All LJ 455 is correct and we reiterate the same."

13. It is also worthy to notice that Rule 15(2) of U.P. Urban Buildings

(Regulation of Letting, Rent and Eviction) Rules, 1972 (hereinafter referred to as the "Rules, 1972") provides, if there are more than one landlord, the application shall be signed by all the landlords. Construing the aforesaid provision in the context of co-owners, the Full Bench in para 16 of the judgment said, if this Rule is to be pressed in the case of co-owners, it shall be invalid since even one co-owner is competent to sign application and filed it. The relevant part of para 16 reads as under:

11. "However, we may point out that the requirement of Rule 15(2) that an application for release of premises owned by co-owners should be signed by all co-owners would be invalid. One co-owner is competent to maintain an action of eviction of the tenant of the entire premises, since he can be considered as a landlord within the meaning of Section 3(i) of the Act. One co-owner alone would be competent to sign such an application."

14. In other words when one comes to seek some relief, the law in presenti, is where the building has several co-owners, in absence of partition, even one co-owner can maintain proceedings for eviction of tenant(s) unless such eviction proceedings are objected to by other co-owners individually or collectively, as the case may be, expressing their intention to keep tenancy continue.

37. The Court after considering different judgments has clearly held that a co-owner has full right to maintain a suit for eviction unless other co-owner raise any objection for the same.

38. The another judgment relied upon by the learned counsel for the plaintiff-opposite party is **Tmt. Kasthuri Radhakrishnan(Supra)**. Relevant paragraph of the said judgment is quoted hereinbelow:

"It is well settled by at least three decisions of this Court, namely, Sri Ram Pasricha v. Jagannath (1976) 4 SCC 184 Kanta Goel v. B.P. Pathak, (1977) 2 SCC 814 and Pal Singh v. Sunder Singh, (1989) 1 SCC 444 that one of the co-owners can alone and in his own right file a suit for ejectment of the tenant and it is no defence open to the tenant to question the maintainability of the suit on the ground that the other co-owners were not joined as parties to the suit. When the property forming the subject-matter of eviction proceedings is owned by several owners, every co-owner owns every part and every bit of the joint property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property so long as the property has not been partitioned. He can alone maintain a suit for eviction of the tenant without joining the other co-owners if such other co-owners do not object. In Sri Ram Pasricha case reliance was placed by the tenant on the English rule that if two or more landlords institute a suit for possession on the ground that a dwelling house is required for occupation of one of them as a residence the suit would fail; the requirement must be of all the landlords. The Court noted that the English rule was not followed by the High Courts of Calcutta and Gujarat which High Courts have respectfully dissented from the rule of English law. This Court held that a decree could be passed in favour of the plaintiff though he was not the absolute and full owner of the premises because he required the premises for his own use and also satisfied the requirement of being "if he is the owner", the expression as employed by Section 13(1)(f) of the W.B. Premises Tenancy Act, 1956."

39. From the perusal of the above paragraph, it transpires that in this

judgment, the Apex Court while considering many judgments, has clearly held that a co-owner has full right for filing a suit for eviction in case other co-owner/s do not object.

40. In the present case, co-owner Sri Rakesh Kumar Agarwal has never raised any objection for filing of suit for eviction by plaintiff-opposite party, Smt. Usha Sharma. Even after filing of suit, co-owner has never taken any objection and has never filed any impleadment application opposing the suit for eviction. Therefore, in light of law laid down by the Apex Court, though co-owner being an outsider, has full right for filing suit for eviction.

41. So far as argument of learned counsel for the revisionist-defendant about the co-owner not being a family member of other co-owner is concerned, in the eyes of law, though co-owners not being the family members, it does not make any difference and each co-owner has full right to file suit for eviction. There is no such Rule or law laid down by the Courts, which provides that in case of co-owners being family members have different better right than that of co-owners not being family members.

42. In light of discussion made herein above, this Court is of the firm view that once by the virtue of valid document, co-ownership is obtained, any co-owner can maintain suit for eviction equally as to whether he is a family member or not unless not objected by the other co-owner.

43. Another argument by learned counsel for the petitioner-defendant about the partition of property for filing suit for eviction is concerned, that is also having no force. Petitioner-defendant being a tenant

has no concern with the partition of property in dispute and it is between the co-owners. Tenant has no business to raise such objection and it is only open for co-owners. Again this Court is of the firm view that tenant has no right to raise issue of partition in eviction suit.

44. Therefore, in light of facts and judgments discussed herein above, this Court is of the firm view that co-owner whether being a family member or not has full right to file suit for eviction in case not objected by other co-owners. Partition of property in dispute is not necessary requirement for filing a suit for eviction so far as tenant is concerned. It is only between the co-owners and in the present case, co-owners are having no dissent on the point of filing of suit for eviction nor having any dispute of partition. The only requirement for filing suit for eviction is about the relationship of landlord and tenant and service of notice, which is not disputed in the present case. Therefore this Court finds no good reason to interfere with the impugned order dated 07.02.2023.

45. Therefore, revision lacks merit and is accordingly **dismissed**.

46. No order as to costs.

(2023) 5 ILRA 683
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2023

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Civil Misc. Transfer Application No. 88 of 2023

Bhagwan Srikrishna Virajman & Ors.

...Applicants

Versus

U.P. Sunni Central Waqf Board & Ors.

...Opposite Parties

Counsel for the Applicants:

Sri Prabhash Pandey, Sri Pradeep Kumar Sharma, Sri Vishnu Shankar Jain, Sri Hari Shankar Jain (Sr. Advocate)

Counsel for the Opposite Parties:

Sri Punit Kumar Gupta, Sri Birendra Prasad Maurya, Sri Devid Kumar Singh, Sri Kamlesh Narayan Pandey, Sri Nasiruzzaman, Sri Prateek Rai, Sri Radheshyam Yadav, Sri Varun Singh, Sri Wajahat Hussain Khan (Sr. Advocate), Sri J.H. Khan (Sr. Advocate), Sri Manish Goyal (Addl. A.G.), Ms. Anjali Goklani

A. Civil Law - Civil Procedure Code, 1908 - Section 24 - the applicants filed civil suit for declaration, injunction and right to worship at the site of Shri Krishna Janmasthan and also removal of the present structure alleged to be Shahi Eidgah Mosque- As many as 10 suits are stated to be pending before the civil court and also there should be more suits that can be said to be pending and issue can be said to be seminal public importance affected the masses beyond tribe and beyond communities having not proceeded an inch further since their institution on merits for past two to three years, provides full justification for withdrawal of all the suits touching upon the issue involved in the suit from the civil court concerned to this Court under Section 24(1)(b) CPC while the prayer made for original suit no.353 of 2022 being withdrawn and transferred to this Court made by the applicant is allowed- For rest of the suits, this Court withdraws such suits of similar nature from the lower civil court concerned are transferred (them) to this Court exercising its suo motu powers for trial.(Para 43)

The transfer application is allowed. (E-6)

List of Cases cited:

1. Baselius Mar Thoma Mathews I & ors. Vs Plaulose Mar Athanasius & ors. (1980) 1 SCC 601

2. St. of U.P. & ors. Vs U.P. Sunni Central Board of Waqf & ors. (1989) 15 ALR 696

3. Swami Vasudevanand Saraswati Disciple of Swami Shanta Nand Saraswati Vs Jagat Guru Shankaracharya

4. Jyotishpeeth Peethadheshwar Shri Swami Swaroopa Nand Saraswati (2016) SCC Online All 2956,

5. Twentieth Century Fox Film Vs NRI Film Production Pvt. Ltd (2003) AIR 148

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Hari Shankar Jain, learned senior counsel for the applicants through virtual mode, Sri Vishnu Shankar Jain, Sri Prabhash Pandey and Sri Pradeep Kumar Sharma, learned counsel for the applicants, Sri Punit Kumar Gupta, learned counsel for the respondent no.1, Sri Wajahat Hussain Khan, learned senior counsel assisted by Sri Nasiruzzaman and Sri J.H. Khan, learned counsel for the respondent no.2, Sri Prateek Rai, learned counsel for the respondent no.3, Sri Birendra Prasad Maurya, Sri Kamlesh Narayan Pandey, learned counsel for the respondent no.4 and Sri Radhey Shyam Yadav, learned counsel for the proposed respondent no.5, Sri Manish Goyal, learned Additional Advocate General for the State appointed as Amicus Curiae by the Court, who is assisted by Ms. Anjali Goklani, Advocate.

2. Noticeable that in this case, an impleadment application was moved on behalf of Mahendra Pratap Singh, Advocate who also wanted hearing on

point of transfer, thus praying that he be impleaded as proposed respondent no.5. The impleadment application was supported by affidavit sworn by deponent Vivek Kumar Mishra whereby averments were made in the accompanying affidavit and it was claimed, inter-alia, that the description of civil suit as described in paragraph no.7 of this transfer application, describes the suit of the proposed respondent at serial no.1 of the list being civil suit no.950 of 2020 (Thakur Keshav Dev Ji Maharaj Virajman Mandir and others Vs. Intezamia Committee and others) has been instituted by the applicants and others on 22.12.2020. Therefore, he should be heard in this case before passing any order. Consequently, he was given opportunity to extend arguments and state his case before this Court along with other counsels of both sides and the case of the proposed respondent no.5 was argued before this Court by his counsel, Sri R.S. Yadav and due consideration was given.

3. By way of this transfer application under Section 24 of the Civil Procedure Code 1908, the following prayer has been made:-

“(a) Withdraw Civil Suit No.353 of 2022 from the Court of Civil Judge (Senior Division), Mathura to this Hon'ble Court for Trial in exercise of the powers under Section 24(1)(b) of Code of Civil Procedure, 1908;

(b) Direct to withdraw all suits of similar nature to this Hon'ble Court on the basis of list of cases which may be supplied by Ld. District Judge, Mathura to this Hon'ble Court;

(c) Pass such other order(s) as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.”

4. The application is supported by affidavit with details of facts of the suit (original suit no.353 of 2022) and for sake of convenience, it would be relevant that a brief sketch of chronological development up to this stage may be narrated.

5. Bare perusal of the record of this transfer application reflects and proceeds on line that the applicants filed civil suit for declaration, injunction and right to worship at the site of Shri Krishna Janmasthan and also removal of the present structure alleged to be Shahi Eidgah Mosque. The suit was registered as misc. case no.176 of 2020 in the court of the Civil Judge (Senior Division), Mathura.

6. It is worth mentioning that the filing of the aforesaid suit was under circumstances wherein by way of the suit some compromise decree passed earlier between parties, to that particular suit was challenged on ground of collusion between the parties of the suit by the present applicants and the alleged compromise dated 12.10.1968 and based upon that the decree passed was stated to be sham and fraud, thus the decree passed by way of aforesaid compromise was claimed to be null and void. It being so, the aforesaid suit was registered by the Civil Judge (Senior Division), Mathura as civil misc. case no.176 of 2020 on 25.09.2020. However, the aforesaid misc. proceeding / suit was dismissed by the learned Civil Judge (Senior Division), Mathura vide order dated 30.09.2020, holding that the worshipers had no right to file the suit, their number were in lakhs as worshipers of Lord Krishna and in case suit is entertained, a large number of cases may be filed / instituted, copy of the plaint has been brought on record (annexure no.1).

7. The applicant aggrieved by the aforesaid order dated 30.09.2020 of the Civil Judge (Senior Division), Mathura, preferred civil appeal no.17 of 2020 before the learned District Judge, Mathura, which was admitted by it vide order of the District Marthura, dated 16.10.2020. Later on this appeal was converted into civil revision no.2 of 2021. The parties were heard in the civil revision and vide judgment and order dated 19.05.2022, the revision was allowed and the matter was remanded to the trial court with direction to proceed in accordance with law. Consequently, the proceeding started afresh by the Civil Judge (Senior Division), Mathura, and the suit was numbered as civil suit no.353 of 2022.

8. However, in the meanwhile it so happened that the respondent nos.1 and 2 – U.P. Sunni Central Waqf Board and Trust Shahi Masjid Eidgah, challenged the aforesaid order of the District Judge, dated 19.05.2022 (passed in civil revision no.2 of 2021) filing the petition under Article 227 of the Constitution of India, Numbered 5967 of 2022 and 5348 of 2022, both the sides were heard by the coordinate Bench of this Court and the petition was disposed of vide order dated 01.05.2023, the last paragraph of which is extracted hereinbelow:-

“In the light of above, both the petitions are disposed by remanding the matter back to the Trial Court with directions to adjudicate the Civil Suit No.353 of 2022 after following due procedure as per law without being influenced by any observation or findings of the District Judge vide impugned order dated 19.05.2022. All the parties are free to raise all their contentions before the trial Court.”

9. In the light of above order, it is apparent that the order dated 19.05.2022 passed by the District Judge, Mathura, in civil revision no.2 of 2021 was sustained. However, the various findings recorded by the District Judge, Mathura touching upon the merit of the suit itself was set aside, for specific reason that any finding on merit can be recorded only after the written statement is filed, issues framed thereon, evidence adduced and after discussion of facts and law applicable, finding to be recorded by the trial court thereon.

10. While coming back to the averments elaborated in this transfer application, it proceeds with the import that the matter involved here has historical background and it involves interest and sentiments of public at large, requires interpretation of various statutes, laws, Acts and ARTICLES of the Constitution of India. The matter is highly sensitive and inter-alia relates to belief and faith of crores of devotees of Lord Krishna. The matter is of national importance and substantial questions of law involved in the suit. In fact, the complicated questions of law concerning a large section of society having its impact on the entire nation are required to be decided by the highest court of the State.

11. The aforesaid suit also involves, explicitly and by implication determination of questions relating to history, scriptures, interpretation of Hindu and Muslim law and it being so, the present suit (no.353 of 2022) is standing entirely on different footing unlike the normal civil suit as such of exceptional nature.

12. The averments contained in the transfer application proceed on to claim that the suit no.353 of 2022 was filed on

25.09.2020, thereafter, a number of suits have been filed and are pending in the court of the Civil Judge (Senior Division), Mathura. The applicant has furnished details of such suits in paragraph no.7 of this transfer application which comprises list of as many as nine cases, a brief reference of the same becomes relevant;

(i) Civil Suit 950 of 2020 Thakur Keshavji Maharaj Vs. Intizamiya Committee

(ii) Civil Suit 107 of 2021 Thakur Keshavji Maharaj Vs. Intizamiya Committee

(iii) Civil Suit 151 of 2021 Bhagwan Shri Krishna Virajmaan Vs. Sunni Central Waqf Board

(iv) Civil Suit 152 of 2021 Bhagwan Shri Krishna Virajmaan Vs. U.P. Sunni Central Waqf Board

(v) Civil Suit 252 of 2021 Thakur Keshavji Maharaj Vs. U.P. Sunni Central Waqf Board

(vi) Civil Suit 174 of 2021 Keshav Dev Ji Maharaj Vs. U.P. Sunni Central Waqf Board

(vii) Civil Suit 620 of 2021 Bhagwan Bal Shri Krishna Keshav Dev Virajmaan Vs. U.P. Sunni Central Waqf Board

(viii) Civil Suit 683 of 2021 Gopal Giri Maharaj Vs. U.P. Sunni Central Waqf Board,

All the aforesaid eight cases are stated to be pending in the court of the Additional Civil Judge (Senior Division), Mathura. However, the last case being ninth case described in the list of suits given in the transfer application is stated to have been pending in the court of the 3rd Additional Civil Judge (Senior Division) Mathura, with relevant detail:-

(ix) Civil Suit 839 of 2022
Bhagwan Bal Shri Krishna Virajman Vs.
Intezamia Masjid Shahi Masjid.

Janmbhoomi and the plaintiffs are claiming
right to worship and removal of the present
Shahi Eidgah Masjid.

13. However, the gravity of the issue involved and the large and wide background of the case has been tried to be equated with the case of the Ram Janam Bhoomi pertaining to Ayodhya and specific plea has been raised that this Court vide order dated 10.07.1989 was pleased to transfer all suits pertaining to Ayodhya dispute consequent upon which, the suits (alike in nature) were tried by this Court (High Court) and decided vide judgment and order dated 30.09.2010. It proceeds further with claim that an appeal was preferred against the aforesaid order and the matter was finally adjudicated upon by the five Judges Bench of the Hon'ble Apex Court vide judgment and order dated 09.11.2019 [2020 (1) SCC 1].

14. Based upon aforesaid averments, specific plea is raised that in case the suit is decided by the trial court itself, it will take long time. However, the matter needs be decided expeditiously to save the time of the litigant parties and to serve the interest of justice.

15. In support of his claim, learned counsel for the applicants proceeds on to say that under prevailing facts and circumstances of this peculiar suit, the same may be conveniently withdrawn by virtue of provision under Section 24 of the Civil Procedure Code, 1908 which empowers the higher Courts to try the suit after withdrawing it from the lower court concerned. The suit requires consideration by higher court which admittedly has vision broad and wide.

16. The point in issue involved in the suit for adjudication relates to Shri Krishna

17. One of the grounds urged for exercise powers under Section 24 of the C.P.C. revolves around the axis to the ambit that the Civil Judge has not worked properly while the suit was initially preferred / instituted while exercising powers under Order 7 Rule 11 C.P.C. touching upon those issues which might not have been touched at this stage. While the applicants were pursuing remedy against outcome of order of the trial court dated 30.09.2020 as many as nine suits were filed and duly registered by the Civil Judge (Senior Division), Mathura and due to that, for the past three years the suit has not progressed any further.

18. Learned counsel for the applicants has explained the historical and religious nature of the suit and claimed that the history of 'Karagar' (jail) of Kans wherein Lord Krishna incarnated in human form, is sacred and divine for the Hindu devotees. It is a deity worshiped by the Hindu devotees. The 'Karagar' of 'Kans' at present is located beneath the alleged Shahi Eidgah Masjid and by explaining these aspects to some length, the learned counsel for the applicant has endeavoured to bring to the notice of this Court the various complicated questions which are involved and call for adjudication of the same in the present suit. Some of these complicated questions were stated to be interpretation, validity and applicability of places of worship Act 1991, interpretation / applicability of Waqf Act 1995, rights of Hindu deity under Hindu Law and under Article 25 of the Constitution of India and interpretation of Article 25, 26 and 300 A of the Constitution of India. Moreover, it involves

adjudication on point of birth place – 'Asthan', as deity, the rights and duty of Shebait under Hindu Law and rights of Hindu devotees where Shebait has been negligent and the property of the deity has been alienated/transferred against the law, decree obtained by fraud and challenged by Hindu devotees, adjudication upon distinction between Waqf and Trust, and apart from all above point of applicability and interpretation of law of adverse possession.

19. Learned counsel has asserted that the aforesaid substantial questions would arise before the trial court. Therefore, the original trial may be conducted by this Court. After describing the factual background, the learned counsel claimed that sensitive / sentimental issues of national and public importance between and among people are involved which need be properly scrutinized and adjudicated upon.

20. At this juncture, it would be relevant to take note of objection raised by the respondents, however, before proceeding further, it would be desirable to state that respondent no.3 has no objection to the forum of litigation, he is interested only in expeditious disposal of the case / suit. Therefore, no special objection has been raised by the respondent no.3.

21. Noticeable that respondent no.1 while rebutting the plea of the applicant is specific to the point that the only reason assigned for ground of transfer of the trial has been enumerated in paragraph no.8 of the transfer application. Thereafter, the respondent no.1 proceeds on the line that claim has been raised by the applicants that the matter is expanding to the length and breadth of India and concerns crores of

devotees of Lord Krishna would not serve the purpose of the applicants. Apart from aforesaid specific objection, there are ancillary objections of the nature that no prejudice is caused to the applicants and the relief sought to its core by way of the suit basically pertains to cancellation of the decree dated 20.07.1973 and 07.11.1974 passed in original suit no.43 of 1967. Thereafter, learned counsel proceeds further and has explained about the import and application of the Section 24 C.P.C. in the present context. Learned counsel continued that in case the transfer appeal is allowed it would be opening pandora box and in every case pertaining to religious places would be the voice of the concerned. Learned counsel in concluding rebuttal vehemently contended that in the matter of Kashi Vishwanath Temple dispute, the Hon'ble Apex Court vide its order dated 20.05.2022 transferred the proceeding of the original suit to the District Judge, Varanasi, he being an experienced judicial officer.

22. The respondent no.2 has virtually adopted the contention as raised by respondent no.1 with fresh addition that none of the applicant is resident of Mathura where the dispute property is situate. The plaintiffs are rich persons, whereas, the opposite party no.2 has no sufficient means and financial position is very weak. Convenience of the parties would be suitably adjusted if the suit is tried by the Civil Judge, Mathura. It would cause inconvenient to witnesses of both the sides to come over to Allahabad / Prayagraj from Mathura. Further claim has been raised that insofar as the nine cases enumerated in paragraph no.7 of the transfer application to be cases of similar nature are concerned, none of the parties to the suit so described has been made to this transfer application.

23. Similarly placed is the line of argument of the respondent no.4 more or less touching and urging upon the same issue as endeavoured by the respondent nos.1 and 2 while objecting to the prayer made in the transfer application, therefore, there is no need of repeating the same argument to the same import.

24. The intervenor-the proposed respondent no.5 Mahendra Pratap Singh, Advocate was allowed to state his case as he claimed himself to be one of the plaintiffs of the suit at the top of the list furnished by the applicants in paragraph no.7 of the transfer application. The learned counsel for the respondent no.5 has not brought any new theme rather his claim is based that the relief sought by the proposed respondent in his suit (950 of 2020) has got nothing to do with the relief sought in the suit instituted by the applicants. Therefore, the transfer application is claimed to be misconceived and misguided one. The court below is competent to decide the issue raised and can be properly adjudicated upon. However, the cases of the similar nature may be consolidated and brought together, may be decided by the court below and basing the leading suit to be suit no.950 of 2020.

25. Before proceeding further with the analysis of the entire claim, certain aspects need be observed. This transfer application is supported by an affidavit of one Rajesh Mani Tripathi wherein the aforesaid details have been provided in paragraph no.8 of the affidavit. Counter affidavit has been filed on behalf of the respondent no.1 and there is no denial of the assertions made in paragraph no.8 of the affidavit filed in support of this transfer application. This is evident from bare perusal of the paragraph no.10 of the counter affidavit filed by respondent. Likewise, in the

counter affidavit of respondent no.2, assertions made in paragraph no.8 of the affidavit has been stated to be matter of record except for the fact that original suit no.151 of 2021 and original suit no. 152 of 2021 were dismissed for want of prosecution besides these two suits, some more suits are also pending before the court concerned. For ready reference, paragraph no.6 of the counter affidavit of respondent no.2 is extracted herein under:-

“That the contents of paragraph no.6, 7 and 8 of the affidavit are also the matter of record but two suits as CS No.151 of 2021 and CS No.152 of 2021 have been dismissed for non prosecution and some more suits are also pending besides the list in paragraph no.7.

26. Likewise counter affidavit filed by the respondent no.4 who has admitted contents of the paragraph no.8 of the affidavit filed in support of the transfer application and has given detail of one further suit being original suit no.12 of 2023 Sri Krishna Janambhoomi Mukti Nirman Trust Vs. Shahi Masjid Eidgah and others, which is stated to be pending before the court of the Civil Judge (Senior Division), Mathura.

27. From pleadings of the parties, it is more evident that at least, nine suits are pending consideration, inter-alia, involving the issue relating to the interpretation of various facets of statutes, constitutional law, elastical law, historical importance besides personal law and common law.

28. The detailed arguments were advanced by the parties and upon completion of the pleadings on several dates which is evident from the order-sheet, judgment was reserved on 03.05.2023.

Analysis

29. Section 24 of the Code of Civil Procedure (hereinafter referred as “the C.P.C.”) is a general power of transfer and withdrawal. This power can be exercised either on the application of the party or power can be exercised suo motu. Section 24 C.P.C. is extracted hereinbelow:-

24. General power of transfer and withdrawal.- (1) *On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage-*

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which [is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

2[(3) For the purposes of this section,

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) proceeding includes a proceeding for the execution of a decree or order].

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

[(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.]

30. Bare perusal of Section 24 (1)(b) CPC shows that suit can be withdrawn which is pending in the subordinate court to the Court to which the transfer application is made i.e. High Court. The High Court is competent to try or dispose of the same. The scope of Section 24 CPC is large enough encompass to try all issues by the High Court and exercise its power on civil court. There is no bar that the High Court cannot try suit, if it is withdrawn from the civil court where it is pending and is transferred to the High Court for disposal.

31. For the purpose of exercising jurisdiction under Section 24 C.P.C., the High Court has to circumspect all the facts in issue and all the consequences that it may have upon masses. It will be apt to refer the decision of Hon'ble Apex Court in the case of **Baselius Mar Thoma Mathews I and others Vs. Plaulose Mar Athanasius and others, (1980) 1 SCC 601**. The facts in the aforecited case relates to the spiritual life affecting orthodox syrian christians, as many as 250 suits manifesting litigious syndrome are remaining pending in the several courts of Kerala. Even the court of the Additional District Judge that was nominated to dispose of eight suits, two

sensitive suits did not work out to possible logical end to the entire litigation. In such backdrop, Hon'ble Apex Court proceeded to make observation as follows:-

“(7) It is indubitable that after the decision by the District Court appeals will inevitably be carried to the High Court. It is predictably reasonable to expect, from all that has been presented to us and all that we have been able to gather from the records, that the case involves questions of public moment and which are likely to spiral up to the Supreme Court on final appeal. In this jurisdiction, the approach has to be pragmatic, not theoretic, without whittling down the basics of law bearing on transfer of cases.

(8) We do not for a moment countenance the suggestion that the district Judge is not equal to the legal intricacies or factual challenges of these or other cases, the procedural law having vested him with unlimited jurisdiction and the High Court having committed these cases to his seisin. Hints of bias are also out of bounds, as we have indicated. If these suits at this stage of early arguments which have yet to begun effectively, are transferred to the High Court a spell of few years in the stressful life of the litigation will be saved. Taking copies of a bunch of decrees by the District Court, followed by preliminaries and filing of appeals, service of notices and other ripening processes, may consume considerable time and money. And then the High Court would begin de novo the entire arguments and appreciation of the whole range of facts and law as in first appeal it is bound to do in a case of this type. Where lakhs of people are excitedly affected by the ultimate decision and the fate of a few hundred suits and a thousand churches is to be settled by adjudication, the elimination of some years and duplication

of hearings and full arguments, at the commanding height of the High Court is a wise measure, all things considered. The social savings of abbreviation of laws' delays are important to social justice.

(9) We do not tarry to dilate on the many dimensions to this transfer petition except to state that we feel the advancement of public justice will be promoted by the High Court itself at this stage, proceeding to hear the suits. We, therefore, direct that all the suits covered by the transfer petition be transferred to the High Court and tried from the present stage post-haste, since expeditious termination is the driving force behind this order for transfer.”

32. It has been admitted to the respondents that they will be losing right of available remedy on misc. application in revision before the District Judge, Mathura and their right of filing the appeal before the High Court but all procedures are merely handmade of the justice, the ultimate aim is to provide speedy justice. One of the arguments which was advanced from both the sides was with respect to the case of Ram Janambhoomi, which was transferred to the High Court from the subordinate courts. On the one hand, the applicants have to say that seminal issue of the public importance was involved in the said case of Ram Janambhoomi and the High Court transferred the matter from the subordinate court to itself. However, on the other hand, learned counsel for the respondents has to say that the transfer was not made, for the reason of the importance in issue but was made because of fact that the suit was already pending before the subordinate court for 40 years and could not reach a logical conclusion and even after transfer to the High Court, it took 30 years for the High Court to decide the suit.

33. In order to appreciate rival contentions, it will be appropriate to refer the decision of the division Bench of this Court in the case of the ***State of U.P. and others Vs. U.P. Sunni Central Board of Waqf and others, (1989) 15 ALR 696*** by which the suit came to be transferred. In paragraph no.2 of the aforesaid decision, facts have been stated and contents of Section 24 C.P.C. and its application have been duly mentioned which are being reproduced herein under:-

“.....An application was again moved by the State in the month of February, 1989 on the administrative side praying that this application under section 24, C.P.C., may be listed for orders as early as possible. It was mentioned in the said application that the suits relate with inter se dispute between the members of two communities; one claiming it to be Ram Janam Bhoomi temple and the other as Babri Masjid and though the dispute is purely civil in nature but it assumes importance, time to time in the context as it some times excites religious sentiments and generates tension between the communities. It was further stated that the State Government is concerned to preserve amity and brotherly relations between the communities, but at time it assumes sensitive issue and sometimes creates possibility of discord and tension between otherwise peaceful population and the hearing and final disposal of suits in the civil court will take long time and hence the cases may be transferred to this court. On that application it was ordered that the case may be listed on February 23, 1989 and this is how proceedings started”

34. A perusal of the same, facts disclose that it was on account of religious sentiments, general of tensions between

two communities and to preserve amity brotherly relations, the application was moved and not on account of fact that the matter was not decided for 40 years. Paragraph no.9 and 10 of the aforesaid decision of the division Bench of this Court are relevant and extracted herein under:-

9. Powers of the court under Section 24 of the C.P.C. are not to be rendered negatory because right of one or two appeals is lost. In suitable cases and situations like the present are the same has rather become necessary for advancing the cause of justice and putting an end to the litigation rotating round the same controversy.

10. Taking into consideration the facts of the case and the pendency of suits for several years and the issue in question which is creating tension between the members of two communities and developing division tendency, we are of the view that the application under Section 24, C.P.C. for withdrawal of suits and its trial and disposal by this court be allowed.

35. The apprehension that was expressed by the learned counsel for the respondent nos.1 and 2 to the effect that their right of appeal will be lost if the suit is transferred to the High Court does not merit consideration. The issue is no longer res integra and has been decided by the division Bench of this Court in the case of ***Swami Vasudevanand Saraswati Disciple of Swami Shanta Nand Saraswati Vs. Jagat Guru Shankaracharya Jyotishpeeth Peethadheshwar Shri Swami Swaroopa Nand Saraswati reported in 2016 SCC Online All 2956***, paragraph nos.27, 28, 29 and 30 are extracted herein under:-

“27. Further argument that transfer of appeal from District Judge to

High Court, if allowed, then a right of second appeal will be lost, has been negated by this Court in *State of U.P. v. Sunni Central Board of Waqf*. It is an order passed on application under Section 24, C.P.C. whereby suits pending in Court of Civil Judge / Munsif were transferred to this Court at Lucknow. A similar argument of loss of right of appeal was negated by observing as under:

“Powers of the Court under Section 24 of the C.P.C. are not to be rendered negatory because right of one of two appeals is lost. In suitable cases and situations like the present are the same has rather become necessary for advancing the cause of justice and putting an end to the litigation rotating round the same controversy”.

28. So far as circumstances when this Court would be justified in transferring a case pending in subordinate Court to High Court is concerned, in *Baselius Mar Thoma Mathews I V. Paulose Mar Asthanasius*, it has been held, where dispute may affect lot of people, who are excitedly affected by ultimate decision, and exercise of transfer would save some years and duplication of hearing, which is likely to take ample time, transfer of matter to High Court is a wise measure.

29. Here we do not propose to multiply this judgment by referring to catena of authorities on the question when exercise of jurisdiction under section 24, C.P.C. would be justified and suffice it to mention, where a matter is of importance of general public and parties also agree for early disposal, and more so that early disposal of matter has been found expedient even by Highest Court of law, an attempt should be made so that dispute is adjudicated at the earliest so as not to consume much more time and leave scope of dispute to prolong and take long time.

30. *It cannot be doubted that office of Jagat Guru Shankaracharya at Jyotirmath Badrikashram is of high importance to majority of people and lakhs of people visit the Holy Math. Dispute of holder of office of such place, is a matter of wide importance and ought to be adjudicated at the earliest.”*

36. The special leave petition filed against the aforesaid judgment was dismissed as such the aforesaid decision has attained finality. The office of Jagat Guru Shankaracharya has been held to be office of high importance as lakhs of people visit the Holy Math, therefore, it was decided to give expeditious disposal to the matter.

37. Having said so on the power to try the suit after withdrawing the same under Section 24 CPC., the next apprehension expressed by the learned counsel for the respondents is with regard to the presence of the witnesses to give evidence and inconvenience caused to the witnesses to come Prayagraj from Mathura for getting their statement recorded before the court concerned. The aforesaid argument, on the face of it, is ill-founded. The Order 18 Rule 4 CPC provides for recording evidence and it is for the Court to record evidence either itself or by commissioner appointed by it. With the advancement of the technology and impetus being provided to e-judiciary, physical presence of the witnesses can be done in the manner and mode as per discretion available with this Court trying the suit and it can be recorded through audio - video link. The reference in this regard may be made in the case reported in the case of ***Twentieth Century Fox Film Vs. NRI Film Production Pvt. Ltd*** AIR 2003 148 wherein following points have been observed by Karnataka High Court.

This can be done by providing link officer in the local court where witnesses can physically present, provide video link and cross examination can be done through audio - video mode. The relevant extract from paragraph no.7 is reproduced herein under:-

“7. Coming to the merits of the matter, let me see as to whether the Audio-Video Link in the matter of evidence is permissible in law or not ?

Order 18 of CPC provides for hearing of the suit and examination of witnesses. Order 18 Rule 3 provides for evidence where other issues are involved. Recording of evidence is provided under Order 18, Rule 4. The CPC is amended from time to time in the Interest of speedy disposal and to avoid cumbersome procedure in the matter of conducting civil trials. It is a matter of fact that civil proceedings in this country take a few years as experience reveals. To get over this normal procedural delay, the Government has thought it fit to amend the Act in the larger interest of speedy disposal. The statement of objects and reasons of CPC Amendment Act 1999 would show that the maximum time is consumed in recording evidence by the courts and it is proposed to reduce such delay by making provision for evidence by affidavit. The object refers to the report of the Hon'ble Mr. Justice Malimath, and the Law Commission Recommendations. The Act was amended in 1999 in terms of the Act 46/1999 it was subsequently amended in CPC amendment Act of 2002. Order 18, Rule 4 provides for examination in chief of a witness by way of an affidavit. Sub-rule (2) provides for cross-examination and re-examination of witnesses being done in attendance whose evidence by affidavit has been furnished to the Court is to be taken

by the Court or the commissioner appointed by it. The Court may also take into consideration the relevant factors as it thinks fit in terms of the rule. The argument of Sri AYN Gupta, learned counsel is that the word "attendance" would mean physical attendance. The argument of Sri Udaya Holla, learned counsel is that the word "attendance" would not mean physical attendance. Audio-Video Link is a technology developed by electronic media to avoid the physical presence and to avoid the loss in time. It is a speedy method evolved for the purpose of speedy decision. Even in Audio-Video Link party is definitely present in person and his presence is reflected on the screen. The word 'in attendance' under Order 18, Rule 3(4)(2) is to be understood as the person being present and it need not be physical presence. The presence on the screen is as good as attendance for the purpose of Order 18, Rule 3(4) (2) of the Rules. After all law only requires the presence of the witness and it does not matter as to how he is present. Just because it is physically impossible for him to be present at Mysore, this method of Audio-Video Link is suggested by the party for speedy disposal. Insistence of personal attendance would defeat the very object of Order 18, Rule 3(4)(2) of the CPC. Moreover, the proviso also provides for taking into account such relevant factor as he thinks fit. Therefore, mere non-physical attendance by itself does not prohibit examination of a witness by way of Audio-Video Link. I must also notice at this stage that Order 18, Rule 3(4)(3) which provides for recording evidence either by writing or mechanically in the presence of a Judge. Audio-Video Link is a mechanical process where the party is present on the screen and there is a mechanical device recording the evidence. This also supports the

contention of Mr. Udaya Holla. Therefore, I am firmly of the view that there cannot be any impediment in the given set of facts to record evidence through Audio-Video Link . There is no prohibition as such in term of Order 18, Rule 3(4) of the Code. On the other hand, the amendments would support the contention of such an interpretation. After all the present amendment has been effected for speedy trial and speedy disposal and that cannot be strangled by narrow interpretation. Technology development is taking place all over the Globe and Courts cannot lag behind in this regard. If law Courts do not permit technological development in Court proceedings, it would be lagging behind compared to other sectors. Law has to develop and if law is to develop, technology has to be made as a tool. Therefore, the objections in this regard is unsustainable. Learned trial Judge has taken a very narrow view. A reading of entire order of the learned Judge would show that the learned Judge had in his mind that time factor of this Court and also certain defects in the matter of procedure of recording evidence. Any implementation of new technology will have initial hiccups and these are to be removed by proper application of law with sufficient safeguards. Therefore, the learned Judge in my view is not right in rejecting recording of evidence by Audio-Video Link in the given set of facts.”

Argument on the constitutional aspect

38. Before dealing with the said argument, the High Court has to remain conscious of the fact that being the highest Court of the State, it is guardian of the people and being 3rd pillar of the Constitution, it safeguards interest of the people as a whole, the small sub-sects, tribe then bigger sub-sect community and full

circle of the people, all fall within the protection of the Constitution. The people as a whole constitutes fraternity, unity and integrity of the nation coupled with dignity of the individual are the essential aim to be achieved as enshrined in the Preamble of the Constitution of India. To adjudge things from the said angle, this Court now appreciate as to what argument that was advanced on behalf of the applicant.

39. Learned counsel for the applicants has explained the historical and religious nature of the suit and claimed that the history of 'Karagar' (jail) of Kans wherein Lord Krishna incarnated in human form, is sacred and divine for the Hindu devotees. It is a deity worshiped by the Hindu devotees. The 'Karagar' of 'Kans' at present is located beneath the alleged Shahi Eidgah Masjid and by explaining these aspects to some length, the learned counsel for the applicant has endeavoured to bring to the notice of this Court the various complicated questions which are involved and call for adjudication of the same in the present suit. Some of these complicated questions were stated to be interpretation, validity and applicability of places of worship Act 1991, interpretation / applicability of Waqf Act 1995, rights of Hindu deity under Hindu Law and under Article 25 of the Constitution of India and interpretation of Article 25, 26 and 300 A of the Constitution of India. Moreover, it involves adjudication on point of birth place – 'Asthan', as deity, the rights and duty of Shebait under Hindu Law and rights of Hindu devotees where Shebait has been negligent and the property of the deity has been alienated/transferred against the law, decree obtained by fraud and challenged by Hindu devotees, adjudication upon distinction between Waqf and Trust, and apart from all above point of applicability

and interpretation of law of adverse possession.

40. Learned counsel has asserted that the aforesaid substantial questions would arise before the trial court. Therefore, the original trial may be conducted by this Court. After describing the factual background, the learned counsel claimed that sensitive / sentimental issues of national and public importance between and among people are involved which need be properly scrutinized and adjudicated upon.

41. To the aforesaid arguments, it is interesting to note that learned counsel for the respondent nos.1 and 2 have not refuted that such issues and seminal importance would not be arising for adjudication of the suit. The only argument advanced is that the suit is of simple nature which is for setting aside the compromise decree and all questions are incidental which are dependent on fate of grant of the first relief. Candidly, learned counsel for the respondent nos.1 and 2 do not dispute consideration of the matter falling within the province of the Articles 25, 26 and 300A of the Constitution of India. Under the circumstances, the Court will be failing in its duty if it does not prima facie consider the scope of Article 25 of the Constitution of India. Article 25 (1) reads as follows:-

“25. Freedom of conscience and free profession, practice and propagation of religion.-(1) Subject to public order, morality and health and to the other provisions of this Part, **all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.**”

Similarly Article 26 of the Constitution of India reads as follows:-

“26. Freedom to manage religious affairs.- Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.”

42. Bare perusal of the Articles 25 and 26 of the Constitution of India discloses that rights are subject to the public order and morality. The principle of constitutional morality, therefore, steps in and hence the rights under Articles 25 and 26 can be exercised when they are tested on the touchstone of the constitutional morality and the public order. Reference in this regard may be made to the very recent decision of the constitution Bench of Hon'ble Apex Court in the case of Central Board Dawoodi Bohra Community and another Vs. State of Maharashtra and another reported in 2023 (4) SCC page 541. The Honble Apex Court has held the Constitution to be living instrument and considered changing need of the society. Paragraph nos. 26, 28, 32.1, 32.2, 32.3 and 34 are reproduced herein under:-

“26. Nariman, J in paragraph 176.7, stressed that the term ‘morality’ refers to that which is considered abhorrent to civilized society, given the mores of the time, by reason of harm caused by way, inter alia, of exploitation and degradation.

28. The question is whether the exclusionary practice which prevails in the Dawoodi Bohra community of excommunicating its members will stand the test of Constitutional morality? As observed by Das Gupta, J. in the case of *Sardar Syedna1*, the excommunication of a member of the community affects many of his civil rights. The Privy Council, in the case of *Hasanali & Ors. v. Mansoorali & Ors.*¹², in paragraph 4, has dealt with the effect of excommunication in Dawoodi Bohra community. Paragraph 4 reads thus:

“4. The appellants would limit the effect of excommunication, whatever steps might have been taken to bring it into being, to complete 12 1947 SCC OnLine PC 63 social ostracism. There is nothing, they say, to show that it excluded from rights of property or worship. Their Lordships do not find themselves able to accept this limitation. The Dai is a religious leader as well as being trustee of the property of the community, and in India exclusion from caste is well known.

There is at least one case in which it is recorded that certain persons applied to the King to intercede with the thirtythird Dai, complaining that in consequence of excommunication they were kept from the mosques and places where true believers met; and no instance has been cited where excommunicated persons freely exercised their religious rights. Indeed, the complaint in the cases brought to their Lordships' attention as regards which relief is claimed for the appellants or those whom they are said to represent is that they were wrongly excommunicated, not that if rightly excommunicated they were wrongly deprived of their religious rights. Excommunication, in their Lordships' view, if justified, necessarily involves exclusion from the exercise of religious rights in places under the

trusteeship of the head of the community in which religious exercises are performed.” (emphasis added) A person who is excommunicated by the community, will not be entitled to use the common property of the community and the burial/cremation grounds of the community. In a sense, such a person will virtually become untouchable (being banished or ostracized) within the community. In a given case, it will result in his civil death. It can be argued that the concept of Constitutional morality which overrides the freedom conferred by clause (b) of Article 26, will not permit the civil rights of ex communicated persons which originate from the dignity and liberty of human beings to be taken away. The concepts of equality, liberty and fraternity are certainly part of our Constitutional morality. Basic ideas enshrined in our Constitution are part of Constitutional morality. The conscience of our Constitution is Constitutional morality. Hence, it is contended that excommunication or ostracisation is anathema to the concepts of liberty and equality. It is against the anti discriminatory ethos which forms a part of Constitutional morality. Therefore, the Constitutional Court ought not to tolerate anything which takes away the right and privilege of any person to live with dignity as the concept of Constitutional morality does not permit the Court to do so. Therefore, in our view, the protection under Article 26(b) granted by the decision in the case of *Sardar Syedna1* to the power to excommunicate a member of the Dawoodi Bohra community, needs reconsideration as the said right is subject to morality which is understood as Constitutional morality. This issue will require examination by a larger Bench.

32. To conclude, prima facie, we find that the exercise of balancing the

rights under Article 26(b) with other rights under Part III and in particular Article 21 was not undertaken by the Constitution Bench in the case of *Sardar Syedna*¹. This question is substantially in issue before the Bench of nine Judges in *Sabrimala Temple Review* 9JJ. Moreover, the question whether the protection can be given by Article 26(b) to the practice of ex-communication is to be tested on the touchstone of the concept of Constitutional morality as the said right is subject to morality. This is an important and emergent issue. These are the two main grounds on which the said decision may need reconsideration by a larger Bench decision was subjected to a review. This Court dealt with the review (*Sabrimala Temple Review* – 5JJ.7). The majority opinion contains questions formulated for referring it to a larger Bench. Question Nos. 5.1 to 5.3 are relevant which reads thus:

“5.1.(i) Regarding the interplay between the freedom of religion under Articles 25 and 26 of the Constitution and other provisions in Part III, particularly Article 14.

5.2.(ii) What is the sweep of expression “public order, morality and health” occurring in Article 25(1) of the Constitution.

5.3.(iii) The expression “morality” or “constitutional morality” has not been defined in the Constitution. Is it overarching morality in reference to Preamble or limited to religious beliefs or faith. There is need to delineate the contours of that expression, lest it becomes subjective.” Accordingly, the review petition was listed before a nine Judge Bench. By the order dated 10th February 2020, the Bench of nine Judges (*Sabrimala Temple Review* – 9 JJ.8) framed seven questions of law, out of which questions 3

and 4 are relevant for our purposes read thus:

“3. Whether the rights of a religious denomination under Article 26 of the Constitution of India are subject to other provisions of Part III of the Constitution of India apart from public order, morality and health?

4. What is the scope and extent of the word ‘morality’ under Articles 25 and 26 of the Constitution of India and whether it is meant to include Constitutional morality?”

43. Having said so and looking to the fact that as many as 10 suits are stated to be pending before the civil court and also there should be more suits that can be said to be pending and issue can be said to be seminal public importance affected the masses beyond tribe and beyond communities having not proceeded an inch further since their institution on merits for past two to three years, provides full justification for withdrawal of all the suits touching upon the issue involved in the suit from the civil court concerned to this Court under Section 24(1)(b) CPC while the prayer made for original suit no.353 of 2022 being withdrawn and transferred to this Court made by the applicant is allowed. For rest of the suits, this Court withdraws such suits of similar nature from the lower civil court concerned are transferred (them) to this Court exercising its suo motu powers for trial.

44. The instant transfer application is allowed.

45. Let the District Judge, Mathura prepare a list of all such cases of similar nature involving the subject matter and touching upon its periphery, expressly or by implication include particulars of such

5 All. Azad Ahmad & Ors. Vs. National Commission for Protection of Child Rights (N.C.P.C.R.) 699 & Ors.

cases and these suits/cases along with record, as above, shall be duly forwarded to this Court within two weeks and the same shall stand transferred to this Court in exercise of suo motu powers of this Court.

46. It is requested to the respected Chief Justice to kindly nominate an appropriate Bench for trial and disposal of such suits, so withdrawn.

47. This Court appreciates the assistance provided to it by Sri Hari Shankar Jain, Sri Vishnu Shankar Jain, Sri Prabhash Pandey and Sri Pradeep Kumar Sharma, learned counsel for the applicants, Sri Punit Kumar Gupta, learned counsel for the respondent no.1, Sri Wajahat Hussain Khan, learned senior counsel assisted by Sri Nasiruzzaman and Sri J.H. Khan, learned counsel for the respondent no.2, Sri Prateek Rai, learned counsel for the respondent no.3, Sri Birendra Prasad Maurya, Sri Kamlesh Narayan Pandey, learned counsel for the respondent no.4 and Sri Radhey Shyam Yadav, learned counsel for the proposed respondent no.5, and more particularly to Sri Manish Goyal, the learned Additional Advocate General for the State appointed as Amicus Curiae by this Court, who is assisted by Ms. Anjali Goklani, Advocate, for rendering valuable assistance to this Court in disposal of this transfer application.

48. Let a copy of this order be transmitted to the trial Judge/District Judge, Mathura, forthwith for ensuring compliance as above.

49. Costs easy.

(2023) 5 ILRA 699
APPELLATE JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 29.05.2023
BEFORE

THE HON'BLE DEVENDRA KUMAR
UPADHYAYA, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal Defective No. 354 of 2023

Azad Ahmad & Ors. ...Appellants
Versus
National Commission for Protection of
Child Rights (N.C.P.C.R.) & Ors.
...Respondents

Counsel for the Appellants:
Gauri Shankar Maurya, Adil Hussain

Counsel for the Respondent:
Rakshit Raj Singh, A.S.G.I., C.S.C.

A. Service Law – Entertaining larger public interest issues in a writ petition - In case any petition is filed and the Bench comes to the conclusion that it involves some issues relating to Public Interest, the Bench may not entertain it as a PIL but the Court has its option to convert it into a public interest litigation and ask the Registry to place it before a Bench which has jurisdiction to entertain the PIL as per Rules. (Para 25)

In view of the aforesaid, Registry is directed to register the PIL as a separate case and place it before Hon'ble the Chief Justice for appropriate direction or before the appropriate PIL Bench. (Para 26)

Special appeal disposed of. (E-4)

Precedent followed:

1. Dinesh Kumar Singh @ Sonu Vs St. of U.P. & ors., Writ Petition No. 2599 (MB) of 2014, decided on 05.01.2017 (Para 10)

2. St. of U. P. & ors. Vs Neeraj Chaubey & ors., (2010) 10 SCC 320 (Para 25)

Present intra-Court appeal arises out of the proceedings drawn by the learned Single Judge in Writ-A No. 2474 of 2023 wherein two orders, namely, the order dated 17.05.2023 and the other order dated 27.03.2023 have been passed. By the order dated 17.05.2023, intervention application moved by the NCPCR has been allowed and the NCPCR has been permitted to intervene in the proceedings.

(Delivered by Hon'ble Devendra Kumar
Upadhyaya, J.
&
Hon'ble Om Prakash Shukla, J.)

1. Office has reported a delay of 28 days in filing the Special Appeal.

2. Having regard to the averments made in the affidavit filed in support of the application seeking condonation of delay in filing the Special Appeal and having heard learned counsel for the parties, we are satisfied that the delay has sufficiently been explained.

3. Accordingly, the application is **allowed** and the delay in preferring the Special Appeal is hereby condoned.

4. Heard Sri V. K. Singh, learned Senior Advocate assisted by Sri M. A. Ausaf, Sri Sankalp Narain, Sri G.S. Maurya, Sri Srivats Narain, Sri Adil Hussain, Sri B. P. Tiwari and Sri Ayush Tandon for the appellants, Ms. Swarupama Chaturvedi, learned counsel appearing for respondent No.1-National Commission for Protection of Child Rights (NCPCR), Sri R. C. Tiwari, learned Counsel representing the Union of India and learned State Counsel representing the State-respondents.

5. This intra-Court appeal arises out of the proceedings drawn by the learned

Single Judge in Writ-A No. 2474 of 2023 wherein two orders, namely, the order dated 17.05.2023 and the other order dated 27.03.2023 have been passed. By the order dated 17.05.2023, intervention application moved by the NCPCR has been allowed and the NCPCR has been permitted to intervene in the proceedings. The learned Single Judge has further observed in para - 4 of the said order that the matter is of wide ramification and some importance. Para - 4 of the said order dated 17.05.2023 is quoted as under:-

"4. The matter is of wide ramification and some importance and outcome of this case will effect the education system as well as the rights of the children studying in Madaras. Therefore, this Court appoints Sri S. M. Singh Raikwar, Advocate, as amicus curiae to assist the Court in the matter."

6. While passing the order dated 27.03.2023, learned Single Judge has directed the Central as well as State Governments to file their responses, in the following words:-

"Let the Central Government and State Government file their affidavits explaining that how on Government expense or the funding provided by the Government Exchequer religious education be imparted and whether this could be in violation of Articles 14, 25, 26, 29 and 30 of the Constitution of India."

7. The order dated 27.03.2023 further recites as under:-

"The affidavits of the Central Government from the Secretary, Ministry of Minority Affairs, Government of India and State Government from the Principal

Secretary, Department of Minority Welfare and Waqf, Government of Uttar Pradesh should be filed answering the petition and aforesaid questions within a period of six weeks from today."

8. Submission of the learned Senior Advocate representing the appellants is that from a perusal of the two orders dated 27.03.2023 and 17.05.2023 passed by the learned Single Judge, it is apparent and more than clear that apart from considering the issue raised primarily in the writ petition, learned Single Judge also intends to consider the issues having wider ramification and some importance and that outcome of the writ petition will effect the education system as well as the rights of the children studying in Madarsas. His submission, thus, is that it is apparent that the learned Single Judge intends to clearly embark upon a journey to adjudicate the issue of larger public interest which has cropped up before him during the pendency of the case, having due regard to the nature of grievances raised by the writ petitioner and the prayers made therein.

9. Drawing our attention to the prayer clause of the writ petition, it has been stated by the learned Senior Advocate that the writ petition was filed by the writ petitioner seeking a direction to the respondents therein to release his withheld salary and to pay him regular salary as admissible to him under law. The prayers made in the writ petition are extracted here-in-below:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may graciously be pleased:

(A) to issue a Writ, Order or Direction in the nature of mandamus commanding the Opposite Parties to release the entire withheld salary to the

Petitioner and to pay him regular salary as admissible to him under the law."

(B) to issue such other Writ, Order or Direction as this Hon'ble Court may deem just and proper in the facts and circumstances of the case.

(C) to award the cost of the Writ Petition."

10. Thus, it has been argued by the learned Senior Advocate that apart from considering the prayers made in the writ petition on the basis of pleadings made by the writ petitioner, if certain issues relating to larger public interest crops up, this Court either sitting singly or in division benches is not precluded from taking cognizance of such issues, however, in that eventuality the law laid down by Full Bench of this Court in the case of ***Dinesh Kumar Singh @ Sonu vs. State of U.P. & Ors. decided on 05.01.2017 [Writ Petition No. 2599 (MB) of 2014]*** has to be followed. According to learned Senior Advocate, in such a situation that part of the matter which touches upon or which needs to be addressed in larger public interest has to be referred to Hon'ble the Chief Justice for being referred to the Division Bench dealing with the Public Interest Litigation.

11. In this view, submission of learned Senior Advocate is that no party to the proceedings before the learned Single Judge may have any grievance, whatsoever, if the matters directly or tangentially touching the issues of general public interest are taken up, however, in such a situation recourse needs to be taken to the law laid down by the Full Bench in the case of ***Dinesh Kumar Singh @ Sonu (supra)***.

12. Learned State Counsel submits that the State Authorities have been directed to file counter affidavit in the

proceedings of the writ petition which shall be filed once it is ready.

13. Learned Counsel representing the Union of India Sri R. C. Tiwari has submitted that counter affidavit on behalf of Union of India was prepared and it was to be filed as well, however, considering the order dated 17.05.2023 passed by the learned Single Judge, he has instructions to pray for more time for preparation of the counter affidavit. However, he does not deny that Public Interest elements in the matter have arisen as are apparent from a perusal of the orders dated 27.03.2023 and 17.05.2023 passed by the learned Single Judge.

14. Learned Counsel representing NCPCR Ms. Swarupama Chaturvedi has submitted that NCPCR has sought its intervention in the matter only on account of the fact that certain anomalies and discrepancies relating to rights of the children in Madarasas have been noticed by the NCPCR. She has categorically stated that NCPCR has nothing to do with the original lis amongst the writ petitioner, the management of the Madarasas and the State authorities though the NCPCR has been taking up the matter relating to children rights involved with the State Government as well.

15. Having submitted as above, learned counsel for NCPCR has also stated that learned Single Judge has yet to form its opinion as to whether the issues concerning larger public interest have cropped up or arisen in the matter pending before him or not, which will be better decided once the response from all the parties are filed before the writ Court.

16. It has also been stated that it is only on 17.05.2023 that the learned Single

Judge has appointed an amicus in the matter and as to whether the issue relating to larger public interest which has arisen needs to be referred to appropriate Bench of this Court in terms of the law laid down by the Full Bench of this Court in the case of **Dinesh Kumar Singh @ Sonu (supra)** may be decided by the learned Single Judge.

17. Learned amicus appointed in the proceedings of the writ petition has also submitted that in a matter like this, two courses are available before the Bench in a matter where apart from the regular lis between the parties some issues concerning general public interest also arise.

18. Leaned amicus thus has submitted that first course is to refer the Public Interest element arising in any matter straightaway in terms of the Full Bench decision in the case of **Dinesh Kumar Singh @ Sonu (supra)** and the second course is such a reference may be made after inviting the responses from the parties not only in relation to the issue raised originally in the writ petition but also in relation to the issues concerning the larger public interest. Thus, in his submission he has urged that a perusal of the order dated 27.03.2023 and 17.05.2023 passed by the learned Single Judge reveals that it is only a prima facie view which has been formed by the learned Single Judge that in the writ petition pending before him certain issues relating to larger public interest have arisen, however, learned Single Judge has yet to form his final opinion in the matter as to whether issues of general public interest have arisen before him or not. Accordingly, his submission is that the matter at this stage may be left to be decided by the learned Single Judge.

19. Ordinarily against interlocutory orders passed by learned Single Judge, intra-Court appeal under Chapter VIII Rule 5 of the Rules of the Court would not be maintainable, however, since in this case the issue raised by the appellants touches upon the very jurisdiction of the learned Single Judge, we have entertained this Special Appeal.

20. We completely agree with the order passed by the learned Single Judge where he has expressed his opinion that the matter at hand requires consideration not only from the point of view of the prayers made by the writ petitioner but also from the point of view as to whether the funding by the State Exchequer of the institutions imparting religious instructions is violative of Articles 14, 25, 26, 29 and 30 of the Constitution of India. It is in this context that we also agree with the learned Single Judge where NCPCR, which is a statutory commission incorporated primarily for overseeing protection of children rights, as intervenor. If any issue which has wide ramification concerning the education system as also the rights of children being imparted education and such institutions, there cannot be any quarrel that such issue does involve larger public interest and in this appropriate case if cognizance of such issue apart from the issues concerning the Writ Petitioner, has been taken up by the learned Single Judge, no one can have any objection to the same.

21. It is in this context only that we find that the learned Single Judge has rightly called upon the Central Government as also the State Government to file their responses not only to the issue raised by the writ petitioner but also to the issue relating to the larger public interest as is reflected from the orders dated 27.03.2023 and

17.05.2023. We have no doubt in our mind, whatsoever, that there is a clear intent in the proceedings of the writ petition that apart from the issue relating to the writ petitioner claiming payment of salary the issue of larger public interest has also to be considered and agitated.

22. However, the question is as to whether in such a situation the larger public interest issues can be entertained by the same Bench or the matter needs to be referred to the PIL Bench as per the law laid down by the Full Bench of this Court in the case of ***Dinesh Kumar Singh @ Sonu (supra)***.

23. Before the Full Bench in the case of ***Dinesh Kumar Singh @ Sonu (supra)***, the following question was formulated for its consideration:-

"Whether a Judge of Hon'ble High Court sitting alone or Judges sitting in a Division Bench hearing any matter in his/their determination assigned by Hon'ble the Chief Justice, can overstep into the determination of another Bench, if any issue or question arises in the matter including a question in public interest, which is not connected to the matter before him/them, and which in his/their opinion is necessary to be decided, and further in such case where in his/their discretion it is necessary to decide such question, what should be the procedure to be adopted."

24. The Full Bench has answered the said question in para - 15 which is also extracted hereunder:-

"15. In the circumstances, we hold that a Judge of the High Court sitting alone or Judges sitting in a

Division Bench, hearing any matter in his/their determination assigned by the Chief Justice, cannot overstep into the determination of another Judge sitting alone or in a Division Bench. If any such issue or question arises in the matter including a question in public interest which is not connected with the matter before him/them and which in his/their opinion is necessary to be decided, in that situation the only option open to the learned Judge or the Division Bench is to direct the Registry to place the matter before the Chief Justice for appropriate directions or before the appropriate PIL Bench and, in any case, should not convert such a writ petition into a PIL. The question is, thus, answered accordingly in the negative."

25. We may also refer to a judgment of Hon'ble Supreme Court in the case of **State of Uttar Pradesh and others v. Neeraj Chaubey and others** reported in [(2010) 10 SCC 320]. Paragraph 10 of the judgment in the said case, Hon'ble Supreme Court has observed that in case any petition is filed and the Bench comes to the conclusion that it involves some issues relating to Public Interest, the Bench may not entertain it as a Public Interest Litigation but the Court has its option to convert it into a public interest litigation and ask the Registry to place it before a Bench which has jurisdiction to entertain the PIL as per Rules. Para - 10 of the said judgment is extracted here-in-below:-

"10. In case an application is filed and the Bench comes to the conclusion that it involves some issues relating to Public Interest, the Bench may not entertain it as a Public Interest Litigation but the court has its option to convert it into a public interest litigation

and ask the Registry to place it before a Bench which has jurisdiction to entertain the PIL as per the Rules, guidelines or by the roster fixed by the Chief Justice but the Bench cannot convert itself into a PIL and proceed with the matter itself."

26. In view of the aforesaid and having regard to the conclusion drawn by the Full Bench of this Court in the case of **Dinesh Kumar Singh @ Sonu (supra)**, we direct the Registry to register the PIL as a separate case and place it before Hon'ble the Chief Justice for appropriate direction or before the appropriate PIL Bench.

27. The Special Appeal, thus, stands *disposed of* in the aforesaid terms.

(2023) 5 ILRA 704

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 19.08.2023

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Writ-C No. 18588 of 2015

Meena Devi		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:
Sri D.P. Singh

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

Civil Law - Uttar Pradesh Panchayati Raj Act, 1947- Section 28 - U.P. Zamindari Abolition and Land Reforms Act, 1950- Section 122-Impugned order-allotment of Patta in Petitioner's favour cancelled-Revision dismissed-Review also rejected-bar under section 28 (C) of the Act-safeguard to avoid

nepotism-Petitioner unable to produce any evidence that she is eligible for patta u/s 122 (c) of Act, 1950-no need to enquire whether allotment to petitioner being daughter in law of pradhan is illegal-allotment was not correct-

W.P. dismissed. (E-9)

List of Cases cited:

1. Vidyawati Vs Gaon Sabha (1982 Law Suit Allahabad 684),

2. St. Vs Pran Shankar, 1981, (2)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. The impugned order dated 03.08.1996 was passed by the Additional Collector, Kanpur Dehat whereby the allotment of Patta in favour of the petitioner was cancelled. The other impugned order dated 26.05.2003 was passed by Additional Commissioner, Kanpur Division, Kanpur whereby the Revision filed against the order dated 03.08.1996 was dismissed and the third impugned order is dated 13.11.2014 whereby the review application filed by the petitioner was also rejected by the Additional Commissioner, Kanpur Division, Kanpur.

2. Shri D.P. Singh, learned counsel appearing on behalf of the petitioner has submitted that plot No.183, measuring area of 0.41, hectare situated in village - Nadihakhurd, Tehsil - Bilhaur, District - Kanpur Nagar was allotted to the petitioner and her name has also been recorded in revenue records on 30.12.1994 as Bhumidhar with non transferable rights. On the basis of complaint filed by one Shravan Kumar for cancellation of Patta, a case was registered under Section 198(4) of the U.P. Zamindari Abolition and Land Reforms

Act, 1950 (hereinafter referred as "the Act of 1950") and a notice dated 06.12.1995 was issued to the petitioner. When the petitioner opted not to appear, the concerned District Collector considered the report of the Tehsildar wherein it was mentioned that before the allotment of Patta, permission of the concerned authority was not taken. Therefore, the Collector passed order dated 03.08.1996 cancelling the said patta.

3. The petitioner moved a Revision Petition No.272 of 2002, under Section 333 of the Act of 1950, however, the same was also dismissed by Additional Commissioner Kanpur Division, Kanpur on the ground that at the time of allotment of Patta, the father-in-law of the petitioner was holding the post of Pradhan of Gram Panchayat and in terms of Section 28 (C) of the Uttar Pradesh Panchayati Raj Act 1947 (hereinafter referred as "the Act of 1947") before granting Patta to any relative prior written permission of the concerned Collector was required. However, in the present case, no such permission was taken. The petitioner had also moved a recall application on 18.02.2019 to recall the order dated 26.05.2003 however, the same was rejected on the ground that order dated 26.05.2003 was passed after giving an opportunity of hearing to the petitioner. In these circumstances, the petitioner has approached this Court challenging the impugned orders. This Court, vide order dated 23.04.2015 passed the following order:-

"Heard Sri D.P. Singh, learned counsel for the petitioners, learned Standing Counsel appearing for the State-respondents and Sri Brij Kumar Yadav, learned counsel for the Gaon Sabha.

Issue notice.

Notices on behalf of respondent nos. 1 to 3 have been accepted by the office of learned Chief Standing Counsel, whereas Sri Brij Kumar Yadav has put in appearance on behalf of respondent no. 4. Therefore, notices need not be served again to the respondents.

Learned counsel for the respondents are granted six weeks time to file counter affidavit. Rejoinder affidavit, if any, may be filed two weeks thereafter. List thereafter.

As an interim measure, without prejudice to right and contention of the parties, till the next date of listing, no third party right shall be created by the parties over the land in dispute."

4. Learned counsel appearing on behalf of the petitioner has not denied the fact that petitioner's father-in-law was holding the post of Pradhan at the relevant time. However, learned counsel for the petitioner submitted that such relationship is not hit by Section 28 (C) of the Act of 1947 and for this purpose, learned counsel for the petitioner relied upon the judgment passed by this Court in **Vidyawati versus Gaon Sabha (1982 Law Suit Allahabad 684)**, **State Vs. Pran Shankar, 1981, (2)** and the relevant part of the judgments are reproduced hereinafter:-

(i). Vidyawati versus Gaon Sabha:-

"(5) The learned Counsel argued that merely because the allottees were the son and the daughter of the Pradhan, it could not be said that the Pradhan acquired or attempted to acquire the lease for himself or through a partner or otherwise. I feel that he is right. If the allotment was in favour of the Pradhan even indirectly that would be covered by the Section. In this case the allotment was

in favour of a widowed daughter who had ceased to be a member of the family of Pradhan and a major son who could not be said to be his appendage. Had he been a minor son or his wife or transaction would have been benami in some-body's name for the benefit of the Pradhan, only in that case the "permission required under the Section aforesaid should have been taken. In the instant case the courts below should have examined the provisions of section itself before presuming that the allotment in favour of the son or daughter of the Pradhan would be an allotment for the benefit of the Pradhan himself. I accordingly agree with the learned Counsel for the Appellant that in the present case the allotment was not hit by the provisions of Section 28-C of the U.P. Panchayat Raj Act."

(ii). State Vs. Pran Shankar:-

"Nowhere there is a provision in section 28-C of the Panchayat Raj Act that a relative of Member of the L.M.C. will not have any interest in the property of Gaon Sabha. The only prohibition was made against the Member acquiring any interest in L.M.C. property for himself either directly or through a partner or otherwise. If it is proved from the circumstances of any case that a Member of the L.M.C. has acquired for himself either directly or through his partner or through his relative an interest in any property belonging to the L.M.C. the said acquisition will be treated as void. But if the member does not acquire the property for himself either directly or through partner etc. the lease in respect of the L.M.C. property will not be cancelled as irregular. If the legislature had intended that relatives of Members of the L.M.C. could not acquire L.M.C. property there was no hitch for not enacting such a provision in Section 28-C Panchayat Raj Act. The absence of such a provision in

Section 28-C Panchayat Raj Act shows that the legislature never intended that relatives of Members of the L.M.C. could not acquire L.M.C. property."

5. Learned Standing Counsel appearing on behalf of the respondent has opposed the submissions made by learned counsel for the petitioner and submitted that the petitioner's father-in-law was Gram Pradhan at the relevant time when the allotment of Patta was executed in favour of the petitioner. Therefore, it is barred under Section 28 (C) of the Act of 1947 as it is akin to acquire the interest. The scope of the Section 28 (C) of the Act of 1947 is very wide and the word "otherwise" has been mentioned which clearly include such relations. Hence, the impugned orders are legally correct and there is no infirmity in the impugned orders. Therefore, this petition is liable to be dismissed.

6. Considered the submissions made at Bar and perused the record. For reference, Section 28-C of "the Act of 1947" is reproduced hereinafter:-

"28-C. Members and officers not to acquire interest in contract etc., with Bhumi Prabandhak Samiti - (1) No member of office bearer of [Gram Panchayat] or Bhumi Prabandhak Samiti shall, otherwise than with the permission in writing of the Collector, knowingly acquire or attempt to acquire or stipulate for or agree to receive or continue to have himself or through a partner or otherwise any share or interest in any licence, lease, sale exchange, contract or employment with, by or on behalf of the Samiti concerned;

Provided that a person shall not be deemed to acquire or attempt to acquire or continue to have or stipulate for or agree to receive any share or interest in

any contract or employment by reason only of his -

(a) having acquired any interest before he became a member or office bearer;

(b) having a share in a joint stock company which makes the contract; and

(c) having a share or interest in the occasional sale through the Samiti concerned of an article in which he regularly trades upto a value not exceeding Rs. 50 in any one year.

(2) No court or other authority shall enforce at the instance of any person a claim based upon a transaction in contravention of the provisions of subsection (1)."

7. There is no dispute that the allotment was made in favour of the petitioner on 30.12.1994 when the father-in-law of the petitioner was holding the post of Pradhan of the Gram Panchayat. The Patta was cancelled within a short period by the Additional District Magistrate Kanpur, on the ground that prior permission was not taken in terms of Section 28 (C) of the Act of 1947 on 3.8.1996. The said Patta was issued to the petitioner on the ground that petitioner is a landless agricultural labourer. However, the petitioner has failed to produce any document or evidence in support of this fact even there is no averments in the writ petition to show that how the petitioner falls under the category of landless agriculture labourer.

8. The contention of learned counsel for the petitioner is that the petitioner, who is the daughter-in-law of the Pradhan was living separately and his father-in-law has not created any interest in the said land as well as the relation of daughter-in-law is not barred by Section 28 (C) of the Act of

1947. It is further submitted that in the **Vidyawati (supra)** wherein it has been held that in case allotment to widow-daughter, son or daughter of Pradhan would not be treated as allotment of the benefit to himself then such allotment would not be hit by the provision of Section 28 (C) of the Act of 1947. In another case of **Pran Shankar (supra)** wherein it has been held that if a member of the Panchayat does not acquire property for himself either directly or through partner, it would not be considered as irregular.

9. Bare perusal of the Section 122 (C) of the Act of 1950 would show that the entire provision has been enacted in respect of allotment of land for housing site for the members of scheduled castes, scheduled tribes and agriculture labourer etc. The purpose of the said Section is to provide land for housing for person belonging to poor strata, and for that, entire scheme has been framed under the said Section. It is a piece of welfare legislation and first requirement to become eligible for such allotment is to fall under the categories mentioned in the said Section which include to live below the poverty line "and to be" an agriculture labourer. In the present case there is no evidence that the petitioner falls under any of the category mentioned above. The petitioner has failed to produce any document or evidence to show that she falls within any of the category mentioned under Section 122 (C) of the Act of 1950.

10. The bar under Section 28 (C) of the Act of 1947 is a further safeguard in order to avoid nepotism and to restrict members and officers of the Gram Panchayat to grant favour to their relatives by allotting Patta even though they are not eligible for the said Patta. It is further relevant to note that any Patta allotted to

ineligible person would deprive rightful claim of an eligible person. In the judgment passed by this Court in the **Vidyawati (supra)** it has been held that even the allotment for father of the son or daughter of the Pradhan would not itself be barred without determination that interest has been created by the Pradhan for himself, however, matter was remanded in court below on the issue of process undertaken during allotment.

11. In the present case, the petitioner has not been able to produce any evidence that she is eligible for Patta under Section 122 (C) of the Act of 1950. Therefore, there is no need to enquire whether the allotment to the petitioner being daughter-in-law of Pradhan is illegal as it would be of no consequence. The allotment to the petitioner was not correct. At least for the sake of precaution before the allotment, a request ought to have been made to the Collector when the petitioner is being daughter-in-law of Pradhan at the time when the allotment was made so that an inquiry be conducted before such allotment as it is the Collector who is competent authority to grant permission in such cases. It is to take note that any illegal allotment would lead to deprivation of a right of landless labourer which is against the Scheme of Section 122 (C) of the Act of 1950.

12. In view of the above discussions, the benefit of the judgments relied upon by learned counsel for the petitioner cannot be granted to the petitioner as the petitioner has even failed to establish her eligibility for allotment of land under Section 122 (C) of the Act of 1950.

13. Accordingly, this writ petition is **dismissed**. Interim order, if any, stands vacated.

(2023) 5 ILRA 709
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 20577 of 2016

L.I.C., Gorakhpur & Anr. ...Petitioners
Versus
Permanent Lok Adalat, Azamgarh & Anr.
...Respondents

Counsel for the Petitioners:

Sri Prateek J. Nagar, Sri J. Nagar (Sr. Advocate)

Counsel for the Respondents:

Sri Sunil Kumar Singh, Sri J.P. Singh, S.C.

A. Civil Law - Insurance Act, 1938 - Section 45 - Insurance Claim-Award of-Validity- Corporation repudiated the claim of respondent on account of the wrong declaration made in the proposal form-contract of insurance being one of utmost good faith, repudiation was rightly done by the L.I.C. for breach of utmost good faith and payment of premium by the brother of respondent and revival of policies by the L.I.C. has no relevance qua the repudiation of policy- on account of misstatement made by the deceased life-assured in reply to the questions in the proposal form with regard to his previous ailment, the life-assured had suppressed the facts, which were material for him to disclose-When medical opinion furnished by the Doctor of Corporation, clearly establish that cause of death had absolutely no relation with fever suffered by assured one year ago-therefore, non-disclosure of such a fever cannot be treated as suppression of material fact while deciding claim made by the respondent-Thus, the amount deposited by the Life Insurance Corporation under the said interim order shall positively be

released in favour of respondent within a period of two months.(Para 1 to 67)

B. Section 45 of the Insurance Act authorizes the L.I.C. to repudiate the claim on the ground of fraud, misrepresentation, or concealment of fact-Since the contract of insurance is a contract of utmost good faith, everything starts from submission of proposal form issued by the Insurance Company. The proposal form issued by the L.I.C. contains a declaration that the statements made in the form are true and correct to the best of the knowledge of the insured. Accordingly, the proposer/insured should not hide any fact in the proposal form. If the insured gives wrong information in the proposal form, the contract of insurance is vitiated.(Para 5)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Om Prakash Agarwal thru L.R. & ors. Vs Vishan Dayal Rajpoot & anr. (2019) 14 SCC 526
2. Subhash Mahadevasa Habib Vs Nemasa Ambasa Dharmadas (Dead) by LRs. & ors. (2007) 13 SCC 650
3. R.S.D.V. Finance Co. Pvt. Ltd. Vs Shree Vallabh Glass Works Ltd (1993) 2 SCC 130
4. Appat Krishna Poduval Vs Lakshmi Nathiar & ors. (1950) AIR (37) Madras 751
5. Kumaran Nambiar Vs Ramunni (1998)AIR 25 Mad. 257
6. Kiran Singh & ors. Vs Chaman Paswan & ors. (1954) AIR SC 340
7. Koopilan Uneen's daughter Pathumma & ors. Vs Unee's son Kuntalan Kutty (dead) by LRs &Ors (1981) AIR SC 1683
8. Harshad Chiman Lal Modi Vs D.L.F. Universal Ltd. & anr. (2005) AIR SC 4446

9. Surendra Mahanti Vs Ghasiram Mahanti & ors. (1996) AIR Ori.

10. Ajay Singh (deceased by Lrs.) & etc. Vs Tikka Brijendra Singh & ors. etc. (2007) AIR H.P. 52

11. ARCE Polymers Pvt Ltd Vs Alphine Pharmaceuticals Pvt Ltd & ors. (2022) 2 SCC 221

12. Krishna Bahadur Vs M/s Purna Threatre & ors. (2004) AIR SC 4282

13. M/s Power Control Appliance & ors. Vs Sumeet Machines Pvt. Ltd. (1994) 2 SCC 448

14. Rodgers Vs Nowill (1847) 2 De GM &G 614

15. Tufan Chatterjee vs Rangan Dhar (2016) AIR Calcutta 213

16. ARCELOR Mittal Nippon Steel India Ltd Vs Essar Bulk Terminal Ltd (2022) 1 SCC 712 para 38

17. Bar Council of India Vs U.O.I. (2012) 8 SCC 243

18. M.P. St. Legal Services Authority Vs Prateek Jain & anr. (2014) 10 SCC 690

19. Inter Globe Aviation Ltd. Vs N.Satchidanand (2011) 7 SCC 463

20. SBI, Dhanbad Vs St. of Jharkhand & anr. (2009) 2 AIR Jhar R 970

21. Mithoolal Nayak Vs LIC, India (1962) AIR SC 814

22. Smt. Krishna Wanti Puri Vs LIC, India, Div. Officer, New Delhi & anr. (1975) AIR Delhi 19

23. Canara Bank Vs G.S. Jayarama, Aironline (2022) SC 835

24. LIC Vs Syed Zaigham Ali& anr. (Writ-C No. 39879 of 2015)

25. LIC, India & anr. Vs PLA & anr. (2018) ADJ Online 0484

26. Nitin Kumar Vs Oriental Ins. Co. Ltd. & ors. (Writ C No. 28999 of 2013)

27. Mithoolal Nayak Vs LIC India (1962) AIR SC 814

28. Smt. Krishna Wanti Puri Vs LIC, India, Div. Officer, New Delhi & anr. (1975) AIR Delhi, 19

29. Sulbha Prakash Motegaonkar & ors. Vs LIC, India Civil Appeal No. 8245 of 2015 (SLP(C)No. 13589 of 2015)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. The instant writ petition has been filed by the Life Insurance of India (herein-after referred to as "L.I.C."), challenging the impugned judgement and award dated 15.02.2016, whereby the Permanent Lok Adalat (herein-after referred to as "P.L.A.") has allowed the claim made by respondent No. 2 directing the L.I.C. to pay to the claimant-respondent a sum of Rs. 14,00,000/- (rupees fourteen lacs only) along with interest @ 9% per anum as covered by the Insurance Policy held by the insured, who was real brother of the claimant-respondent.

2. In short compass, the facts of the case, as pleaded in the writ petition, are that Thakur Prasad Singh, the brother of respondent No. 2, aged 47 years, was insured with the L.I.C. under Policy No. 297170129 dated 28-11-2011. Proposal of the said insured was accepted by the L.I.C. and Policy No. 297170129 dated 28-11-2011 was issued to him towards insurance of his life. Unfortunately, Thakur Prasad Singh died on 10-09-2012.

3. On receipt of information about the death of Thakur Prasad Singh, along with the claim papers, the L.I.C. made enquiries in the matter, whereupon, it stood revealed that prior to submitting the proposal for

Policy No. 297170129 dated 28-11-2011, the assured was suffering from Enteric Fever and Urinary Tract Infection and was being treated for the same in Chitransh Hospital and Surgical Care Centre, Shivpur, Varanasi. Accordingly, the L.I.C., by its letter dated 28-11-2013, repudiated the claim of the respondent No.2.

4. After the claim was repudiated, respondent No.2 filed a Case No. 406 of 2014, (Kali Prasad Singh versus Life Insurance Corporation of India and others) before the Permanent Lok Adalat at Azamgarh for recovery of a sum of Rs.14,00,000/- (rupees fourteen lac only) towards death claim of Late Thakur Prasad Singh.

5. Having coming to know about the filing of complaint, the L.I.C. filed its reply in the matter denying the averments made by respondent No.2 in his application and stating therein that the Corporation had repudiated the claim of respondent No.2. on account of the wrong declaration made in the proposal form. It was further stated that the contract of insurance being one of utmost good faith (uberima-fide), repudiation was rightly done by the L.I.C. for breach of utmost good faith and payment of premium by the brother of respondent No.2 and revival of policies by the L.I.C. has no relevance qua the repudiation of policy. It was further stated that Section 45 of the Insurance Act authorizes the L.I.C. to repudiate the claim on the ground of fraud, misrepresentation or concealment of fact. Since the contract of insurance is a contract of utmost good faith, everything starts from submission of proposal form issued by the Insurance Company. The proposal form issued by the L.I.C. contains a declaration that the statements made in the form are true and

correct to the best of the knowledge of the insured. Accordingly, the proposer/insured should not hide any fact in the proposal form. If the insured gives wrong information in the proposal form, the contract of insurance is vitiated. Further, on account of misstatement made by the deceased life-assured in reply to the questions in the proposal form with regard to his previous ailment, the life-assured had suppressed the facts, which were material for him to disclose. Accordingly, the contract of insurance became void and nothing was payable to the respondent No.2. It was further stated that the L.I.C. was not willing to settle the matter with the claimant.

6. After the parties led evidences in support of their respective claim and defence, the P.L.A., Azamgarh, by impugned judgment and award dated 15.02.2016, has allowed the claim and directed the L.I.C. to pay to the claimant-respondent a sum of Rs. 14,00,000/- (rupees fourteen lac only) along with 9% interest per anum as covered by Insurance Policy.

7. A counter affidavit has been filed by the claimant-respondent No. 2 stating that his brother was insured with the L.I.C. under Policy No. 297170129 dated 28-11-2011 and before the said policy was issued, respondent's brother, Thakur Prasad Singh was thoroughly examined by the Doctor of the Corporation on 23rd of November, 2011. It is further stated that after the claim papers were submitted before the L.I.C., it, instead of allowing the claim, directed to conduct an enquiry. The said enquiry is shown to have been made on 10-12-2013 and, to make out a ground for repudiating the claim, the Enquiry Officer mentioned that prior to submitting the proposal for

Policy dated 28-11-2011, the deceased (life assured) was suffering from Enteric Fever and Urinary Tract Infection and he was being treated for some time in Chitransh Hospital and Surgical Care Centre, Shivpur, Varanasi. The illness cited in the report has nothing to do with the lawful claim for the reason that the brother of respondent No.2 was insured with the L.I.C. after thorough medical examination/check-ups conducted by the Doctors of L.I.C.

8. It is further stated in the counter affidavit that the basic object of the contract of insurance is to insure the life of the assured and the element of utmost good faith is equally applicable to the Corporation. Here, the Corporation, on its own, presumed that there was a breach of good faith, while there was no breach of good faith, and the fact of the matter is that the brother of the respondent No.2 was insured after thorough medical check-up and the death was not on account of any prolonged illness, therefore, the order repudiating the claim of respondent No.2 was wholly illegal.

9. It is further stated in the counter affidavit that the life assured did not give any misstatement. So far as previous ailments are concerned, the assured is not required to give details of all previous ailments, like Typhoid and Fever etc. The purpose of disclosure is to inform the serious disease, if any. Moreover, self-declaration of assured is not sufficient for insurance. The Corporation before issuing policy, conducts medical examination of the person seeking insurance. Here, in the given case, the brother of respondent No.2 was medically examined by the Doctors of L.I.C. on 23-11-2011 and taking into account the said medical report, policy was

issued. There was no suppression by the life-assured. It is usually seen that Insurance Corporation, instead of allowing the claim of the life-assured, takes a number of objections. Here, in the given case also the Corporation illegally and arbitrarily repudiated the claim of respondent No.2 on the basis of the report of his officer, which was not at all accepted by the respondent No.2.

10. The petitioner has filed a rejoinder affidavit. Insofar as the pleadings contained in paragraph 5 of the counter affidavit to the effect that the insured was thoroughly examined by the Doctor of the Corporation on 23.11.2011, whose medical examination report is annexed as annexure No. CA-1 to the counter affidavit, are concerned, it has been stated in paragraph No. 7 of the rejoinder affidavit that the averments made in paragraph No. 5 of the counter affidavit are not admitted as they stand, and the respondent No. 2 is put to strict proof of the averments made therein. It is stated in paragraph No. 7 that the deceased life-assured was examined by the Doctor of the L.I.C., is of no help to respondent No. 2. However, pleadings contained in rejoinder affidavit are substantially reiteration of the contention raised through the writ petition.

11. I have heard Shri J. Nagar, learned Senior Advocate assisted by Shri Pratik J. Nagar, learned counsel for the petitioners and Shri J.P. Singh, learned counsel for respondent No. 2.

12. Shri J. Nagar, learned Senior Advocate has raised the following **THREE ISSUES/CONTENTIONS** for consideration by this Court in the present writ petition:

(1) The claim made by respondent No. 2 had a valuation of Rs.

14,00,000/- (rupees fourteen lac only) and, therefore, as per section 22C of the Legal Services Authorities Act, 1987, the P.L.A. had no jurisdiction to entertain and decide the case, because as per the second proviso to section 22 C (1) of the Act, the pecuniary limits of jurisdiction of the P.L.A. were confined to the matters, where the value of property in dispute was only Rs. 10,00,000/- (rupees ten lac only).

(2) The P.L.A. has failed to perform statutory duty cast upon it as per section 22 C (5) of the Legal Services Authorities Act, 1987, whereunder it was duty bound to hold conciliation proceedings before deciding the matter on merits.

(3) The claim of respondent No.2 was not entitled to be allowed as the deceased (insured) had, at the time of taking Insurance Policy, deliberately concealed his physical ailment, which subsequently stood revealed during the enquiry and, hence, the award of the P.L.A. is unsustainable.

13. This Court proceeds to deal with the aforesaid three contentions/issues as raised by Shri Nagar, learned Senior Advocate.

ISSUE/CONTENTION NO. 1 :-

14. Shri Nagar, learned Senior Advocate has, with reference to second proviso attached to section 22C (1) of the Legal Services Authorities Act, 1987, contended that the claim made before the P.L.A. was valued at Rs. 14,00,000/- (rupees fourteen lac only), whereas the pecuniary limits of jurisdiction of P.L.A. were restricted and confined upto claims of Rs. 10,00,000/- (rupees ten lac only) and, therefore, the impugned order is unsustainable.

15. To this argument of Shri Nagar, Shri J.P. Singh, learned counsel for respondent No. 2, has vehemently argued that the said contention cannot be allowed to be raised by the petitioner for two main reasons. First, as per section 21 of the Code of Civil Procedure (herein-after referred to as "C.P.C."), such objection to the pecuniary limits of jurisdiction of P.L.A. must have been taken before the court below itself at the earliest available opportunity, and once the same was not raised, either through any plea in the written statement or otherwise, the same cannot be allowed to be agitated before the writ court for the first time. Secondly, As per the Notification No. S.O. 803(E), dated 20.03.2015, issued by the Ministry of Law and Justice (Department of Justice), the pecuniary limits of jurisdiction of P.L.A. were enhanced from Rs. 10,00,000/- (ten lacs only) to Rs. 1,00,00,000/- (one crore only) with effect from the date of publication of the said Notification in the Official Gazette.

16. For a ready reference, section 21 of the Code of Civil Procedure and Notification No. S.O. 803(E), dated 20.03.2015 issued by the Ministry of Law and Justice (Department of Justice) are being respectively quoted herein-below:

"21. Objections to jurisdiction.-

(1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction

shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, unless there has been a consequent failure of justice."

Notification No. S.O. 803(E), dated 20.03.2015

In exercise of the powers conferred by the third proviso to sub-section (1) of Section 22-C of the Legal Services Authorities Act, 1987 (39 of 1987) and in supersession of the Government of India, Ministry of Law and Justice (Department of Legal Affairs), Notification Number S.O. 2083(E), dated the 15th September, 2011, published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i), dated the 15th September, 2011, the Central Government, in consultation with the Central Authority, hereby increases the limit of the value of the property in dispute for the purpose of determining the jurisdiction of Permanent Lok Adalat to **"one crore rupees" with effect from the date of publication of this notification in the Official Gazette.**"

17. Shri Nagar, learned Senior Advocate has argued on behalf of the petitioner that since by virtue of section 22-D of the Legal Services Authorities Act, 1987, the Code of Civil Procedure, 1908 shall not be applicable to the proceedings

under the said Act, the contention of Shri J.P. Singh to the effect that objection to the pecuniary limits of jurisdiction, if not raised at the initial stage, shall be treated to have been waived, is not acceptable.

18. Before dealing with the said argument of Shri Nagar, it would be appropriate to refer to section 22-D of the Legal Services Authorities Act, 1987 which, for a ready reference, is reproduced as follows:

"22-D. Procedure of Permanent Lok Adalat.- The Permanent Lok Adalat shall, while conducting conciliation proceedings or deciding a dispute on merit under this Act, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) and the Indian Evidence Act, 1872 (1 of 1872)."

19. The heading of the section 22-D speaks of **"Procedure of Permanent Lok Adalat"**. The necessary implication of the words used in section 22 D of the Act, is that Permanent Lok Adalat will adopt its own procedure while dealing with the case and the procedure prescribed for trial of suits, as contained in the Code of Civil Procedure, would not be applicable.

20. However, it would be appropriate to mention that **Code of Civil Procedure, though named as procedure, is divided into two parts, i.e. substantive part and the procedural part.** The substantive part of the Code of Civil Procedure contains sections 1 to 158, whereas the procedural part is spread from Order I to Order LI. **Section 21** of Code of Civil Procedure, as referred to herein above, regarding bar/stage of taking objections with regard

to pecuniary limits of jurisdiction, finds place in the "**substantive part**" of the Code of Civil Procedure and **not in the "procedural part"**. That is to say that section 22-D of the Legal Services Authorities Act, 1987 does not exclude applicability or significance of the substantive provisions of Code of Civil Procedure or their soul while considering any case, which is tried by Permanent Lok Adalat.

21. Even otherwise, section 22-D of the Act itself speaks that Permanent Lok Adalat shall be guided by the principles of Natural Justice, objectivity, fair play, equity and other principles of justice. In the opinion of this Court, words "**natural justice, objectivity, fair play and equity**" used in section 22-D of the Act, would mean that whatever objections are taken by any party to the litigation before the Permanent Lok Adalat, the rival parties must be aware of the same and must get an opportunity to rebut the same at appropriate stage. Meaning thereby, that a party cannot be taken by surprise and the objections, factual or legal, must be met during the course of the trial before the first court.

22. There is no dispute about the fact that the plea of alleged lack of pecuniary limits of jurisdiction of the P.L.A. was neither taken in the written statement nor was it otherwise raised on behalf of the petitioner, who was defendant in the proceedings before the P.L.A. Therefore, the effect of such omission would be fatal to the case of the petitioner, even if we ignore subsequent Notification dated 20th March, 2015, which was published in the Official Gazette on the same date as the argument of the learned Senior Advocate is to the effect that the case in reference was instituted prior to issuance of the said

Notification, and therefore, on the date of institution of proceedings, the P.L.A. was not competent to even register the case.

23. The Supreme Court, in the case of **Om Prakash Agarwal (since deceased) through L.R. and others vs Vishan Dayal Rajpoot and another**, reported in 2019 (14) SCC 526, has elaborately dealt with the effect of section 21 of C.P.C. upon proceedings with reference to the stage of objection to be raised in this regard. Paragraph Nos. 57, 58 and 59 of the said report are worth reproduction and, hence, are being reproduced as follows:

"57. The policy underlying Section 21 of Code of Civil Procedure is that when the case has been tried by a court on merits and the judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice. The provisions akin to Section 21 are also contained in Section 11 of the Suit Valuation Act, 1887 and Section 99 of the Code of Civil Procedure. This Court had the occasion to consider the principle behind Section 21, Code of Civil Procedure and Section 11 of the Suit Valuation Act, 1887 in Kiran Singh v. Chaman Paswan AIR 1954 SC 340. In para 7 of the judgment following was laid down: (AIR p. 342)

"7.... The policy underlying Sections 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate

court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained under Section 11 of the Suits Valuation Act."

58. One more submission which was raised in the said appeal was considered by this Court. One of the submissions of the appellant who had instituted the suit in the subordinate court was that as per the revised valuation, the appeal against the decree of the subordinate Judge did not lie before the District Court but to the High Court, hence, the judgment of the District Judge in appeal should be ignored. The appeal in the High Court be treated as first appeal. It was contended that appellant has been prejudiced in the above manner. Rejecting the above submissions, this Court laid down following in paras 11 and 12: (Kiran Singh case, AIR p. 343)

"11. ... This argument proceeds on a misconception. The right of appeal is no doubt a substantive right, and its deprivation is a serious prejudice; but the appellants have not been deprived of the right of appeal against the judgment of the Subordinate Court. The law does provide an appeal against that judgment to the District Court, and the plaintiffs have exercised that right. Indeed, the undervaluation has enlarged the appellants' right of appeal, because while they would have had only a right of one appeal and that to the High Court if the suit had been correctly valued, by reason of the undervaluation they obtained right to two appeals, one to the District Court and another to the High Court. The complaint of the appellants really is not that they had been deprived of a right of appeal against the judgment of the subordinate court,

which they have not been, but that an appeal on the facts against that judgment was heard by the District Court and not by the High Court. This objection therefore amounts to this that a change in the forum of appeal is by itself a matter of prejudice for the purpose of Section 11 of the Suits Valuation Act.

12. The question, therefore, is, can a decree passed on appeal by a court which had jurisdiction to entertain it only by reason of undervaluation, be set aside on the ground that on a true valuation that court was not competent to entertain the appeal? Three High Courts have considered the matter in Full Benches, and have come to the conclusion that mere change of forum is not a prejudice within the meaning of Section 11 of the Suits Valuation Act. Vide *Kelu Achan v. Cheriya Parvathi Nethiar* 1923 SCC Online Mad 356, *Moolchand Motilal v. Ram Kishen* 1933 SCC Online All 2, and *Ramdeo v. Raj Narain* 1948 SCC Online Pat 91. In our judgment, the opinion expressed in these decisions is correct."

59. The above principle has been reiterated by this Court in *Hira Lal Patni v. Kali Nath* AIR 1962 SC 199 and *Bahreini Petroleum Co. Ltd. v. P.J. Pappu* AIR 1966 SC 634."

24. Similar view has been taken by the Supreme Court in the case of **Subhash Mahadevasa Habib vs Nemasa Ambasa Dharmadas (Dead) by LRs. and others**, reported in 2007 (13) SCC 650, reference to paragraph No. 34 whereof can be made, which reads as follows:

"34. It may be noted that Section 21 provided that no objection as to place the suing can be allowed by even an appellate or revisional court unless such objection was taken in the court of first

instance at the earliest possible opportunity and unless there has been a consequent failure of justice. In 1976, the existing Section was numbered as sub- Section (1) and sub-Section (2) was added relating to pecuniary jurisdiction by providing that no objection as to competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection had been taken in the first instance at the earliest possible opportunity and unless there had been a consequent failure of justice. Section 21A also was introduced in 1976 with effect from 1.2.1977 creating a bar to the institution of any suit challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing. The amendment by Act 104 of 1976 came into force only on 1.2.1977 when O.S. No. 4 of 1972 was pending. By virtue of Section 97(1)(c) of the Amendment Act, 1976, the said suit had to be tried and disposed of as if Section 21 of the Code had not been amended by adding sub-Section (2) thereof. Of course, by virtue of Section 97(3) if Section 21A had to be applied, if it has application. But then, Section 21A on its wording covers only what it calls a defect as to place of suing."

25. Reference to another decision of the Supreme Court in the case of **R.S.D.V. Finance Co. Pvt. Ltd. Vs Shree Vallabh Glass Works Ltd**, reported in 1993 (2) SCC 130 , can also be made with reference to concept of **consequent failure of justice.**

26. Learned counsel for respondent No. 2 has also relied upon the judgment of Madras High Court in the case of **Appat Krishna Poduval vs Lakshmi Nathiar and**

others, reported in AIR (37) 1950 Madras 751, in which it was held as under:-

"8. The learned District Munsif has dealt with this aspect of the case elaborately and I do not think it necessary to reiterate the reasons which he has given for rejecting the contention relying on the following observations in **Kumaran Nambiar v. Ramunni**, 1988-1 M. D. J. 193: (A. I. R. (25) 1998 Mad. 257):

"To treat want of territorial or pecuniary jurisdiction as amounting to incompetency, seems incompatible with the idea underlying the two statutory provisions mentioned above (S. 11, Suita Valuation Act and S. 21, Civil P C.). These sections provide that even had the objection not been waived, that is to say, had been taken in the Court of first instance, the presence of a further element is essential, viz. that **there has been consequent failure of justice.** The principle that they appear to embody is that these defects of jurisdiction are not fundamental in character and are no more than irregularities in the exercise of jurisdiction."

9. In this case I do not see any justification for holding that there has been a failure of justice by reason of the claim not having been in respect of the entire amount due for all the three thavzahis but only in respect of two thavazhis represented by the plaintiffs and I do not see much substance in this point and especially when the petitioner who raised this point at the time of the trial but did not take it up in appeal."

27. Learned counsel for respondent No. 2 has also placed reliance upon the judgment of Supreme Court in the case of **Kiran Singh and others vs. Chaman Paswan and others**, reported in AIR 1954 SC 340 holding that-

.....
 "With reference to objections relating to **territorial jurisdiction**, section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a **consequent failure of justice**.

It is the same principle that has been adopted in section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying sections 21 and 99 of the Civil Procedure Code and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and **the policy of the Legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits.** The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained under section 11 of the Suits Valuation Act."

28. Further reliance has been placed reliance upon the judgment of the Supreme Court in the case of **Koopilan Uneen's daughter Pathumma and others vs Uneen's son Kuntalan Kutty (dead) by LRs and others**, reported in AIR 1981 SC 1683 as well as the judgment of Supreme Court in the case of **Harshad Chimani Lal Modi vs D.L.F. Universal Ltd. and another** reported in AIR 2005 SC 4446 wherein same view has been taken. He has also placed reliance upon the judgment of Orissa High Court in the case of **Surendra Mahanti vs Ghasiram Mahanti and**

others, reported in AIR 1996 Orissa 172 reiterating the same view in the light of miscarriage of justice and also upon the judgment of High Court of Himachal Pradesh in the case of **Ajay Singh (deceased by Lrs.) and etc. vs Tikka Brijendra Singh and others etc.** reported in AIR 2007 Himachal Pradesh 52, where the same proposition of law has been reiterated.

29. In this regard, concept of "Waiver" should also be reiterated which is **an intentional relinquishment of a known legal right**. In the present case, the petitioner had a legal right to raise objections regarding pecuniary limits of jurisdiction immediately after registration of the case, or even thereafter. However, for the reasons best known to it, the said objection was admittedly not raised, and therefore, the same shall be deemed to have been waived.

30. Reference to judgement of Supreme Court in the case of **ARCE Polymers Private Limited vs Alphine Pharmaceuticals Private Limited and others** reported in 2022 (2) SCC 221, can be made, paragraph Nos. 16 and 17 of which read as follows:

"16. Waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the legal rights in that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by express conduct in consideration of some compromise. However, a statutory right may also be waived by implied conduct, like, by wanting to take a chance of a favourable decision. The fact that the other

side has acted on it, is sufficient consideration.

17. It is correct that waiver being an intentional relinquishment is not to be inferred by mere failure to take action, but the present case is of repeated positive acts post the notices under Sections 13(2) and (4) of the SARFAESI Act. Not only did the Borrower not question or object to the action of the Bank, but it by express and deliberate conduct had asked the Bank to compromise its position and alter the contractual terms. The Borrower wrote repeated request letters for restructuring of loans, which prayers were considered by the Bank by giving indulgence, time and opportunities. The Borrower, aware and conscious of its rights, chose to abandon the statutory claim and took its chance and even procured favourable decisions. Even if we are to assume that the Borrower did not waive the remedy, its conduct had put the Bank in a position where they have lost time, and suffered on account of delay and laches, which aspects are material. Action on the Subject Property was delayed by more than a year as at the behest of the Borrower, the Bank gave them a long rope to regularise the account. To ignore the conduct of the Borrower would not be reasonable to the Bank once third party rights have been created. In this background, the principle of equitable estoppel as a rule of evidence bars the Borrower from complaining of violation."

31. Shri J.P. Singh has further relied upon the judgment of Supreme Court in the case of **Krishna Bahadur vs M/s Purna Theatre and others**, reported in AIR 2004 SC 4282, paragraph Nos. 8 and 9 whereof are reproduced as under:

"8. The principle of waiver although is akin to the principle of

estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

9. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

32. Learned counsel for the respondent No.2 has also placed reliance upon the judgment of Supreme Court in the case of **M/s Power Control Appliance and others vs Sumeet Machines Pvt. Ltd.** reported in 1994 (2) SCC 448. Paragraph No. 26 of the said judgement is reproduced as follows:

"26. Acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches. In *Harcourt v. White* (1860)28 Beav 303, Sr. John Romilly said: "It is important to distinguish mere negligence and acquiescence." Therefore, acquiescence is one facet of delay. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their

acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence as was laid down in Mouson (J. G.) & Co. v. Boehm (1884) 26 Ch D 406. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant as was laid down in Rodgers v. Nowill, (1847) 2 De GM &G 614."

33. Shri J.P. Singh has, apart from arguing that the objection to pecuniary limits of jurisdiction was not raised by the petitioner before the court below, submitted that even if, at the time of institution of proceedings, the P.L.A., financial limits were confined to Rs. 10,00,000/- only (rupees ten lac only), there would not be any consequent failure of justice, if the claim of Rs. 14,00,000/- (rupees fourteen lac) has been finally allowed by the P.L.A. particularly, when the financial limits had already been enhanced to Rs. 1,00,00,000/- (rupees one crore), vide Notification dated 20th March, 2015.

34. I deal with this aspect of the matter and find that insofar as the effect of Notification dated 20th March, 2015 is concerned, admittedly, the case in reference was decided by the P.L.A. in the year 2016. That is to say that **it was entertained and judicial mind was applied on the facts and circumstances involved in the case at the time when the pecuniary limits of jurisdiction were already enhanced from Rs.10,00,000/- (rupees ten lac) to Rs.1,00,00,000/- (rupees one crore).** Therefore, on the date of its decision, the P.L.A. had financial competence to adjudicate upon the claim of respondent No. 2, which has been accepted and allowed under the order impugned.

35. As per Black's Law Dictionary (7th Edition) by Bryan A. Garner, Editor in

Chief, the word "**Entertain**" has been defined as "**to bear in mind or consider, to give judicial consideration to**". The New Lexicon Webster's Dictionary of the English Language defines the word "**Entertain**" as "**to give thought or consideration to**" and "**to have in one's mind**". The Chambers Dictionary (10th Edition) explains the word "**Entertain**" as "**to keep or hold in the mind**" and "**to receive and take into consideration**".

36. Expression "**Institute**" is not synonymous with the expression "**Entertain**", the Supreme Court in the case of *Martin and Harris Limited vs Sixth Additional District Judge and others*, reported in 1998 (1) SCC 732 interpreted the expression "Entertain" in section 21 (1) (a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, to mean entertaining the ground for consideration for the purpose of adjudication on merits and not on any stage prior throughout.

37. A Division Bench of Calcutta High Court, in the case of *Tufan Chatterjee vs Rangan Dhar*, reported in AIR 2016 Calcutta 213, has elaborately explained the meaning of word "Entertain". The decision of *Tufan Chatterjee* (supra) was considered by the Apex Court in a very recent decision in the case of *ARCELOR Mittal Nippon Steel India Limited vs Essar Bulk Terminal Limited* reported in 2022 (1) SCC 712, paragraph No. 38 whereof is worth reproduction, which reads as follows:

"38. Mr. Khambata referred to the meaning of "entertain" in *Black's Law Dictionary* (Bryan A. Garner, 8th edition, 2004), which is to "bear in mind or "to give judicial consideration to". Mr. Khambata

also cited the judgment of a Division Bench of the Calcutta High Court in **Tufan Chatterjee v. Rangan Dhar**, 2016 SCC Online Cal 483, authored by one of us, (Indira Banerjee, J.). In *Tufan Chatterjee (supra)*, the word "entertain" was interpreted to mean "considering an application on merits, even at the final stage". Mr. Khambata argued that the interpretation of the term "entertain" by the Gujarat High Court in the judgment and order impugned, is consistent with the interpretation of the expression in *Tufan Chatterjee (supra)*."

38. Once this Court finds that the plea of pecuniary limits of jurisdiction was neither taken in the written submission nor was argued before the P.L.A throughout the proceedings of the case in reference, this Court cannot allow the same to be raised for the first time in the present writ petition. The situation would have been different, had the issue been with respect to "inherent lack of jurisdiction" of the P.L.A. and not with respect to its pecuniary limits, inasmuch as, in the previous case, the decree/judgment/award would have become without jurisdiction, which is not the situation in a case where difficulty in jurisdiction is co-related to the pecuniary limits.

39. In view of above discussion, it is clear that in any case, on the date when the impugned judgment and award was passed by the P.L.A., the Court was well within its financial/pecuniary limits of power, competence and jurisdiction to adjudicate the same, and therefore, the argument on issue No. 1, as raised by Shri Nagar, learned Senior Advocate, cannot be accepted and is hereby discarded.

ISSUE/CONTENTION NO. 2 :-

40. Shri J. Nagar, learned Senior Advocate has vehemently argued that the duty cast upon the P.L.A. under section 22-C (5), (6) and (7) of the Legal Services Authorities Act, 1987, to hold conciliation proceedings, has been avoided by the P.L.A., inasmuch as no conciliation proceedings were held before finally deciding the matter. In support of his submissions, learned Senior Advocate has placed reliance upon the following authorities:

- **Bar Council of India vs Union of India**, 2012 (8) SCC 243

- **Madhya Pradesh State Legal Services Authority vs Prateek Jain and another**, 2014(10) SCC 690

- **Inter Globe Aviation Ltd. Vs N.Satchidanand**, 2011 (7) SCC 463

- **State Bank of India, Dhanbad vs State of Jharkhand and another**, 2009(2) AIR Jhar R 970

- **Mithoolal Nayak vs Life Insurance Corporation of India**, AIR 1962 Supreme Court 814;

- **Smt. Krishna Wanti Puri vs The Life Insurance Corporation of India, Divisional Officer, New Delhi and another**, AIR 1975 Delhi 19;

- **Canara Bank vs G.S. Jayarama**, Aironline 2022 SC 835;

- **Life Insurance Corporation of India vs Syed Zaigham Ali and another**, (Writ-C No. 39879 of 2015 decided on 21.07.2015);

- **Life Insurance Corporation of India (LIC) and another vs Permanent Lok Adalat and another**, 2018 ADJ Online 0484;

- **Nitin Kumar vs Oriental Insurance Company Limited and 3 others** (Writ C No. 28999 of 2013 decided on 16.12.2021);

41. Per contra, Shri J.P. Singh, learned counsel for respondent No. 2 has

argued that the P.L.A. has taken into consideration the stand taken by the petitioner in his written statement that right from the very beginning the defendant-petitioner had expressed its intention in clear words and conduct not to settle the matter and not to sit for any talks for conciliation. The pleadings contained in the written statement that "महोदय हम विपक्षी को कोई सुलह नहीं करना है।" are clear to this effect.

42. Shri J.P. Singh has further referred to paragraph No. 23 of the affidavit of Ram Kumar Singh, Manager (Law) of the Life Insurance Corporation, Regional Office, Gorakhpur filed in the proceedings before the P.L.A. stating on oath as follows:

"23. यह कि मैं, राम कुमार सिंह बहलफ बयान करता हूँ कि हम प्रतिवादीगण वादी से इस मामले में किसी प्रकार का समझौता करने हेतु तैयार नहीं हैं"

43. Shri Singh has also referred to the clear findings recorded by the P.L.A. that conciliation proceedings were held by the P.L.A. and sufficient opportunity of hearing was provided continuously to the parties, but on 10.04.2015, during the course of such conciliation proceedings, the defendant-petitioner had, in writing, given a statement that it did not want to compromise/conciliate the matter, and therefore, the matter was heard on merits. The said findings are extracted hereunder:

"जहाँ पर सुलह वार्ता के बिन्दु पर भी पत्रावली का अवलोकन किया गया तो पाया गया कि पक्षकारों को पर्याप्त अवसर दिया जाता रहा, परन्तु विपक्षीगण द्वारा दिनांक 10.4.2015 को सुलह वार्ता के बिन्दु पर विपक्षी ने लिखित में यह कथन किया है कि "महोदय हम विपक्षी को कोई सुलह नहीं करना है" इस प्रकार पक्षों के मध्य सुलह वार्ता असफल रही है और पक्षों ने गुणदोष के आधार पर उभयपक्षों को तर्क पूर्वक बहस सुनी गयी तथा पत्रावली में उपलब्ध साक्ष्यों के अवलोकन

करने के उपरांत स्थायी लोक अदालत की पीठ इस निष्कर्ष पर पहुंची है कि....."

44. This Court has also perused the contents of **paragraph Nos. 23 and 24 of the present writ petition**, which read as follows:

"23. That there is nothing on record to show that the Life Insurance Corporation of India ever agreed for settlement or negotiation of dispute through Permanent Lok Adalat, as provided under the Legal Services Authorities Act, 1987.

24. That the Permanent Lok Adalat cannot adopt the role of an Arbitrator or a Civil Court and proceed in the matter without consent of both the parties."

45. From the aforesaid, it is clear that not only in pleadings, but also in the affidavit of the Officer of L.I.C., and also, during the course of conciliation proceedings held by the P.L.A. and further before this writ court, consistent stand of the defendant-petitioner L.I.C. has been that it never wanted to settle or negotiate the dispute and that it even disputed the competence of P.L.A. to get the matter settled through negotiation.

46. There is no dispute about the proposition laid down in the Authorities cited by Shri Nagar as to the role of P.L.A. regarding conciliation, however, at the same time, the ratio laid down in the aforesaid Authorities has to be examined in the light of factual background of the present case, where this Court finds that written statement, affidavit, another written statement during the course of conciliation proceedings and also pleadings contained in paragraph Nos. 23 and 24 of the writ

petition clearly infer that despite best efforts made by the respondent as well as by the P.L.A., the conciliation proceedings were not held due to stiff and stubborn attitude of the Corporation and its officials.

47. In this regard, importance of sub-sections (5) and (6) of Section 22-C of the Legal Services Authorities Act, 1987 cannot be ignored, which are reproduced for ready reference:

*"(5) The Permanent Lok Adalat shall, during conduct of conciliation proceedings under sub-section (4), **assist the parties in their attempt to reach an amicable settlement** of the dispute in an independent and impartial manner.*

*(6) It shall be **the duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute** relating to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it."*

48. In view of aforesaid provisions of the Legal Services Authorities Act, 1987, the petitioner, before putting a blame on the P.L.A., should introspect itself in the light of pleadings and statements as referred to herein-above inasmuch as the words **"assist the parties in their attempt to reach an amicable settlement"** used in sub-section (5) of the Section 22C of the Act and the words **"it shall be duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute"** make the legislative intent clear to the effect that conciliation proceedings can be held by the P.L.A. with the cooperation of the parties to the lis and in case, one of the parties is adamant not to

enter into talks of compromise or conciliation, the P.L.A. cannot be expected to whip a party to conciliate the matter. Therefore, under such circumstances, the judgment of P.L.A. on merits after recording such refusal by the parties, cannot be faulted on the ground that it should not have been passed on merits in violation of provisions of "conciliation".

49. In view of above discussion, the issue/contention No. 2 raised by Shri Nagar, learned Senior Advocate is also hereby discarded.

ISSUE/CONTENTION NO. 3 :-

50. It is with respect to merits of the claim made by respondent No. 2 and the contention of Shri Nagar, learned Senior Advocate is that at the time of taking the Policy No. 297170129 dated 28.11.2011, the deceased (assured) was suffering from Enteric Fever and Urinary Tract Infection and was being treated at Chitransh Hospital and Surgical Care Centre, Shuddhipur, Shivpur, Varanasi, and therefore, the L.I.C. was justified in repudiating the claim in exercise of powers under section 45 of the Insurance Act as the deceased had made concealment of his physical ailment, which was a material fact. He has argued that the policy was issued on 28.11.2011 and the assured died on 10.09.2012 and since the death took place within two years from issuance of policy, the repudiation of the claim was according to law.

51. In support of his submission, Shri Nagar has relied upon the judgment of Supreme Court in the case of ***Mithoolal Nayak vs Life Insurance Corporation of India***, reported in AIR 1962 Supreme Court 814, and has emphasised upon paragraph No. 7 of the report, which reads as follows:

"7. We shall presently consider the evidence, but it may be advantageous to read first Section 45 of the Insurance Act, 1938, as it stood at the relevant time. The section, so far as it is relevant for our purpose, is in these terms:

"No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose.

x x x x x x"

It would be noticed that the operating part of S. 45 states in effect (so far as is relevant for our purpose) that no policy of life insurance effected after the coming into force of the Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false; the second part of the section is in the nature of a proviso which creates an exception. It says in effect that if the insurer shows that such

statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policyholder and that the policyholder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose, then the insurer can call in question the policy effected as a result of such inaccurate or false statement. In the case before us the policy was issued on March 13, 1945, and it was to come into effect from January 15, 1945. The amount insured was payable after January 15, 1968, or at the death of the insured, if earlier. The respondent company repudiated the claim by its letter dated October 10, 1947. Obviously, therefore, two years had expired from the date on which the policy was effected. We are clearly of the opinion that S. 45 of the Insurance Act applies in the present case in view of the clear terms in which the section is worded, though learned counsel for the respondent company sought, at one stage, to argue that the revival of the policy some time in July, 1946, constituted in law a new contract between the parties and if two years were to be counted from July, 1946, then the period of two years had not expired from the date of the revival. Whether the revival of a lapsed policy constitutes a new contract or not for other purposes, it is clear from the wording of the operative part of S. 45 that the period of two years for the purpose of the section has to be calculated from the date on which the policy was originally effected; in the present case this can only mean the date on which the policy (Ex. P-2) was effected. From that date a period of two years had clearly expired when the respondent company repudiated the claim. As we think that S. 45 of the Insurance Act applies in the present case, we are relieved of the task

of examining the legal position that would follow as a result of inaccurate statements made by the insured in the proposal form or the personal statement etc. in a case where S. 45 does not apply and where the averments made in the proposal form and in the personal statement are made the basis of the contract."

52. Shri Nagar has also relied upon a judgment of Delhi High Court in the case of **Smt. Krishna Wanti Puri vs The Life Insurance Corporation of India, Divisional Officer, New Delhi and another**, reported in AIR 1975 Delhi, 19 in support of his contention that even if the Doctor of the Corporation had reported medical condition of the assured as fit, the same would not be a decisive factor to allow the claim. He has referred to paragraph Nos. 42 and 43 of the said judgment, which are reproduced as follows:

"42. The plaintiff's Counsel lastly urged that before the deceased was insured he was examined by as many as three doctors of the Corporation Dr. Uppal, Dr. R. N. Rohatri and Dr. Kartar Singh. All these doctors: appeared in the witness on behalf of the Corporation. It is true that all of them deposed that in the opinion the deceased was fit to be insured at the time of their examination but their evidence does not advance the case of the plaintiff. The corporation did not know that there was a fraudulent suppression of facts by the deceased. The terms of the policy make it clear that the averments made as to the state of health of the insured in the Proposal form and the personal statement were the basis of contract between the parties and the circumstances that Dharam Pal Puri had taken Pains to conceal that he had ever been treated for this serious ailment by Dr (Miss) S. Padmavati when in

fact he had been treated only a few months before he took out the first policy dated October 12, 1959, shows that the fraudulent suppression and concealment had an important bearing in obtaining the consent of the Corporation.

43. On the whole case my conclusion is that the declarations made by the deceased in the Personal statement were on a material matter and that he suppressed fraudulently facts which were material to disclose and that the deceased knew at the time of making the statement that it was false and that he suppressed facts which it was his duty to disclose."

53. Per contra, the contention of Shri J.P. Singh, learned counsel for respondent No.2 is that on merits, the grounds of repudiation cannot be sustained for the simple reason that admittedly, the cause of death of the policy-holder was not at all the disease cited in the order of repudiation. On the contrary, the cause of death was heart attack. Attention has been drawn to Supreme Court's judgment dated 05.10.2015 passed in Civil Appeal No. 8245 of 2015 (Arising out of S.L.P.(C) No. 13589 of 2015 (**Sulbha Prakash Motegaonkar and others vs Life Insurance Corporation of India**), where the Insurance Company had repudiated the claim of the policy holder on the ground that he was suffering from lumbar spondilitis with PID with sciatica. The Supreme Court held that element of the disease was not a life threatening disease and it could not be cause of death of the insured.

54. Shri J.P. Singh has argued that since in the present case also, the diseases cited in the order of repudiation were not life threatening disease, and admittedly, the death of the insured occurred due to heart

attack, non-disclosure of the fact that the insured was hospitalized for few days in the hospital before taking the policy, could not be a valid ground for repudiating the claim. He has further argued that even otherwise, here the insured had not taken policy for the first time in 2011, rather he had taken first policy in 2004 and had been continuously depositing the installments of the policies and it is not the case that when the insured purchased the policy, he was bed ridden. On the contrary, before accepting the policy, the insured was medically examined by the Medical Examiner of L.I.C. and the confidential report of the Medical Examiner of L.I.C. dated 23-11-2011 has already been brought on record as Annexure CA-1, in which, there was nothing adverse to the insured, therefore, the order of repudiating the claim cannot be sustained.

55. This Court proceeds to consider the rival contentions made at the bar regarding merits of the claim of respondent No. 2.

56. A perusal of the impugned order dated 28.11.2011, whereby the L.I.C. had repudiated the claim of respondent No. 2, shows that it was on the ground that assured had remained hospitalized in Chitransh Hospital and Surgical Care Centre, Shivpur, Varanasi for the period w.e.f. 12.10.2011 to 17.10.2011 (five days), while he was suffering from Enteric Fever and Urinary Tract Infection. For a ready reference, the ground for rejection of claim by the L.I.C. is extracted herein-below:

"उपरोक्त पालिसी जो स्व० ठाकुर प्रसाद सिंह के जीवन पर जारी की गई थी, के सम्बन्ध में आप द्वारा प्रस्तुत मृत्यु दावा के अन्तर्गत हमने पालिसी के समस्त दायित्वों को निरस्त करने का निर्णय इस आधार पर लिया है कि स्व० पालिसीधारक पालिसी लेने के पूर्व दिनांक 12.10.2011 से 17.10.2011 तक Enteric Fever &

UTI यानि टाइफाइड एवं मूत्रीय पथ संक्रमण की बिमारी की इलाज हेतु चित्रांस हास्पिटल एवं सर्जिकल केयर सेन्टर शुद्धीपुर शिवपुर वाराणसी में भर्ती रहा। बीमाधारक बीमा प्रस्ताव पत्र दिनांकित 30.11.2011 भरते समय जान बूझकर इस महत्वपूर्ण तात्विक तथ्य को छिपाकर धोखे से बीमा संरक्षण प्राप्त कर लिया गया था।

हमारे पास यह मानने एवं प्रमाणित करने हेतु पर्याप्त साक्ष्य उपलब्ध है जिससे प्रमाणित होता है कि स्व० बीमाधारक पालिसी लेने के पूर्व से Enteric Fever & UTI यानि टाइफाइड एवं मूत्रीय पथ संक्रमण की बिमारी से पीड़ित था किन्तु बीमा प्रस्ताव भरते समय बीमारी सम्बन्धी तथ्य को छिपाकर धोखे से बीमा संरक्षण प्राप्त कर लिया था।"

57. I have perused the annexure C.A.-1 to the counter affidavit, which is a copy of medical examiner's confidential report dated 23.11.2011 and such examination was done by the Doctor of the Corporation itself, where everything regarding health of the assured was mentioned to be fine.

58. I have also perused the prescription/diagnosis made by the Chitransh Hospital and Surgical Care Centre, Shivpur, Varanasi forming part of Annexure No. 3 to the writ petition, which is a report/form filled up and prepared by the Investigating Official of the Corporation. A perusal of the said report reveals that the official visited the Hospital concerned on 10.10.2013, i.e. one year after the death of assured and, insofar as the cause of death as mentioned in the said report is concerned, the same has been described as **heavy pain in the chest felt by assured on 10.09.2012 when he died during the course of treatment in Hospital of Dr. R.N. Dwivedi, situated in front of the house of the deceased.** The said noting is found in answer to question No. 11 contained in the form in the following words:

"मृतक बीमेदार 10.09.2012 को सीने में तेज दर्द शुरू हुआ उनके घर वाले घर के सामने जाओ आरओ एनओ द्विवेदी के अस्पताल मे ले गये । इलाज के दौरान उनकी मृत्यु हो गई । आत्म हत्या की कोई सम्भावना नहीं है।"

59. Further, insofar as physical ailment of the assured w.e.f. 12.10.2011 to 17.10.2011 in Chitransh Hospital and Surgical Care Centre, Shivpur, Varanasi is concerned, a noting is found in the form as answer to question No. 12 in the following words:

"मृतक बीमेदार पालिसी लेने से पूर्व बुखार होने के कारण चित्रांश हस्पताल वाराणसी में 12.10.2011 से 17.10.2011 तक इलाज करवाया। प्रपत्र फाइल में संलग्न है।"

60. From perusal of the entire facts and material available on record regarding physical ailment of the assured, I find substance in the arguments of Shri J.P. Singh, learned counsel for respondent No. 2 that the sufferance of the deceased from fever in October, 2011 and five days' hospitalization due to the same at Chitransh Hospital and Surgical Care Centre, Shivpur, Varanasi, could not be taken as a ground for repudiating the claim of respondent No. 2 after the death of assured, which occurred after one year on 12.09.2012, particularly, when the Fever or Enteric Fever cannot be treated as a life threatening disease, moreso, when cause of death has been described by the Investigating Official of the Corporation itself, as sudden severe pain in the chest of the deceased on 10.09.2012, when he died the same day during treatment in a Hospital situated in front of his house.

61. Insofar as the judgement cited by Shri Nagar regarding period of death or the opinion of the Doctor, in the case of **Mithoolal Nayak** (supra) is concerned, there the Supreme Court was dealing with the matter and examining the provisions of section 45 of the Insurance Act, in the light of peculiar facts of that case, where challenge was made in respect of a lapsed

policy with reference to two years period. The effect of concealment of material fact was also examined and repudiation of claim by the Life Insurance Corporation was found to be justified. However, with due respect the case of **Mithoolal Nayak** (supra) would be of no help to the petitioner as the case in hand is neither a case of lapsed policy nor in view of the aforesaid discussion, this Court finds that non-mentioning of sufferance of fever one year prior to death of the assured was a fact material to decide the claim. Therefore, section 45 of Insurance Act, cannot come in the way of respondent No. 2 to claim desired relief in the factual matrix of the present case.

62. Insofar as the judgment of Delhi High Court in the case of **Krishna Wanti Puri** (supra) is concerned, it was a case where three Doctors of the Corporation examined the assured and appeared in the witness box of the Corporation stating that the deceased was in a fit medical condition. The Corporation did not know that there was a fraudulent suppression of the facts by the deceased. The case before the Delhi High Court was where the assured was suffering from serious ailment i.e., Mitral Stenosis with Auricular Fibrillation, which was described as a type of rheumatic heart disease, which, according to the Insurance Corporation, in that case, was deliberately concealed by the assured. It was in the peculiar factual background of the said case that the Delhi High Court came to the conclusion that the said serious ailment was a material fact, which was deliberately and fraudulently suppressed by the assured at the time of taking the policy.

63. However, in the present case, it has elaborately been discussed that medical opinion furnished by the Doctor of the

Corporation as contained in the certificate filed as annexure No. CA-1 to the counter affidavit, when compared to the subsequent report of the Investigating Official of the Corporation, clearly established that cause of death, which occurred on 10.09.2012, had absolutely no co-relation with the fever suffered by the assured one year ago, and therefore, non-disclosure of such a Fever/Enteric Fever/Urinary Tract Infection cannot be treated as suppression of a material fact while deciding the claim made by the respondent No. 2. Therefore, the facts of the case in the case of **Mithoolal Nayak** (supra) and **Smt. Krishna Wanti Puri** (supra) are distinguishable.

64. In view of above discussion, the issue/contention No. 3 raised by Shri Nagar, learned Senior Advocate also does not have any force and is hereby discarded.

65. While I am fully satisfied that grounds raised by the petitioner Life Insurance Corporation of India challenging the impugned award of Permanent Lok Adalat do not have any substance, the claim made by the respondent No.2 has rightly been allowed by the Permanent Lok Adalat under the order impugned.

66. In view of above discussion, I do not find any good ground to interfere with the impugned judgement and award of Permanent Lok Adalat dated 15.02.2016. Consequently, the writ petition fails and is accordingly **dismissed**, however, without imposing any costs.

67. In the present writ petition, an interim order was passed on 06.05.2016 staying the operation of the impugned award dated 15.02.2016 subject to condition of making deposit of the entire amount by the L.I.C. as awarded along with

upto date interest with a further stipulation that the amount so deposited shall be kept in a fixed deposit with a nationalized Bank. **Therefore, the amount deposited by the Life Insurance Corporation under the said interim order shall positively be released in favour of respondent No. 2 within a period of two months** from the date a certified copy of this judgment and order is produced before the court below. The court below shall also ensure that nationalized Bank, in which the amount has been invested in pursuance of the interim order dated 06.05.2016, shall be directed and informed to release the same **along with interest accrued upto date** in favour of respondent No.2 within a period of two months.

(2023) 5 ILRA 728

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 03.04.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 23241 of 2016

**M/s Bureau Chief Rashtriya Sahara & Anr.
...Petitioners**

Versus

Labour Commissioner, U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Sri Shakti Swarup Nigam, Sri Karshit Nigam

Counsel for the Respondents:

C.S.C., Sri Janmed Kumar

A. Civil Law - U.P. Industrial Disputes Act, 1947 - Section 6(4) , 4K, 6N-Reinstatement- once the Tribunal found termination of the services of the petitioner as contrary to the provisions of law, relief only in the form of

compensation etc would be unjust and the Labour Court should have directed reinstatement of the petitioner in service with full or 50% back-wages. The Court does not find any cogent reasoning in the order of the Labour Court in so far as the denial of relief of reinstatement or back-wages is concerned- no reference made in the order impugned dated 15.09.2014 that any opportunity of hearing was provided to the parties before remitting the matter to the Labour Court. Therefore, remittance made by the Labour Commissioner under the order impugned dated 15.09.2014 is found to be in teeth of specific provisions of Section 6(4) of U.P. Act. (Para 1 to 42)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Hindustan Aeronautics Ltd., Transport Aircraft Division, Chakeri, Kanpur Vs St. of U.P. & ors. (2021) 168 FLR 338
2. Pratap Chandra Mohanty Vs G.M. United News of India & anr. (1991) 2 OLR 326
3. Madhya Bharat Gramin Bank Vs Panchamlal Yadav (2021) 171 FLR 8
4. M/s Jagran Prakashan Ltd. & anr. Vs P.O., Labour Court, U.P., Alld & ors. (2020) 167 FLR 412
5. M/s Hindustan Tin Works Pvt. Ltd. Vs The Employees of M/s Hindustan Tin Works Pvt. Ltd & ors. (1979) AIR SC 75
6. Harjinder Singh Vs Punj. St. Warehousing Corp. (2010) 124 FLR 700
7. Deepali Gundu Surwase Vs Kranti Junior Adhyapak & ors. (2013) 139 FLR 541
8. Bhuvanesh Kumar Dwivedi Vs M/s Hindalco Industries Ltd (2014) 142 FLR 20
9. Mackinnon Mackenzie & Co. Ltd. Vs Mackinnon Employees' Union (2015) 145 FLR 184
10. Armed Forces Ex Officers Multi Services Co-operative Society Ltd. Vs Rashtriya Mazdoor Sangh (INTUC) (2022) 175 FLR 544

11. Jeetubha Khansangji Jadeja Vs Kutchh Distt. Panchayat Civil Appeal No.6890 of 2022 (SLP (Civil) No.8393 of 2022)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. All these writ petitions cover certain factual and legal aspects which are common in all the matters. Therefore, while deciding these writ petitions by a common judgment, individual cases shall also be dealt with.

2. For the purposes of deciding these matters, Writ-C No.23241 of 2016 is being treated as the leading one.

3. Heard Shri Shakti Swarup Nigam, learned Senior Advocate assisted by Shri Karshit Nigam, learned counsel for the petitioners and Shri Janmed Kumar, learned counsel for respondent workman in Writ-C No.23241 of 2016 and Writ-C No.23786 of 2016; Shri Chandra Bhan Gupta, learned counsel for the petitioner and Shri Ajay Rajendra, learned counsel for respondent workman in Writ-C No.22872 of 2016; and Shri Ajay Rajendra, learned counsel for the petitioner and Shri Chandra Bhan Gupta, learned counsel for respondents in Writ-C No.27687 of 2016.

Writ-C No.23241 of 2016
(M/S Bureau Chief Rastriya Sahara And Another Vs. Labour Commissioner U.P. And 2 Others)

4. This writ petition has been filed challenging the award dated 09.11.2015 passed by the Labour Court (I), U.P. Kanpur in Adjudication Case No.275 of 1999, M/s Bureau Chief Rastriya Sahara Vs. Munraj Singh. The award was published on 15.03.2016. Another relief has been claimed for quashing of the order

dated 15.09.2014 whereby the Labour Commissioner, U.P., Kanpur had, in purported exercise of powers conferred by Section 6(4) of U.P. Industrial Disputes Act, 1947 (for short U.P. Act), remitted the matter to the Presiding Officer of the Labour Court (I), U.P., Kanpur for reconsideration.

5. The facts of the case, as per the pleadings contained in the writ petition, are that the petitioners are engaged in the business of publication and distribution of newspaper under the name and style of "Rashtriya Sahara" and for the purpose of distribution of newspapers they incorporated regulations known as "Audit Bureau of Circulation" under which they appointed M/s. Rastriya News Agency and M/s. Awathi News Agency as news agents for distribution of news papers on commission basis; the respondent no 2 was appointed as hawker on commission basis for distribution of newspapers by the petitioners. After incorporation of regulations known as 'Audit Bureau of Circulation', after June 1996, the respondent no. 2 joined M/s. Rastriya News Agency and M/s. Awathi News Agency for distribution of news paper; the Deputy Labour Commissioner in exercise of powers under Section 4K of the U.P. Industrial Disputes Act, 1947, vide its order dated 27.01.2000 referred the matter of alleged termination to respondent no. 1. The contesting respondent set up his claim that he was appointed as Salesman w.e.f. 01.06.1992 on consolidated salary of Rs. 950/- but since the payment was less than minimum wages, a demand was raised that was not considered by the petitioners and in violation of Section 6N of the U.P. Industrial Disputes Act, 1947, his services were terminated and as such the respondent no. 2 prayed for reinstatement.

6. The petitioners filed written statement inter-alia on the ground that the contesting respondent was a hawker on commission basis upto June, 1996 and, thereafter, there remained no relationship between them and as such in absence of employer and employee relationship there can arise no question of termination of service in year 1998, as after June, 1996 he joined M/s. Rashtriya News Agency and M/s. Awathi News Agency and after enforcement of Regulations of 'Audit Bureau of Circulation'. It was also stated that contesting respondent was not given any appointment letter nor applied for and also there exists no post of Salesman.

7. The contesting respondent filed his rejoinder affidavit; the petitioner also filed rejoinder statement and again reiterated the facts that contesting respondent was appointed as Hawker and as such at no point of time there was any relationship of employer and employee. It was also stated that provisions of Section 6N will not be applicable as there remained no master and servant relationship.

8. In support of his case, the respondent no. 2 examined himself; in support of their case the petitioners examined Shri Ajai Tripathi and Shri Manoj Dubey; and the petitioners filed salary register to prove that there existed no relationship of employer and employee. It was also stated that no appointment letter was ever issued nor was any Provident Fund deduction or Employees State Insurance Contribution ever made. Since the contesting respondent was working on commission basis as hawker, as such no salary was ever paid to him; and without considering the material on record and ignoring the material facts and evidence, the respondent no.1 treated the contesting

respondent as workman employed as Salesman and granted reinstatement with entire back wages.

9. It is contended that challenging the award dated 24.12.2007 published on 01.04.2008, the petitioners filed Civil Misc. Writ Petition No.25780 of 2008 before this Court, which was allowed by judgment and order dated 18.07.2011. Relevant portion of the said judgment is extracted herein below:-

"After having very carefully examined the submissions made by the learned counsel for the parties and perused the impugned award as well as the other materials brought on record, I find that there is force in the submissions made by learned counsel for the petitioners and the same are liable to be accepted. The respondent no. 2 moved the State Govt. under section 4K of the U.P. Act claiming himself to be working as salesman in the petitioners' establishment challenging the termination of his employment by the petitioners vide order dated 01.10.1998 on the ground that the same infringed the provisions of section 6N of the U.P. Act.

From perusal of the the written statement filed by the petitioners before the respondent no. 1 it transpires that the petitioners had challenged the jurisdiction of the respondent no. 1 to entertain and decide the adjudication case in view of section 3 of the Act 45 of 1955 which stipulates that the central government alone is competent to refer a dispute between the employers and the employees of a establishment to which the provisions of the Act 45 of 1955 apply and that to, to a tribunal constituted under the central Act. From the perusal of the written statement filed by the petitioners before the respondent no. 2 it appears that before the

respondent no. 1 the petitioners had taken a specific plea that the respondent no. 2 was employed in their establishment as a hawker and not as a salesman. In support of their contention they had filed voluminous evidence which has been compositely annexed as annexure no. 2 to the writ petition.

I have very carefully gone through the impugned award and I do not find therein any adjudication by the respondent no. 1 on the preliminary objection raised before him by the petitioners regarding his lack of jurisdiction to entertain and decide the adjudication case on account of the reference made to him by the State Govt. under Section 4K of the U.P. Act being without jurisdiction in view of section 3 of the Act 45 of 1955 on account of respondent no. 2 being employed as a hawker in the petitioners' establishment. There is also no consideration in the impugned award of the evidence filed by the petitioners before the respondent no. 1 in support of their claim that the respondent no. 2 was employed in their establishment as a hawker and not as a salesman as alleged by him. This omission on the part of the respondent no. 2 has further vitiated the impugned award.

For the aforesaid reasons, I am of the view that the impugned award cannot be sustained and is liable to be set aside. The writ petition accordingly succeeds and is allowed. The award dated 24.12.2007 passed by the respondent no. 1 is hereby set aside and the matter is remitted back to the respondent no. 1 for passing a fresh award in the matter after considering the objections raised by the petitioners in their written statement and the evidence adduced by the parties in support of their respective claims, in accordance with law. Necessary exercise in this regard shall be completed

by the respondent no. 1 within a period of six months from the date of production of certified copy of this order."

10. It is also contended that contesting respondent filed an application for amendment for reference before respondent no. 2 and the State Government sent a reference under Section 4k of U.P. Industrial Disputes Act, 1947 whereas the case is covered under the "The Working Journalist and other Newspaper Employees (Conditions of Service and Miscellaneous Provisions Act, 1955 (45 of 1955")", as such the reference could be sent under Section 10(1C) of the Industrial Disputes Act, 1947.

11. The petitioners filed objections and stated that the establishment of petitioner is covered under "The Working Journalist and another Newspaper Employees (Conditions of Service and Miscellaneous Provisions Act, 1955 (45 of 1955") as such reference can be made under Section 3(1) of the Act, 1955 by the Central Government and they had raised their preliminary objection before Labour Court but Award dated 24.12.2007 was passed without deciding the preliminary objection, as such this Court remanded the matter to decide the preliminary issue; the Labour Commissioner, U.P. (respondent no.1) vide its order dated 13.03.2013 decided the application of contesting respondent and held that the contesting respondent is non working journalist as such dispute between the parties is covered under Section 4k of U.P. Industrial Disputes Act, 1947.

12. In pursuance of the order of this Court passed in Writ-C No.25780 of 2008, a fresh award was passed on 12.07.2012 which was sent to the State Government for

publication but for some reason, the award was not published. Pleadings to this effect are contained in paragraph 21 of the writ petition which states that by the award dated 12.07.2012, the Labour Court had rejected the claim of the workman and dismissed the adjudication case as not maintainable. **However, copy of such award dated 12.07.2012 has not been brought on record by either of the parties in support of their pleadings.**

13. The reference in this case was made to the Labour Court, Rampur for adjudication of the industrial dispute in the following terms:-

"क्या सेवायोजकों द्वारा श्रमिक श्री मुनराज सिंह पुत्र श्री महेश सिंह सेल्समैन, को दिनांक 1.10.98 से कार्य से पृथक / वंचित किया जाना उचित एवं वैधानिक है ? यदि नहीं, तो संबंधित श्रमिक हितलाभ/क्षतिपूर्ति पाने का अधिकारी है ? किस तिथि एवं अन्य किस विवरण के साथ?"

14. The Labour Commissioner, U.P., Kanpur by order impugned dated 15.09.2014 sent back/remitted the matter, in purported exercise of powers conferred under Section 6(4) of U.P. Act, before the respondent no.2 for the purpose of reconsideration.

15. Pursuant to the order impugned dated 15.09.2014, the Labour Court, by impugned award dated 09.11.2015, has found that termination of services of the workman with effect from 01.10.1998 is not according to law and, therefore, he is entitled for reinstatement with continuity in service along with 50% of back-wages. The award was published as per the provisions of the Act on 15.03.2016.

Contention of petitioners

16. Sri S.S. Nigam, learned Senior Counsel for the petitioner, while arguing the matter at length, has placed reliance upon the provisions of Sections 2(c), 2(dd) and 3 of the Working Journalists and Other Newspaper Employees (Condition of Service) and Misc. Provisions Act, 1955 (Act No.45 of 1955) (hereinafter referred to as the Act of 1955) and has submitted that in view of the said provisions, the respondent no.3 cannot be treated as an employee in the petitioner establishment and, even if he is treated to be a workman as per the provisions of U.P. Industrial Disputes Act, 1947 (U.P. Act) or the Industrial Disputes Act, 1947 (Central Act), it was the Central Government which was competent to make reference to the labour court and not the State Government. He has referred to the definition clause contained in Sections 2(c), 2(dd) and the provisions of Section 3 regarding applicability of the Central Act in relation to the employees who are covered by the Act of 1955. For a ready reference, Sections 2(c), 2(dd) and 3 of the Act of 1955 are being quoted herein below:-

"2. (c) "newspaper employee" means any working journalist, and includes any other person employed to do any work in, or in relation to, any newspaper establishment;

(dd) "non-journalist newspaper employee" means a person employed to do any work in, or in relation to, any newspaper establishment, but does not include any such person who-

- (i) is a working journalist, or*
- (ii) is employed mainly in a managerial or administrative capacity, or*
- (iii) being employed in a supervisory capacity, performs, either by the nature of the duties attached to his office or by reason of the powers vested in*

him, functions mainly of a managerial nature;]

3. Act 14 of 1947 to apply to working journalists.—(1) *The provisions of the Industrial Disputes Act, 1947 (14 of 1947), as in force for the time being, shall, subject to the modification specified in sub-section (2), apply to, or in relation to, working journalists as they apply to, or in relation to, workmen within the meaning of that Act.*

(2) Section 25F of the aforesaid Act, in its application to working journalists, shall be construed as if in clause (a) thereof, for the period of notice referred to therein in relation to the retrenchment of a workman, the following periods of notice in relation to the retrenchment of a working journalist had been substituted, namely:-

(a) six months, in the case of an editor, and

(b) three months, in the case of any other working journalist."

17. Sri Nigam has further submitted that the Labour Commissioner, Kanpur had no authority, power or competence to remit/refer the matter for reconsideration/review to the Labour Court. In support of his submission, he has placed reliance upon the judgment of this court in the case **Hindustan Aeronautics Ltd., Transport Aircraft Division, Chakeri, Kanpur Vs. State of U.P. and others: 2021 (168) FLR 338** and has specially referred to paragraph 18 of the said judgment, which is reproduced herein below:-

"18) A perusal of the impugned order shows that the Labour Commissioner, U.P., Kanpur has held a judicial order of the Labour Court to be flawed. He has sent back the matter to the Labour Court to decide the reference on

merits. The Labour Commissioner has decided that the reference is competent. He has done so on the basis of an opinion of the District Government Counsel, Kanpur Nagar. The Labour Commissioner is not a Court. He exercises the powers of the State Government to make a reference that is not a judicial power of any kind. All that he can exercise is an administrative or executive power conferred on the Government. Now, if there were a delegation in his favour under Section 39, assuming that he had the necessary delegation, the delegation of powers under Section 39 of the Central Act made by the Central Government is to exercise the administrative power of making a reference to the competent Court. It is in no way a judicial authority of supervision over the Labour Court, conferred on the Commissioner. In case, any party was aggrieved by the order dated 17.09.2019 passed by the Presiding Officer, Labour Court (3), U.P., Kanpur in Adjudication Case No. 115 of 2010, it was open to that party to approach this Court under Article 226 or 227 of the Constitution, for those are the only remedies that are open, apart from Article 136 of the Constitution, to challenge a judicial determination of the Labour Court, be it an order or an award. There is no principle known to law which permits an administrative review of judicial action. The law envisages judicial review of administrative action, and in some cases, legislative action also. But there is no concept known to law that permits an administrative review. Judicial orders can be undone by invoking the appellate, revisional or supervisory procedures by approaching a higher judicial forum. It cannot be done by an executive or administrative action. The impugned order is also bad, for another reason. It has proceeded substantially, if not entirely, on

the opinion of the District Government Counsel. Even if an opinion were sought by the Labour Commissioner, who is presumably a layman (as opposed to a legally trained mind) ought not have referred to the legal opinion received by him. In fact, he should not have acted on any legal opinion at all. This is so because an order founded on legal opinion is not one where the Authority making the order, has done an independent application of mind. Rather, he has gone by the opinion of another, may be a legal expert. This in itself would vitiate the impugned order. In any view of the matter, this Court is of clear opinion that the impugned order undoing a judicial order by an administrative determination is ultra vires and without jurisdiction. Though, Mr. Diptiman Singh sought to justify the order dated 17.07.2019 passed by the Presiding Officer, Labour Court (3), U.P., Kanpur in Adjudication Case No. 115 of 2010, this Court is not minded to examine that question in the absence of a challenge to the order dated 17.07.2019 by a party who is aggrieved. It is also made clear that if any party, including the fourth respondent, is aggrieved by the order dated 17.07.2019, it would be open to them to challenge the said order through competent proceedings, as advised."

18. Sri Nigam further submits that once the Labour Court had passed an award, which was not challenged before this Court, the Labour Commissioner had no jurisdiction to remit/refer the matter for reconsideration by the Labour Court as it would amount to administrative review of a judicial order which this Court, in the case of **Hindustan Aeronautics Ltd. (supra)**, has deprecated. He further submits that even if the order of the Labour Commissioner dated 15.09.2014 is treated

to be within jurisdiction, the power of making reference to the Labour Court could be exercised only when one or more of the contingencies mentioned under Section 6(4) of the U.P. Act were satisfied which, according to Sri Nigam, did not exist in the facts and circumstances of the present case. He has emphatically pressed upon the provisions of Section 6(4) of U.P. Act, which are reproduced herein below:-

"6(4) Before publication of an award of a Labour Court or Tribunal under sub-section (3), if the State Government if of the opinion that,-

(a) the adjudicating authority has unreasonably refused permission to any party to adduce evidence; or

(b) any party was prevented by any other sufficient cause from adducing evidence; or

(c) new and important material fact or evidence has come to notice, which after the exercise of due diligence, was not within the knowledge of, or could not be produced by, the party at the time when the award was made; or

(d) the award is likely to disturb the industrial peace; or

(e) the award is likely to affect prejudicially the national or State economy; or

(f) the award is likely to interfere with the principles of social justice; or

(g) the award has left undetermined any of the matters referred for adjudication, or where it determines any matter not referred for adjudication and such matter cannot be separated without affecting the determination of the matters referred; or

(h) the award is so indefinite as to be incapable of being enforced; or

(i) illegality of the award is apparent upon the face of it, it may, after

*giving the parties reasonable opportunity of being heard, for reasons to be recorded, **remit the award for reconsideration of the adjudicating authority, and that authority shall, after reconsideration, submit its award to the State Government, and the State Government shall publish the award in the manner provided in sub-section (3).1"***

19. Sri Nigam has further placed reliance upon a judgment of Division Bench of Orissa High Court in the case of **Pratap Chandra Mohanty Vs. General Manager, United News of India and another: 1991(2) OLR 326**. Paragraphs 11 and 12 of the said judgment are being extracted herein below:-

"11. We have duly considered the aforesaid submission of Shri Mohanty and, according to us, it would be difficult to say that the benefit of the Industrial Disputes Act would not be available to newspaper employees other than working journalists even if they be workmen within the meaning of that Act. As to Section 3(1) of the Working Journalists Act, we would say that the provision in that section making the Industrial Disputes Act applicable to working journalists cannot be taken to be that the said Act would not apply to other newspaper employees. Section 3(1) might have been enacted to make it abundantly clear that the Industrial Disputes Act would apply to working journalists even if they may not satisfy the definition of 'workman' as given in the Industrial Disputes Act. It is worth pointing out in this connection that a working journalist as defined in Section 2(f) of the Working Journalists Act may not be a 'workman' if the definition of that expression as given in the Industrial Disputes Act were to apply to him. The legislature, however, wanted the benefits of

the Industrial Disputes Act to be made available to working journalists and it is perhaps because of this that Section 3(1) was inserted in the Act. This apart, reference to Section 3(1) shows that certain modifications were made in the provisions of the Industrial Disputes Act in their application to working journalists. We do not think if we would be justified in denying the benefits of a statute as important as the Industrial Disputes Act to other categories of newspaper employees, if otherwise they be workmen within the meaning of that Act, because of what has been provided in Section 3(1) of the Working Journalists Act. 12. As to the application of the two specific Acts to newspaper employees because of what has been provided in Secs. 14 and 15 of the Working Journalists Act, we would say that these two sections were enacted to make the two Acts in question applicable to newspaper establishments because de hors these provisions, those Acts might not have applied to such establishments. The legislature, however, wanted to give the benefit of those Acts to all newspaper employees. It may be pointed out that Secs. 14 and 15 have referred to the application of the two Acts in question to "every newspaper establishment" and not to "newspaper employees". Of course, by making these two Acts applicable to all newspaper establishments, the benefits of the same were conferred on all newspaper employees. This does not mean that the legislature wanted to rob the newspaper employees of the benefits of other Acts. According to us, no such conclusion can be drawn on the basis of what has been provided in Secs. 14 and 15 of the Working Journalists Act."

20. Apart from the aforesaid, Sri Nigam has argued that the respondent no.3

was merely working as a Hawker for effecting distribution of newspapers and he was neither an employee nor a workman in the petitioners' establishment. He submits that voluminous evidence was led on behalf of the petitioners before the Labour Court to demonstrate that in none of the registers containing particulars and description of the workmen/employees, the name of the respondent no.3 found place. He has referred to various annexures to the writ petition to demonstrate that the respondent no.3 was never enrolled for the purposes of insurance which aspect is applicable for all the employees/workmen of petitioner-establishment. He submits that the respondent no.3 never led any evidence before the Labour Court to establish that any appointment letter was issued to him at any point in time. He also submits that no evidence was led by the respondent no.3 even to demonstrate that he worked continuously from 1992 to 1998 and therefore, in absence of evidence, the award of the Labour Court on merits is unsustainable. He further submits that in evidence only an identity card was filed by the respondent no.3 which was marked as Exhibit- W-3, containing the description of the respondent no.3 as "Salesman" and that such identity card could be issued to any hawker or anyone for the purposes of facilitating any task in the organization but in no circumstance such an identity card could be a cogent evidence to establish workmanship or an employment so as to justify passing of an award for reinstatement and back-wages.

21. Sri Nigam has also placed reliance upon the judgment of the Apex Court in the case of **Madhya Bharat Gramin Bank Vs. Panchamlal Yadav: 2021 (171) FLR 8** and has contended that merely because there is some violation on the part of the employer

which, in the present case, is not there according to Sri Nigam, reinstatement with back-wages is not automatic and relief depends upon the facts of every case.

Contention of respondent

22. ***Per contra***, Sri Janmed Kumar, learned counsel for the respondent no.3, while referring to the counter affidavit filed by the said respondent, submits that the Labour Court has rightly passed the award by treating the services of the respondent no.3 as a "salesman". He submits that since salary of Rs.950/- per month was being paid by the petitioners to the respondent no.3 which was much less as per the provisions of Minimum Wages Act, the respondent no.3 agitated his claim for enhancing wages before the petitioners which ultimately resulted into termination of his services with effect from 01.10.1998 and the Labour Court, by considering the material placed before it, has rightly directed reinstatement with back-wages. He submits that pursuant to the award, the respondent no.3 has been reinstated but he is being paid only a sum of Rs.1,200/- per month and not the regular pay scale which is applicable for other workmen.

23. Rejoinder affidavit has been filed on behalf of the petitioner reiterating the version contained in the writ petition.

24. Since all the aforesaid writ petitions were heard together, in one of the matters reliance was placed on behalf of the respondent-workman on a judgment of this Court in the case of ***M/s Jagran Prakashan Ltd. and another Vs. Presiding Officer, Labour Court, U.P., Allahabad and others: 2020 (167) FLR 412***, with special reference to paragraph 38 thereof, which is quoted herein below:-

*"38. The workman in this case is, therefore, a workman, both under the Central Act and the State Act as he satisfies the definition of a workman under both the statutes, independent of the provisions of the Working Journalists Act. The employers here being not an industry carried on by or under the authority of the Central Government or one who fall under any of the specified categories or named establishment, authorities or bodies, mentioned under Section 2(a)(i) of the Central Act, **the Appropriate Government would be the State Government in accordance of the provisions of Section 2(a) (ii) of the Act, last mentioned.** Accordingly, reference of the dispute under Section 4-K of the State Act is valid and competent. Since the reference under Section 4-K of the State Act is competent, the further question, "Whether the Labour Court/ Industrial Tribunal constituted under the Central Act alone is competent to answer a reference in relation to the workman?" is not required to be answered."*

25. Before proceeding to deal with submissions made, the interim order dated 19.05.2016 passed in the present writ petition is being referred to, whereby the operation of the impugned award dated 09.11.2015 was stayed subject to the condition that the petitioners deposit entire back-wages as awarded to the respondent no.3 and reinstate him in the same position as he was working at the time when his services were terminated.

26. Having heard the learned counsel for the parties, this Court proceeds to analyse the arguments advanced at the bar in the light of the statutory provisions contained under the Act of 1955, U.P. Act 1947 as well as Central Act, 1947.

Analysis of rival contentions

27. In so far as the definition of "newspaper employee" as contained in Section 2(c) as well as definition of "non journalist newspaper employee" as contained in Section 2(dd) of the Act, 1955 is concerned, this Court in view of the Division Bench judgment of Orissa High Court in the case of **Pratap Chandra Mohanty (supra)**, as referred to and relied upon by this Court in its judgment in the case of **Jagran Prakashan (supra)** and in light of Section 3 of the Central Act, 1947, has extended the provisions of the Act of 1955 to the working of the respondent no.3 holding that he would fall in the inclusion clause contained under Section 2(c) which is apparent from the words **"and includes any other person employed to do any work in, or in relation to, any newspaper establishment"**.

28. The other contention of Sri Nigam with reference to Section 3 that it was only the Central Government which was competent to make a reference in the matter, this Court finds that by virtue of Section 2(a) (ii) of the Central Act, 1947, it was the State Government which was fully competent to make a reference and Section 3 of the Act 1955 does not in any manner restrict power of the State Government to make a reference inasmuch as the power to make a reference by the State Government is implicit in the Central Act 1955 itself and keeping in view of the nature of the petitioner establishment, this Court finds that Section 2(a) (ii) of the Central Act, 1947 fully clothed to the State Government with power to make a reference to the Labour Court. The said provision is reproduced herein below:-

"2(a)(ii) in relation to any other industrial dispute, including the State

*public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the State Government, **the State Government:***

29. In so far as Shri Nigam's contention with regard to the impugned order dated 15.09.2014 is concerned, the argument is that the Labour Commissioner had no power under the Act to make a reference to the Labour Court after the Labour Court had passed an award and such a remittance for reconsideration is in teeth of the provisions of Section 6(4) of the U.P. Act. He has placed strong reliance upon the judgment of this Court in **Hindustan Aeronautics Ltd. (supra)** and submits that this Court has already held that such a recourse is impermissible under the eyes of law.

30. This Court has carefully examined the judgment of this Court in the case of **Hindustan Aeronautics Ltd. (supra)** and finds that facts of the present case are different from the facts of the case of **Hindustan Aeronautics Ltd. (supra)**. In the case of **Hindustan Aeronautics Ltd. (supra)**, the Labour Commissioner had sought an opinion from the District Government Counsel (Civil), Kanpur after passing of the award and the said DGC submitted his opinion on 17.03.2020 advising the Labour Commissioner that adjudication case could be heard by a court constituted under the U.P. Industrial Disputes Act, 1947 and merely on the basis of such opinion, the Commissioner denounced the award and remitted the matter to the Labour Court for reconsideration. This Court, under such facts, found the action of the Labour Commissioner as unjustified. Further, the provisions of Section 6(4) of the U.P. Act

were not considered in the judgment of **Hindustan Aeronautics Ltd. (supra)** nor were the delegated powers conferred by Section 11-A of the U.P. Act, 1947 touched, which reads as follows:-

"[11-A. Delegation of powers.-
The State Government may, by notification in the Official Gazette, direct that any power exercisable by it under this Act or rules made thereunder shall, in relation to such matters and subject to such conditions if any, as may be specified, in the direction, be exercisable also by such officer or authority subordinate to the State Government as may be specified in the notification.]

NOTES

Delegation of power-Power of State Government.- *It was held that the State Government is empowered under Section 11-A to delegate any power under the Act to any subordinate authority."*

31. The judgment of **Hindustan Aeronautics Ltd. (supra)** touches the provisions of Section 39 of the Central Act and states that the delegated power could be exercised only for the purpose of making a reference but could not be exercised to examine the validity of an award passed by the Labour Court as the same would tantamount to administrative interference in a judicial adjudication.

32. Meeting all the aforesaid arguments of Sri S.S. Nigam, this Court finds that the power of Labour Commissioner to remit the award passed by the Labour Court for reconsideration by the said court itself, is contained under Section 6(4) of the U.P. Act, 1947 in the light of delegation made by the State Government in exercise of power under Section 11-A of the said Act. It has neither been pleaded nor

argued nor has anything been placed on record that the State Government has not delegated its powers upon the Labour Commissioner by issuing any notification. Therefore, this Court cannot assume that there is no delegation made by the State Government in favour of the Labour Commissioner to exercise powers under Section 6(4) of the Act.

33. In so far as the contention of Sri Nigam with regard to existence/non existence of any of the contingencies enumerated under Section 6(4) of the U.P. Act so as to remit the award for reconsideration, Section 6(4)(i) is worth consideration. Though, in the present case, clauses (a) to (h) of Section 6(4) of U.P. Act, 1947 do not at all stand attracted, that is to say that in exercise of power of remittance, the conditions laid down in the said clauses are non-existent, this Court finds that such power of remittance can be exercised in case **"illegality of the award is apparent upon the face of it"**, as per clause (i) of sub-section (4) of Section 6 of U.P. Act, 1947. For a ready reference, Section 6(4)(i) is reproduced herein below:-

"6(4)(i) illegality of the award is apparent upon the face of it, it may, after giving the parties reasonable opportunity of being heard, for reasons to be recorded, remit the award for reconsideration of the adjudicating authority, and that authority shall, after reconsideration, submit its award to the State Government, and the State Government shall publish the award in the manner provided in sub-section (3).]"

34. In the present case, it has been pleaded in paragraph no.21 of the writ petition that pursuant to the remand order passed by this Court in Writ-C No.25780 of

2008, a fresh award was passed by the Labour Court rejecting the claim of the respondent no.3 on 12.07.2012, however, on misc. application moved by the respondent no.3, the matter was reopened at the level of Labour Commissioner. As indicated above, the award dated 12.07.2012 has not been placed on record of the present case. However, when this Court examines the validity of the impugned order dated 15.09.2014 it finds that it does not contain any specific reason as to under which clause of sub-section (4) of Section 6 of U.P. Act, 1947 the case in hand fell. Even assuming that due to some narration regarding applicability of Act 1955 in the impugned order dated 15.09.2014, the Labour Commissioner was persuaded to remit the matter for reconsideration to the Labour Court, the case may fall under clause (i) of sub-section (4) of Section 6 and it may be a case where "illegality of the award was apparent upon the face of it", which, in fact, **is not the finding/observation in the impugned order dated 15.09.2014.**

35. Going to the extent of assuming that there was some illegality in the award dated 12.07.2012 which might have been apparent upon its very face so as to attract clause (i) of sub-section (4) of Section 6 of U.P. Act, 1947, there is nothing in the impugned order dated 15.09.2014 which could be said to be compliance of the specific provision of making remittance inasmuch as it is clearly provided after clause (i) **..... it may, after giving the parties reasonable opportunity of being heard, for reasons to be recorded,** remit the award for reconsideration of the adjudicating authority, and that authority shall, after reconsideration, submit its award to the State Government, and the

State Government shall publish the award in the manner provided in sub-section (3).

36. There is **no reference made in the order impugned dated 15.09.2014 that any opportunity of hearing was provided to the parties before remitting the matter to the Labour Court.** Therefore, remittance made by the Labour Commissioner under the order impugned dated 15.09.2014 is found to be in teeth of specific provisions of Section 6(4) of U.P. Act.

37. In so far as the view taken by the learned Single Judge in the case of **Hindustan Aeronautics Ltd. (supra)** that delegated power cannot be exercised for remittance for the purpose of reconsideration, this Court finds that the said power is available under Section 6(4) of U.P. Act itself which provision did not fall for consideration of this Court in the case of **Hindustan Aeronautics Ltd. (supra)**. Therefore the submission of Shri Nigam to the extent that the Labour Commissioner has no power to remit the award, is not acceptable, but in the facts of this case, exercise of such power is found to be contrary to law, as elaborately discussed hereinabove.

38. Sri Nigam has also argued that if the impugned order dated 15.09.2014 is held to be unsustainable, the award of the Labour Court which is consequential in nature shall also stand nullified. He alternatively submits that the Labour Court has not taken into consideration the specific case of the petitioners that the respondent no.3 utterly failed to lead any evidence establishing his workmanship/employment in the petitioner establishment, except one identity card which, for the purpose of making an award, cannot be treated as

cogent evidence, particularly, in view of the voluminous documentary evidence led by the petitioners demonstrating no mention of the name of the respondent no.3 in the entire record which is maintained for all the workmen/employees. Further there is no evidence worth the name that the respondent no.3 completed 240 days of continuous service in one calendar year preceding termination of his services.

Conclusion

39. This Court has examined the matter in its entirety and finds that the order impugned dated 15.09.2014 not only being bereft of any cogent reasoning, suffers from violation of statutory mandate contained under Section 6(4) of U.P. Act, 1947. Therefore, the consequential award itself becomes bad. Apart from this, as against the voluminous evidence led by the petitioner, no evidence worth consideration was led by the respondent no.3 which could hold him an employee/workman in the petitioner establishment.

40. Considering the facts and circumstances of the case and the nature of the interim order dated 19.05.2016 whereby the petitioners were directed to deposit entire back-wages before the Labour Court and also the fact that the alleged services of the respondent no.3, as a hawker, were terminated in the year 1998; the award was passed in the year 2015 and the interim order was passed in the year 2016, whereafter the respondent no.3 has been allowed to work and was paid wages, this Court agrees with the contention of Sri Nigam that the order impugned dated 15.09.2014 as well as award dated 09.11.2015 is unsustainable for the reasons stated hereinabove.

41. The writ petition succeeds and is **allowed**. The impugned order dated 15.09.2014 passed by the Additional Labour Commissioner, U.P., Kanpur (respondent no.1) remitting the matter to the Labour Court as well as consequential impugned award dated 09.11.2015, published on 15.03.2016, passed by the Presiding Officer, Labour Court (First), U.P., Kanpur (respondent no.2) in Adjudication Case No.275 of 1999 (Bureau Chief, Rastriya Sahara Vs. Munraj) are hereby **quashed**.

42. It is for the petitioners to take or not to take work from the respondent no.3 as a hawker in future. However, in so far as the relief of reinstatement or 50% back-wages granted under the impugned award is concerned, the same is hereby refused and annulled. The amount deposited by the petitioners pursuant to interim order granted in this writ petition shall be refunded to the petitioners within **two months**.

Writ-C No.23786 of 2016 **(M/S Bureau Chief Rastriya Sahara And Another Vs. Labour Commissioner And 2 Others)**

43. The facts of the present case are exactly the same as to the facts of Writ-C No.23241 of 2016. The only change which this Court finds is that this writ petition is regarding a different workman who had agitated his claim exactly on the same lines and on the same facts and, ultimately, the adjudication case was registered as Case No.34 of 2000 (Bureau Chief, Rastriya Sahara Vs. Ravindra Kumar Mishra). The reasonings recorded in the award as well as order of remittance dated 15.09.2014, are exactly the same. Nature of claim and defence put by the parties is also the same.

Exactly identical arguments were advanced on behalf of both the parties in this writ petition also. Therefore repetition of facts or law would unnecessarily make this judgment further bulky.

44. For all the aforesaid reasons, this writ petition also succeeds and is **allowed**. The impugned order dated 15.09.2014 passed by the Additional Labour Commissioner, U.P., Kanpur (respondent no.1) remitting the matter to the Labour Court as well as consequential impugned award dated 09.11.2015, published on 15.03.2016, passed by the Presiding Officer, Labour Court (First), U.P., Kanpur (respondent no.2) in Adjudication Case No.34 of 2000 (Bureau Chief, Rastriya Sahara Vs. Ravindra Kumar Mishra) are hereby **quashed**.

45. It is for the petitioners to take or not to take work from the respondent no.3 as a hawker in future. However, in so far as the relief of reinstatement or 50% back-wages granted under the impugned award, the same is hereby set aside and annulled. The amount deposited by the petitioners pursuant to interim order passed in this writ petition shall be refunded to the petitioners within **two months**.

Writ-C No.22872 of 2016
(M/S Jagran Prakashan Ltd. Vs.
Presiding Officer Industrial Tribunal
And Another)

46. This writ petition has been filed by M/s Jagran Prakashan Ltd., Meerut through its Manager challenging the impugned award dated 20.07.2015, published on 02.01.2016, passed by Presiding Officer, Industrial Tribunal (5), Meerut (respondent no.1) in Adjudication No.18 of 2002.

47. The facts of the present case, as per the pleadings contained in the writ petition, are that the petitioner is a newspaper company and publishes newspapers in the name of "Dainik Jagran" from various places including District Meerut.

48. It is pleaded by the petitioner that the respondent no.2 (Umesh Kumar) was never engaged by the petitioner establishment at any point of time and no relation of the employer and employee ever existed between the petitioner and the respondent no.2 and in fact one Muley Ram Singh, who was the relative of respondent no.2, was working in the petitioner establishment and the respondent no.2 used to come from time to time at the petitioner establishment to meet his said relative. It is stated that on 11.08.2001 the respondent no.2 came to meet Muley Ram Singh and without knowledge of the watchman, he entered into the premises of the establishment and took away certain papers of the petitioner establishment with some ulterior motive, which incident was reported by the establishment on 18.08.2001 to the police station concerned and a first information report concerning the same was registered as Case Crime No.334 of 2001, under Section 380 IPC at Police Station Civil Lines, Meerut. It is further stated that the respondent no.2 took away production report, register and other papers from the petitioner establishment and it appears that he prepared some documents in relation to his employment to get undue benefit stating that his services were illegally terminated with effect from 09.08.2001. It is further stated that the respondent no. 2 filed an application before the Deputy Labour Commissioner under section 2-A of the U.P. Industrial Disputes Act, 1947 and prayed that the matter may

be referred to the Conciliation board and, on the said application, the Conciliation Officer, Meerut instead of constituting Conciliation board proceeded with the case for settlement and issued notice to the petitioner. It is further stated that there is no provision under the U.P. Industrial Disputes Act, 1947 and Rules framed thereunder that before constitution of the Conciliating board, the conciliation proceeding may be proceeded, however, without following the procedure as prescribed under the U.P. Industrial Disputes Act, 1947 in respect of Conciliation Bard; the State Government referred the matter to the Presiding Officer, Industrial Tribunal, respondent no. 1 for adjudication of the following alleged dispute where Adjudication Case No. 18 of 2002 was registered:

"क्या सेवायोजकों द्वारा अपने कर्मचारी श्री उमेश कुमार पुत्र भूडिया सिंह की सेवाएं दिनांक 09-08-2001 से समाप्त किया जाना उचित एवं वैधानिक है? यदि नहीं, तो संबंधित श्रमिक किस हितलाभ / अनुलोभ के पाने का अधिकारी है और अन्य किस विवरण के साथ ? "

49. Pursuant to the notice issued in the aforesaid case, the petitioner and the respondent no.2 filed respective replies before the Tribunal and whereas the contention of the respondent no.2 was to the effect that he was working in the petitioner establishment since 1996, his services were illegally terminated by an oral direction with effect from 09.08.2001, on the other hand, the defence of the petitioner establishment was that there never existed any relationship of employer and employee and that the respondent no.2 had never worked in the establishment, rather he manufactured some documents by committing theft in the organisation. Further defence of the petitioner was that there is no documentary evidence to establish that the petitioner was ever

appointed in the organisation nor his name finds mention in relation to any scheme which is applicable for workmen. It is further contended by the petitioner in defence before the Tribunal that the order of reference was bad in law as the case was instituted under the provisions of Industrial Disputes Act, 1947 (Central Act), whereas the reference had been made under the provisions of U.P. Industrial Disputes Act, 1947 (State Act).

50. After holding proceedings where pleadings and affidavits were exchanged, the documentary evidence was filed and the witnesses were also examined and cross examined, the Presiding Officer (respondent no.1), by impugned award the dated 20.07.2015, held that before terminating the services of the respondent no.2, no notice was served upon him by the petitioner establishment and, therefore, the termination was bad and, consequently, the respondent no.2 was awarded one month's salary and compensation equivalent to 15 days' salary of every working year along with Rs.20,000/- as additional compensation and Rs.5,000/- as the cost of litigation.

51. A counter affidavit has been filed by the respondent no.2 stating that initially the respondent no.2 was appointed as Junior Clerk on 02.09.1996 in the establishment of petitioner. The respondent no. 2 used to bring news items from the editorial department and endorsed the same into register in his handwriting. Besides above, the respondent no. 2 also endorsed the day to day work done by the computer operators in the register under his handwriting. The said work is of permanent nature. The aforesaid register is lying with the employers. Further, the State Government has full jurisdiction and is

competent to refer the matter for adjudication and, as such, the reference order was correctly made. Moreover, if the employers were aggrieved with the reference order, they ought to have challenged the same by means of writ petition immediately at that time when the reference was made on 4.06.2002.

52. It is further pleaded in the counter affidavit that the respondent no.2, with regard to proof of his working with the employer w.e.f. 2-9-1996 to 2-8-2001 and payment of wages by the employers for said period, filed one application dated 22-11-2003 paper no. 13-D supported by affidavit, paper no. 14-A, for producing the requisite documents from the employers before the court namely, (a) Production Register/Report w.e.f. 2-9-1996 to 2-8-2001, (b) Overtime detail and payment register w.e.f. 2-9-1996 to 2-8-2001 alongwith ledger of said period and overtime slip, (c) Leave Register alongwith Leave Application w.e.f. 2-9-1996 to 2-8-2001 and (d) Payment of Wages Register w.e.f. 2-9-1996 to 2-8-2001.

53. Further defence in the counter affidavit is that the employers did not produce the best evidence in this case. Shri Rajendra Kumar Supervisor of the petitioner took work from the respondent no.2 and granted leave etc. to him, but Shri Rajendra Kumar Supervisor was not produced by the employers for the examination although he was in service. Likewise, another employee Muley Ram was also not produced by the employers for examination, whereas the employers have taken the name of Muley Ram and setup their false case concerning him. Thus, the employers deliberately did not produce their best evidence and withheld it. In case the employers produced Shri Rajendra

Kumar and Shri Muley Ram, the said witnesses would have spoken the truth which might have gone against the case set up by the employers.

54. The petitioner has filed a rejoinder affidavit reiterating the version contained in the writ petition.

55. I have heard Sri Chandra Bhan Gupta, learned counsel for the petitioner, Sri Ajay Rajendra, learned counsel for the respondent no.2 and the learned Standing Counsel for respondent no.1.

56. This matter was heard along with Writ-C Nos.23241 of 2016 and 23786 of 2016 which were argued by S.S. Nigam, learned Senior Counsel and the arguments in relation to the validity of reference in the light of various provisions of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955, Industrial Disputes Act, 1947 (Central Act) as well U.P. Industrial Disputes Act, 1947 (U.P. Act) were advanced.

57. When the present writ petition was argued, Sri Chandra Bhan Gupta, learned counsel for the petitioner, submitted that in the present case also, the reference was bad in the eyes of law and he adopts all the arguments advanced by Sri S.S. Nigam, learned Senior Counsel with regard to validity of reference as well as applicability of the provisions of Act, 1955, Central Act, 1947 as well as U.P. Act, 1947.

58. Now, I proceed to consider the rival submissions made at the bar on the merits of the case.

Rival contentions and their analysis

59. A perusal of the record reveals that both the parties in support of their respective claims and defence submitted various documents. Whereas the respondent no.2 filed 19 documents along with list 8-B2, the petitioner filed two documents along with list 12-B1. It was contended by the petitioner before the Tribunal that the documents filed by the respondent no.2 did not relate to his employment and since he had taken away the documents from the petitioner establishment concerning which FIR was also registered, he cannot get any advantage out of manufactured documents.

60. On the other hand, the contention of the respondent no.2 was to the effect that the theory of alleged theft has been falsely narrated and no action was taken by the police authorities pursuant to false FIR lodged against him.

61. This Court finds that on behalf of the petitioner, one Rajesh Kumar Bhardwaj was produced as a witness who made his statement and was also cross examined. In his cross examination, Sri Bhardwaj stated as follows:-

"मेरी नियुक्ति वरिष्ठ लिपिक के पद पर हुई थी और अब मेरा प्रोमोशन होकर मैं वर्ष 2005 के कार्मिक अधिकारी के पद पर कार्य कर रहा हूँ, कर्मचारियों के अभिलेखों के रख-रखाव का विभाग बना हुआ है, जिसका नाम कार्मिक विभाग है। कार्मिक विभाग में मेरे सहित तीन कर्मचारी कार्य करते हैं। इस विभाग में कर्मचारियों के उपस्थिति रजिस्टर, वेतन भुगतान रजिस्टर व व्यक्तिगत पत्रावलियों का रख-रखाव किया जाता है। अवकाश प्रार्थना पत्र फार्म संख्या-14 में तैयार किये जाते हैं। कर्मचारी जो अवकाश प्रार्थना पत्र देते हैं, उनकी पत्रावली भी रखी जाती है। पांच वर्ष की अवधि बीत जाने पर उन अभिलेखों को विनिष्ट (बीड) कर दिया जाता है। जो अभिलेख विनिष्ट किये जाते हैं, उनका कोई रजिस्टर अलग से नहीं रखा जाता है। नष्ट होने वाले कागजात की सूची भी तैयार नहीं की जाती है। मेरे अनुसार महत्वपूर्ण कागजात में कर्मचारियों की व्यक्तिगत पत्रावलियां व वेतन भुगतान संबंधी रजिस्टर तथा उपस्थिति रजिस्टर आते हैं। वेतन भुगतान से संबंधित ई०एस०आई० तथा पी०एस० संबंधी कागजात भी महत्वपूर्ण होते हैं। ओवर टाईम से संबंधित कागजात पांच वर्ष तक रखे जाते

हैं। मुझे यह जानकारी नहीं है कि संबंधित श्रमिक उमेश कुमार ने अपने सेवा संबंधी विवाद किस सन् में उठाया था। संबंधित कार्मिक विभाग से कोई रजिस्टर अथवा अन्य कागजात उठाकर नहीं ले गया। कर्मचारियों की उपस्थिति और वेतन भुगतान रजिस्टर करीब 15 वर्ष के हमारे कार्यालय में रखे हुए हैं। मैं उत्पादन विभाग का कार्य नहीं देखता, लेकिन उत्पादन विभाग में जो कर्मचारी कार्य करते हैं, उनके अभिलेख जो कार्मिक विभाग से संबंधित हैं। हमारे द्वारा तैयार किये जाते हैं। मैं नहीं बता सकता कि उत्पादन विभाग में कौन-कौन से अभिलेख रखे जाते हैं। यदि कोई कर्मचारी अवकाश लेना चाहता है, तो वह संबंधित विभाग के इन्चार्ज से अवकाश प्रार्थना पत्र अग्रसारित हमारे विभाग में देता है। अवकाश प्रार्थना पत्र पर कार्मिक विभाग की टिप्पणी अंकित की जाती है और उसके पश्चात पत्र की पत्रावलियां अलग से हमारे विभाग में तैयार की जाती हैं। वर्ष 2000-2001 में उत्पादन विभाग के इन्चार्ज श्री राजेन्द्र कुमार थे। मैं देखकर राजेन्द्र कुमार के हस्ताक्षर पहचान सकता हूँ। सूची 8-बी(2) का कागज सं०-6 देखकर साक्षी ने कहा कि मुझे नही लगता कि इस कागज पर श्री राजेन्द्र कुमार और श्री सुरेश चन्द शर्मा के हस्ताक्षर हों। सूची 8-बी(2) का कागज संख्या-1 दैनिक जागरण, मेरठ के फार्म पर तैयार किया गया है, लेकिन मैं देखकर यह नहीं बता सकता कि हस्ताक्षर अधिकारी के सामने किसके हस्ताक्षर हैं। इसी प्रकार सूची 8-बी(2) का कागज सं०-3,8,9,10,11,12 व 13 भी दैनिक जागरण के फार्मेट पर तैयार किये गये अवकाश प्रार्थना पत्र हैं, लेकिन इस पर अधिकारी के हस्ताक्षर के कॉलम में किसके हस्ताक्षर हैं, मैं नहीं बता सकता। अवकाश प्रार्थना पत्र के फार्मेट दैनिक जागरण कार्यालय के स्टोर विभाग में रखे रहते हैं। वहां से कोई भी कर्मचारी ले सकता है। जिस विभाग में मूले राम कार्य करता है, उस विभाग से मिला हुआ ही स्टोर विभाग है। दोनों विभाग दो मंजिला पर हैं। वर्ष 2000-2001 में दैनिक जागरण, मेरठ का कार्यालय दिनांक 140-डी, साकेत, मेरठ में था। जो बाहरी व्यक्ति कार्यालय में आते हैं, उनका इन्द्राज गेट पर ही एक रजिस्टर में किया जाता है। स्वयं कहा कि कई बार सिक्वोरिटी वाले कर्मचारी लापरवाही भी करते हैं और कुछ लोगों को बिना इन्द्राज करे भी अन्दर घुसा लेते हैं। गेट पर जो रजिस्टर रख रहता है, उसमें आगन्तुक का नाम दिनांक व समय तथा आने का उद्देश्य आदि इन्द्राज किये जाते हैं। हो सकता है कि उमेश कुमार का इन्द्राज गेट पर रखे गये पंजिकाओं में आगन्तुक के रूप में हो। गेट का रजिस्टर सिक्वोरिटी विभाग में रखे जाते हैं। मैं नहीं कह सकता कि वर्ष 2000-2001 के गेट रजिस्टर अब सिक्वोरिटी विभाग में है या नहीं। जब आगन्तुक कार्यालय में आते-जाते हैं, तो गेट पर तलाशी नहीं ली जाती, बल्कि केवल इन्द्राज ही किया जाता है। मुझे यह जानकारी नहीं है कि आगन्तुक का सामान गेट पर रख लिया जाता है अथवा नहीं। यह बात मेरी जानकारी में नहीं है कि जिस दिन की चोरी उमेश कुमार द्वारा करना बताता हूँ, उस दिन मूले राम से कोई स्पष्टीकरण इस आशय का मांगा गया था या नहीं कि उसका परिचित व्यक्ति उत्पादन विभाग से अभिलेख उठाकर ले गया है। मेरे विभाग में मूले राम का विभाग 5-7 कदम दूर था। उत्पादन विभाग के हॉल में स्थित है, जिसमें 10-12 कर्मचारी कार्य करते थे, सर्कुलेशन विभाग में वर्ष 2000 में करीब 10-12 कर्मचारी कार्य करते थे। संबंधित श्रमिक

महीने में एक-दो बार मूले राम से मिलने आता था और उससे मिलकर चला जाता था। मैं यह नहीं बता सकता कि मैंने पहली बार उमेश कुमार को किस सन् में और किस महीने में मूले राम के पास आते हुए देखा था। मैं यह भी नहीं बता सकता कि मैंने अन्तिम बार उमेश कुमार को कार्यालय में आते हुए कब देखा था। जागरण प्रकाशन लि० में जितने भी कर्मचारी सेवारत हैं, उन सब की उपस्थिति मुख्य गेट पर ही सिक्कोरिटी गार्ड के समक्ष दर्ज हो जाती है। मुख्य गेट पर प्रत्येक विभाग के अनुसार उपस्थिति शीट रखी रहती है, जिसमें प्रत्येक कर्मचारी अपना हस्ताक्षर करता है और उसके बाद अपने विभाग में ड्यूटी पर चला जाता है। उपस्थिति शीट के आधार पर ही कार्मिक विभाग में उपस्थिति रजिस्टर तैयार किया जाता है, जिसमें केवल "ए" और "पी" लिखकर उपस्थिति और अनुपस्थिति दर्शाई जाती है, उसी रजिस्टर में अवकाश और साप्ताहिक अवकाश इन्द्राज कार्मिक विभाग द्वारा किया जाता है। वर्ष 1996 के बाद की उपस्थिति शीट संभवतः इस केस में दाखिल नहीं की गई है। उपस्थिति शीट में जिन कर्मचारियों के नाम लिखे हैं और जिन्होंने अपने हस्ताक्षर किये हैं, वे जागरण प्रकाशन लि० के कर्मचारी होते हैं। कोई बाहरी व्यक्ति उपस्थिति शीट पर हस्ताक्षर नहीं बना सकता, जो कर्मचारी गेट पर रखी हुई उपस्थिति शीट पर हस्ताक्षर करते हैं, उन सभी के नाम कार्मिक विभाग में तैयार किये गये उपस्थिति रजिस्टर में कर्मचारी का पद भी लिख जाता है। कागज संख्या 6-ए० (सेवायोजक का लिखित कथन) देखकर साक्षी ने कहा कि इस पर श्री शरद टण्डन के हस्ताक्षर हैं, जो फैक्ट्री मैनेजर थे। सुरेश चन्द शर्मा भी फैक्ट्री मैनेजर थे, मैं उनके हस्ताक्षर भी पहचानता हूँ। यह कहना गलत है कि मैं सेवायोजकों के दबाव में सही बात नहीं बता रहा हूँ। यह कहना गलत है कि संबंधित श्रमिक उमेश कुमार ने दिनांक 02-9-1996 से लगातार सेवा समाप्ति तक जागरण प्रकाशन लि० की सेवा में रहा हो। यह कहना भी गलत है कि मैंने सेवायोजक के निर्देश और दबाव के कारण संबंधित श्रमिक का नाम कार्मिक विभाग के उपस्थिति रजिस्टर में न लिखा हो।"

62. As against the said oral evidence, the respondent no.2 produced himself as DW-1, one Hari Shanker as DW-2 and one Ravindra Kumar as DW-3.

63. DW-1 (respondent no.2) clearly stated that he was appointed on the post of junior clerk on 02.09.1996 but he was not issued any appointment letter and the petitioner used to take work from him for bringing newspaper from Editorial Section, submitting the same to the composite section, thereafter making entries in the production register after such composition, making further entries of main heading and length of the particular news items and,

then, forwarding the same to other employees. He states that his duty was from 7.00 pm to 3.00 am; that he used to work for about 300 days in every 12 months; that when he fell ill on 02.08.2001, he remained under treatment of Dr. Sudarshan Kumar Verma till 08.08.2001 concerning which medical certificate issued by the said doctor was also submitted in the petitioner establishment but when he went to the petitioner establishment on 09.08.2001 with fitness certificate, the petitioner refused to take him on duty, whereafter, he proceeded with legal remedies through notices etc. In his cross examination, DW-1 Umesh Kumar (respondent no.2) further stated as follows:-

"मैं जागरण की नौकरी में दिनांक 02-9-1996 को आया था। प्रार्थना पत्र कोई नहीं दिया, केवल हाई स्कूल का प्रमाण पत्र दिया था। मेरी नौकरी श्री अजय मिश्रा जी ने लगाई थी। नियुक्ति के समय मैं श्री राजेन्द्र कुमार को नहीं जानता था। नियुक्ति के बाद श्री राजेन्द्र शुक्ला जी के सुपरविजन में काम करने के लिए श्री मूले राम नागर ने कहा था। मुलेराम नागर प्रोडक्शन क्लर्क के पद पर कार्य करते थे। ये बात नियुक्ति के एक डेढ़ महीने के बाद की है, उससे पहले मैं प्रोडक्शन विभाग से मौडम लाकर प्रोडक्शन विभाग में देता था। राजेन्द्र कुमार जी के सुपरविजन के अंदर में काम करने का कोई लिखित आदेश नहीं था। छुट्टी का मूल प्रार्थना पत्र टाईम आफिस के बाक्स में डाल दिया जाता है। उसकी प्राप्ति लेने का प्रश्न ही नहीं उठता था। जागरण में नौकरी करने से मैं श्री मूले राम नागर को जानता था। नौकरी में आने से पहले मैं उनसे मिलने कभी नहीं आया था, जो प्रलेख मैंने दाखिल किए हैं, वो कंपनी में जमा है। मेरे ज्ञान में मेरे ऊपर फौजदारी का कोई मुकदमा नहीं चल रहा है। मेरी जानकारी में ऐसा नहीं है कि कंपनी ने मेरे खिलाफ कंपनी का रिकार्ड चुरा ले जाने की रिपोर्ट लिखाई हो। मुझे फौजदारी का कोई सम्मन नहीं मिला और मैं कभी न्यायालय में उपस्थित नहीं हुआ। मैंने अपने सेवाकाल में ऐसी आपत्ति नहीं उठाई कि मुझे लिखित में जागरण में काम करने के लिए दिया जाए।

श्री मूले राम नागर और राजेन्द्र कुमार अब भी जागरण प्रकाशन में कार्यरत हैं। मैं ड्यूटी पर जाता था, तो हाजिरी लगती थी। मैं हाजिरी शीट पर हस्ताक्षर करता था। जिस शीट पर मैं हस्ताक्षर करता था, उस पर चार नाम थे, उस पर राजपाल का नाम था और दो के नाम ध्यान नहीं। तनखाह उस शीट पर नहीं मिलती थी। तनखाह श्री सरदार सुरेन्द्र सिंह जी अपने शीट पर बुलाकर एक शीट पर दस्तखत कराकर देते थे, उसे जो रकम देते थे, वह लिखी जाती थी व मैंने उस शीट की कापी कभी नहीं मांगी। मेरे सामने किसी अन्य कर्मचारी ने भी उस शीट की कापी नहीं मांगी। मूले राम नागर जी मेरे बहनोई के भाई हैं। उनका नाम उस शीट

पर नहीं था। उसका नाम किस रजिस्टर पर होता था, मुझे नहीं पता। जो कर्मचारी जागरण में काम करते थे उनकी हाजिरी फार्म नं०-12 में लगती थी। मूल राम नागर परमानेंट कर्मचारी थे, उनकी हाजिरी कहां लगती थी। मुझे नहीं पता, जो प्रार्थना पत्र राजेन्द्र कुमार के हस्ताक्षर कराकर छुट्टी के लिए कराए थे, वो छपे-छपाए फार्म थे। छुट्टी का प्रार्थना पत्र राजेन्द्र कुमार जी शाम को हस्ताक्षर करके हमें देते थे और कह देते थे कि उसको कल डाल देना, तब मैं उसे घर ले जाकर फोटो कापी करा लेता थे और उसके बाद मैं संबंधित बक्से में डाल देता था। यही बात ओवर टाईम स्लिप के बारे में है। प्रार्थना पत्रों में तारीख भी डालते थे। मुझे छुट्टी सैंक्शन होने के बाद सूचना नहीं मिलती थी। हम तो प्रार्थना पत्र देकर छुट्टी कर लेते थे। दिनांक 12.02.2000 को मैंने टैक्सी से जाने के लिए प्रार्थना पत्र दिया था, उससे पहले कोई प्रार्थना पत्र नहीं दिया था। जब मैं कभी टैक्सी से जाता था, तो किराए देता था। इस प्रार्थना पत्र पर राजेन्द्र कुमार "के भी हस्ताक्षर हैं और उस पर तारीख भी पड़ी है। ओम प्रकाश सांगवाल को मैंने कई बार टैक्सी पर जाने के लिए पैसे दिए। ये परमिशन रात को ड्युटी से वापस जाते समय हुई थी। ढाई से तीन बजे तक की बात है। यह गलत है कि यह प्रार्थना पत्र मैंने राजेन्द्र कुमार के कहने से दिया हो। मेरे प्रार्थना पत्र पर संस्तुति करने से पूर्व राजेन्द्र कुमार जी ने तुरंत ही अपनी संस्तुति मेरे सामने लिख दी थी। टैक्सी में जाने की परमिशन के लिए मैंने प्रार्थना पत्र अपने हाथ से लिखकर दिया था। मैं अपने हस्ताक्षर सामान्यता: अंग्रेजी में करता हूँ। प्रदर्श डब्लू-11 पर मेरे हस्ताक्षर नहीं हैं पर प्रार्थना पत्र मेरे लेख में हैं। इस पर हस्ताक्षर न करने का कोई कारण नहीं है। सूची 8-बी(2) का पेपर नं०-7 प्रोडक्शन रिपोर्ट की छाया प्रति है, जो फरवरी 2000 की है। यह मेरे द्वारा बनाई गई है और इस पर मेरे हस्ताक्षर हैं। इस पर प्रतिष्ठान का नाम नहीं लिखा और न ही अधिकारी के हस्ताक्षर हैं। इस पर प्रोडक्शन में प्रतिदिन के हस्ताक्षर हैं। यह प्रोडक्शन कम्प्यूटर से निकाली जाती थी, फिर इसमें भरी जाती थी। कार्य प्रोडक्शन रजिस्टर में चढ़ता था। उस से मैं विवरण तैयार करता था। इस विवरण की मूल आफिस के कार्यालय में जमा कर दी थी। इसकी कोई रसीद नहीं है, जो तारीख इस विवरण की फोटो प्रति पर पड़ी है, उसी तारीख को आफिस में जमा कर देते थे। ये राजेन्द्र कुमार जी को मूल दे दी जाती थी। मुझे याद नहीं है कि मुझे छुट्टियों का वेतन मिला था अथवा नहीं। साल भर में कितनी छुट्टी बनती थी, मुझे नहीं पता। सैंक्शन तभी होती थी, जब छुट्टी ड्यू होती थी। ड्यू नहीं होती थी, तो तनख्वाह कट जाती थी। प्रतिष्ठान में ई०एस०आई० स्कीम लगती है। मुझे नहीं पता मेरे वेतन से नहीं कटती थी। उक्त सूची का पेपर नं०-15 यह छुट्टी का प्रार्थना पत्र है, इस पर राजेन्द्र कुमार के हस्ताक्षर नहीं हैं। ये फार्म पर भी नहीं हैं। बीमारी के प्रार्थना पत्र पर राजेन्द्र जी हस्ताक्षर करते थे यह नहीं पता। मैंने अपना प्रार्थना पत्र अपने दोस्त से भिजवाया था। मैंने प्रार्थना पत्र के साथ डाक्टरी का प्रमाण पत्र नहीं लगाया था। असल प्रमाण पत्र प्रार्थना पत्र के साथ भेज दिया था। प्रमाण पत्र फोटो प्रति मैं अपने पास नहीं रखता था। प्रोडक्शन विवरण की फोटो कापी के अतिरिक्त मैं अन्य कोई रिकार्ड मैटैन नहीं करता था। प्रदर्श डब्लू०-6 फिटनेस प्रमाण पत्र की फोटो प्रति है। इसी में चिकित्सा प्रमाण पत्र भी सम्मिलित है। इस पर मेरे कोई हस्ताक्षर नहीं हैं। फिर कहा इस पर मेरे हस्ताक्षर हैं। यह बात गलत है कि दवाई के पर्चे अलग डाक्टर के हैं और फिटनेस के अलग डाक्टर के हैं, जो प्रलेख मेरे नौकरी के संबंध में मेरे पास हैं, मैंने दाखिल कर दिया है

अन्य कोई और सबूत मेरे पास नहीं है। यह गलत है कि मैं जागरण प्रकाशन के नियोजन में कभी नहीं रहा और मेरे ऊपर अभिलेख चुराने का मुकदमा मेरे ज्ञान में चल रहा है।"

64. The other witnesses, namely, Hari Shanker and Ravindra Kumar (respectively DW-1 and DW-3) also supported the stand taken by DW-1 Umesh Kumar (respondent no.2). In so far as the documentary evidence is concerned, it has come on record as well as in the impugned award that the respondent no.2 filed six applications regarding medical leave, as papers no.3, 8, 9, 10, 11 and 13, certificates of overtime being paper nos.1 and 12, production report being paper nos.2, 4 and 5 as Exhibit W-7, W-8 and W-9 and another document paper no.6 (Exhibit W-11) whereby the respondent no.2, after completing his duty at 3.00 am, had sought permission from the manager for going through taxi which permission was accorded by the manager on 12.02.2000. With regard to the documentary evidence produced by the petitioner establishment, it has come in the award that only attendance register of August, 2001 and earned leave register of the year 1999 was produced by the petitioner mentioning and arguing that there is no entry of the name of the respondent no.2 in the said registers which reflects that he was not a workman in the establishment.

65. Sri Chandra Bhan Gupta, learned counsel for the petitioner, apart from adopting the arguments of Sri S.S. Nigam regarding the provisions of aforesaid Acts of 1955 and 1947, submits that even otherwise on merits, there was no evidence worth the name to establish employer and employee relationship between the petitioner the respondent no.2 and that the Tribunal wrongly arrived at a conclusion that the respondent no.2 had been engaged

by the petitioner and that he had worked for more than 240 days in one year preceding termination of his services.

66. On the other hand, Sri Ajay Rajendra, learned counsel for the respondent no.2, has vehemently argued that in so far as the validity of reference is concerned, it has already been held by this Court in paragraph 38 of the judgment in the case of **Jagran Prakashan (supra)** as follows:-

"38. The workman in this case is, therefore, a workman, both under the Central Act and the State Act as he satisfies the definition of a workman under both the statutes, independent of the provisions of the Working Journalists Act. The employers here being not an industry carried on by or under the authority of the Central Government or one who fall under any of the specified categories or named establishment, authorities or bodies, mentioned under Section 2(a)(i) of the Central Act, the Appropriate Government would be the State Government in accordance of the provisions of Section 2(a) (ii) of the Act, last mentioned. Accordingly, reference of the dispute under Section 4-K of the State Act is valid and competent. Since the reference under Section 4-K of the State Act is competent, the further question, "Whether the Labour Court/ Industrial Tribunal constituted under the Central Act alone is competent to answer a reference in relation to the workman?" is not required to be answered."

67. Sri Ajay Rajendra further submits that voluminous documentary evidence was led by the workman before the Tribunal which was sufficiently proved through oral evidence establishing that the respondent

no.2 was appointed as Junior Clerk in the year 1996, he worked continuously and his services were wrongly terminated without ensuring compliance of provisions of Section 6-N of U.P. Industrial Disputes Act, 1947. Sri Rajendra has referred to the documents on record as well as findings recorded in the award.

68. So far as the argument of Sri Chandra Bhan Gupta regarding validity of reference, this Court finds that the order of reference has neither been annexed along with the present writ petition, nor has it been challenged by making any prayer whatsoever. Further, it appears from perusal of the impugned award that during the course of arguments before the Tribunal, contention against the validity of reference was advanced, however the Tribunal, by examining the provisions of law and referring to various decisions, held that reference under the provisions of U.P. Act was valid. This Court, while discussing validity of reference made in the aforesaid writ petitions argued by Sri S.S. Nigam, has held that appropriate Government to make a reference to the Labour Court was State Government. No further deliberation is required on the said issue, particularly when, the reference order is not under challenge nor has it been annexed.

69. In so far as the contention of Sri Gupta to the effect that no evidence was led by the respondent no.2 establishing his workmanship in the petitioner establishment since 1996 onwards or otherwise, this Court finds that the argument has no substance and is contrary to the material on record. The Court has already noticed that the Tribunal has taken into consideration voluminous evidence produced by the respondent no.2 establishing his employment in the

petitioner establishment and all the three witnesses produced by the workman established the same. No discrepancy is found either in oral testimony or in documentary evidence filed on behalf of the workman.

70. As regards the contention of Shri Gupta that the respondent no.2 had stolen away certain documents from the petitioner establishment and manufactured the same for establishing his employment, there is nothing on record as to what happened in pursuance of the FIR registered against the respondent no.2 nor has anything been argued to establish that the respondent no.2 was found guilty by any court of competent jurisdiction regarding commission of alleged theft.

71. The Tribunal also recorded a finding that the allegation of commission of theft did not stand established on record. Even otherwise, in so far as the allegation of manufacturing documents by the respondent no.2 is concerned, the Tribunal has rightly arrived at a conclusion by perusing the oral testimony of Sri Rajesh Kumar Bhardwaj that it was not stated by him that the documents had been fraudulently manufactured, rather by perusing the signature on the said documents, only this much was stated that it did not appear that the documents were signed by the officers Rajendra Kumar and Suresh Sharma. The Tribunal has rightly recorded that the witness produced by the petitioner did not specifically deny the signatures nor did he say that the signatures were not of any officers of the petitioner establishment.

72. Regarding the contention that the respondent no.2's relative Muley Ram Singh was working in the petitioner

establishment and the respondent no.2 did not work in the establishment but he used to come to meet Muley Ram Singh, the Tribunal has rightly drawn adverse inference against the petitioner establishment on the ground that Muley Ram Singh was not produced as a witness by the petitioner side. Apart from him, adverse inference was rightly drawn for non production of Ajay Mishra who was an employee having made the signatures and Rajendra Kumar, the taxi driver.

73. Section 114 of the Indian Evidence Act, 1872 contains the provisions where a court may presume existence of certain facts. For a ready reference, Section 114 of the Evidence Act, with special reference to illustration (g), is reproduced below:-

"114 Court may presume existence of certain facts.-- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume--

(a)

(b)

(c)

(d)

(e)

(f)

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

(h)

(i)

74. A perusal of Illustration (g) of Section 114 clearly shows that if the

evidence which could be and is not produced, adverse inference can be drawn against the defaulting party presuming that the evidence, if produced, would be unfavourable to the person who withholds it. The said provision would apply to these proceedings by virtue of Section 5-C(3) of the U.P. Industrial Disputes Act, 1947.

Conclusion

75. In the present case, not only documentary evidence but also oral evidence produced by the petitioner side was thoroughly lacking as against the voluminous documentary and oral evidence produced by the workman and it is a clear case where on the issue of engagement of the workman in the petitioner establishment, **adverse inference** should be drawn and has rightly been drawn by the Tribunal against the petitioner establishment.

76. In the facts and circumstances of the present case, this Court finds that oral termination of services of the respondent no.2 was in teeth of provisions of Section 6-N of U.P. Industrial Disputes Act, which reads as follows:-

"6N. Conditions precedent to retrenchment of workmen. - No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until, -

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice wages for the period of the notice;

Provided that no such notice shall be necessary if the retrenchment is

under an agreement which specifies a date for the termination of service;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the State Government.]"

77. In so far as the award is concerned, reinstatement has not been ordered, rather compensation as described in the initial portion of this judgment has been awarded. I do not find any factual or legal error committed by the Tribunal in deciding the adjudication case and making the award in so far as findings on unlawful termination are concerned. However, the validity of award, to the extent it does not direct reinstatement of workman or award of back wages, shall be examined while dealing with Writ-C No.27687 of 2016, filed by workman Umesh Kumar, as both the employer and the workman have challenged the same award by their respective writ petitions clubbed together. The findings recorded in the impugned award regarding services of respondent no.2 and wrongful termination thereof are pure findings of fact and do not call for any interference in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. The writ petition fails and is accordingly **dismissed**.

Writ-C No.27687 of 2016
(Umesh Kumar Vs. The Presiding
Officer Industrial Tribunal And
Another)

78. This writ petition has been filed by the workman Umesh Kumar challenging

the impugned award dated 20.07.2015, published on 02.01.2016, passed by Presiding Officer, Industrial Tribunal (5), Meerut (respondent no.1) in Adjudication No.18 of 2002.

79. Heard Sri Ajay Rajendra, learned counsel for the petitioner and Sri Chandra Bhan Gupta, learned counsel for the respondent no.2.

80. The validity of award on factual and legal grounds in so far as services of the workman and their wrongful termination, has been thoroughly discussed while writing judgment in Writ-C No.22872 of 2016. However, the Court proceeds to consider as to what relief the workman is entitled to and as to whether the award to that extent is good or bad.

Rival contentions and their analysis

81. In the present case, the contention of Sri Ajay Rajendra, learned counsel for the workman is to the effect that once the Tribunal had arrived at a conclusion that termination of services of workman was illegal, direction for reinstatement of the workman with continuity in service and back-wages should have been issued and, therefore, to this extent, the award is illegal.

82. Contrarily, Sri Chandra Bhan Gupta, learned counsel for the respondent no.2 submits that since award is illegal in toto for the reasons stated in Writ-C No.22872 of 2016, this writ petition deserves to be dismissed.

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

84. The impugned award has already been held to be lawful while deciding Writ-

C No.22872 of 2016 to the extent indicated above. In so far as the sole point pressed by Sri Ajay Rajendra regarding non reinstatement of the petitioner in services with continuity in services and payment of back-wages, law in this regard is well settled to the effect that reinstatement is not an automatic consequence in every case and it depends on the facts and circumstances of individual cases under which the Tribunal as well as the High Court is under discretionary power to direct or not to direct reinstatement or to award compensation in lieu thereof.

85. In this regard, the Apex Court in the case of ***M/s Hindustan Tin Works Pvt. Ltd. Vs. The Employees of M/s Hindustan Tin Works Pvt. Ltd and others: AIR 1979 SC 75***, in paragraph 9, has held that "*it is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. **The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid.** It would mean that the employer has taken away illegally the right to the work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived deprived workman of his earnings. Thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. **Speaking realistically, where termination of service***"

is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigating activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, viz., to resist the workman's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavored to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation upto the apex Court and

now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workman were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workman were always ready to work but they were kept away therefrom on account of invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in Dhari Gram Panchayat v. Safai Kamldar Mandal, and a Division Bench of the Allahabad High Court in Postal Seals Industrial Co-operative Society Ltd. v. Labour Court, Lucknow & ors., have taken this view and we are of the opinion that the view taken therein is correct."

86. The Supreme Court in the case of **Harjinder Singh Vs. Punjab State Warehousing Corporation: 2010 (124) FLR 700** has held as follows:-

"A reading of the impugned order shows that the learned Single Judge did not find any jurisdictional error in the award of the Labour Court. He also did not find that the award was vitiated by any error of law apparent on the face of the record or that there was violation of rules of natural justice. As a matter of fact, the learned Single Judge rejected the argument of the corporation that termination of the appellant's service falls within the ambit of Section 2(oo)(bb) of the Act, and expressed unequivocal agreement with the Labour Court that the action taken by the

Managing Director of corporation was contrary to Section 25G of the Act which embodies the rule of last come first go. Notwithstanding this, the learned Single Judge substituted the award of reinstatement of the appellant with compensation of Rs.87,582/- by assuming that appellant was initially appointed without complying with the equality clause enshrined in Articles 14 and 16 of the Constitution of India and the relevant regulations. While doing so, the learned Single Judge failed to notice that in the reply filed on behalf of the corporation before the Labour Court, the appellant's claim for reinstatement with back wages was not resisted on the ground that his initial appointment was illegal or unconstitutional and that neither any evidence was produced nor any argument was advanced in that regard. Therefore, the Labour Court did not get any opportunity to consider the issue whether reinstatement should be denied to the appellant by applying the new jurisprudence developed by the superior courts in recent years that the court should not pass an award which may result in perpetuation of illegality. This being the position, the learned Single Judge was not at all justified in entertaining the new plea raised on behalf of the corporation for the first time during the course of arguments and over turn an otherwise well reasoned award passed by the Labour Court and deprive the appellant of what may be the only source of his own sustenance and that of his family."

87. Further, the Supreme Court, in the case of **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak and others: 2013 (139) FLR 541** elaborately discussed the very idea of restoring an employee to the position which he held before dismissal or

removal or termination of his services and, in paragraph 17, the Supreme Court held that the very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned

employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

88. In the same report, with regard to award of back-wages, it was held that payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. The Supreme Court further elaborately laid down various propositions, in paragraph 33 of its report stating that in case of wrongful termination of service, reinstatement with continuity of service and back-wages is the normal rule.

89. Reference of another decision of the Supreme Court in the case of **Bhuvanesh Kumar Dwivedi Vs. M/s Hindalco Industries Ltd: 2014 (142) FLR 20** is also worth mention in which, while referring to the judgment in the case of **Deepali Gundu Surwase (supra)** the Apex Court has held that it would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in **Hindustan Tin Works Private Limited v.**

Employees of Hindustan Tin Works Private Limited (supra)....."

90. After discussing on the issue of reinstatement vis-a-vis back-wages, the Apex Court in the case of **Mackinnon Mackenzie & Company Ltd. Vs. Mackinnon Employees' Union: 2015 (145) FLR 184**, in paragraph 43, has held as follows:-

"43. Further, with regard to reinstatement of the concerned workmen and back- wages to be paid to them, the learned senior counsel on behalf of the workmen has rightly placed reliance upon the case of Anoop Sharma v. Executive Engineer 2010 (125) FLR 629 (SC), wherein it was held that since termination of employment is in breach or violation of the mandatory provisions of Chapter V-A or V-B of the I.D. Act is void ab initio in law and ineffective and suffers from nullity, in the eyes of law and in the absence of very strong and compelling circumstances in favour of the employer, the Court must grant a declaration that the termination was non est and therefore the employees should continue in service with full back wages and award all the consequential benefits. Further, with respect to payment of back wages and consequential benefits, reliance was rightly placed on the decisions of this Court in the cases of Deepali Gundu Surwase v. Adhyapak Mahavidyala (2013) 10 SCC 324 and Bhuvnesh Kumar Dwivedi v. Hindalco 2014 (142) FLR 20 (SC). This Court opined thus in the case of Deepali Gundu Surwase (supra):

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be

put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

91. In a very recent decision in the case of **Armed Forces Ex Officers Multi Services Co-operative Society Ltd. Vs.**

Rashtriya Mazdoor Sangh (INTUC): 2022 (175) FLR 544, the Supreme Court rejected the contention of the employer to the effect that the Tribunal was not justified in directing continuity of service. In paragraph 16 it was held as under:-

"16. The further submission of the Appellant that the Tribunal is not justified in directing continuity of service, as in the case of retrenchment followed by re-employment, the workmen are not entitled to continuity of service needs to be answered. Even here, there is no quarrel with the principle of law that re-employment of retrenched workmen does not entitle them to claim continuity of service as held in *Cement Corpn. of India Ltd. v. Presiding Officer Industrial Tribunal-cum-Labour Court and Anr.*, as well as the *Maruti Udyog Ltd v. Ram Lal and Ors.* However, the principle laid down in these judgments will only apply to cases where the retrenchment is bona fide. The Tribunal has held that the retrenchment of all the drivers followed by an offer of re-employment on new terms and conditions is not bona fide. Once the orders of retrenchment are set aside, the workmen will naturally be entitled to continuity of service with order of back wages as determined by a Tribunal or a Court of law."

92. The aforesaid view has been reiterated by the Supreme Court very recently in its judgment dated 23.09.2022 passed in **Civil Appeal No.6890 of 2022 (Arising out of Special Leave Petition (Civil) No.8393 of 2022) Jeetubha Khansangji Jadeja Vs. Kutchh District Panchayat.**

Conclusion

93. Following the law laid down in the aforesaid authorities and having considered the material on record, this Court is of the considered view that once the Tribunal found termination of the services of the petitioner as contrary to the provisions of law, relief only in the form of compensation etc would be unjust and the Labour Court should have directed reinstatement of the petitioner in service with full or 50% back-wages. The Court does not find any cogent reasoning in the order of the Labour Court in so far as the denial of relief of reinstatement or back-wages is concerned.

94. In view of the above, the writ petition succeeds and is allowed. The impugned award dated 20.07.2015, published on 02.01.2016, passed by the Presiding Officer, Labour Court (5), U.P., Meerut (respondent no.1) in Adjudication Case No.18 of 2002 (M/s Jagran Prakashan Ltd. Vs. Umesh Kumar) is hereby modified and it is directed that the petitioner (Umesh Kumar) shall be forthwith reinstated in his services. He shall also be entitled for back-wages to the extent of 50% from the date of his termination. All other consequential benefits of service are also awarded in favour of the petitioner (Umesh Kumar) which shall be released in accordance with law by the respondent-establishment without any delay.

95. Since the amount under the award was directed to be deposited under the interim order dated 20.05.2016 passed in Writ-C No.22872 of 2016 with a further direction that it shall be invested in a fixed deposit with a nationalized bank, it is hereby directed that on moving of an application by the workman (Umesh Kumar) before the Tribunal below, the Tribunal and the concerned bank shall facilitate release of

the amount deposited in the nationalized bank through proper course to the petitioner (workman) not later than two months from the date a certified copy of this order is produced along with appropriate application. The said amount shall be adjusted towards financial benefits conferred upon the petitioner (workman) under this judgment.

End Result

Writ-C No.23241 of 2016 (M/s Bureau Chief Rastriya Sahara and another Vs. Labour Commissioner U.P. and 2 others) is allowed; Writ-C No.23786 of 2016 (M/s Bureau Chief Rastriya Sahara and another Vs. Labour Commissioner and 2 others) is allowed; Writ-C No.22872 of 2016 (M/S Jagran Prakashan Ltd. Vs. Presiding Officer, Industrial Tribunal and another) is dismissed; and Writ-C No.27687 of 2016 (Umesh Kumar Vs. The Presiding Officer, Industrial Tribunal and another) is allowed.

(2023) 5 ILRA 756

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 31.03.2023

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Writ-C No. 26184 of 2020

**M/s Shree Bhoomi Food Beverages Pvt.
Ltd. ...Petitioner**

Versus

**Debts Recovery Appellate Tribunal & Ors.
...Respondents**

Counsel for the Petitioner:

Sri Gyan Prakash Srivastava, Sri Shashi Nandan (Sr. Advocate)

Counsel for the Respondents:

Sri Sanjai Singh, Sri Krishna Mohan Asthana, Ms. Deepika Tiwari, Sri Anjani Kumar Raghuvanshi

allowed to proceed further for auction but restrained the bank not to confirm the sale till further order.

Civil Law - SAERFAESI ACT-Possession memo-

Bank initiated proceedings under SARFAESI Act and mortgaged property for auction-auction materialized- Petitioner-auction purchaser-deposited complete sale price and sale certificate was issued to auction purchaser-Petitioner-sale in favour of Petitioner was set aside-no reason for bank to handover the movable assets to Petitioner-no inventory filed in support of handing over movable property-referred document as possession memo –not signed by any officer of bank, bank seal absent - cannot be considered as legal documents for handing over possession of property to petitioner.

W.P. allowed. (E-9)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

Facts :-

1. Punjab National Bank (respondent no.3 bank) has granted certain credit facilities to M/s Shamli Papers Mill Ltd. (respondent no.5/borrower company), however, it defaulted in payment.

2. The Bank accordingly initiated proceedings under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI") and mortgaged property was put for auction. At this stage, the borrower company filed a Securitization Application (S.A.) No. 160 of 2010 before Debt Recovery Tribunal at Lucknow (for short "DRT").

3. The DRT passed an interim order dated 19.07.2011, whereby the bank was

4. First sale notice was not materialized, therefore, bank issued fresh sale notice and ultimately auction was materialized on 17.02.2014. Petitioner (auction purchaser) deposited complete sale price and sale certificate was also issued on 03.03.2014 to auction purchaser.

5. Petitioner (auction purchaser) filed an application before DRT for impleadment and clarification of interim order dated 19.07.2011 passed by DRT.

6. On above referred application, the DRT passed an order dated 08.05.2014 whereby application was allowed and held that the auction dated 17.02.2014 to be illegal and quashed it and the bank was directed to refund the amount received from petitioner (auction purchaser) along with interest. Relevant part of order is mentioned hereinafter :-

"I have heard rival submissions and perused the record.

It reveals from the record that restrain order dated 19.07.11 was passed by my predecessor was with specific direction that the *"the bank to proceed as per law but do not confirm the sale till further orders"* and the said order was not vacated till date by this Tribunal. The Contention raised by the Ld. Counsel for the applicant that since no bid was received, therefore, auction was not materialized, thus the order dated 19.07.11 has no effect is not acceptable. A formal declaration of this Tribunal was necessary before proceeding further. The second limb of argument of the respondent-bank is that the order dated 19.07.2011 was for the sale notice dated 16.6.11 which

pertains to auction sale of the factory, land and building only and the plant and machinery were not part of the said auction. Therefore, in any case the said restrain order is not applicable for the plant and machinery. The said contention of the respondent Bank is not sustainable as during the fourth impugned auction, the factory land and building were also put for auction along with plant and machinery, therefore, I do not find merit in the contention of the Ld. Counsel for the respondent- Bank and I am of the view that since without vacation of the restrain order the respondent-Bank proceeded further and sold the plant and machinery in the auction, the said act amounts disobedience of the interim order of this Tribunal, therefore, the Judgment of the Hon'ble High Court of judicature at Allahabad in case of Savitri Devi (supra) is rightly applicable in the present matter. Their Lordship in the said judgment has categorically held that :-

"9. Admittedly,... it is settled regal proposition that sale deeds so executed are a nullity as having been executed in disobedience of the interim order of the Court. In Mulraj V. Murti Raghunathji Maharaj, AIR 1967 SC 1386 the Hon'ble Supreme Court considered the effect of action taken subsequent to passing of an interim order in its disobedience and held that any action taken in disobedience of the order passed by the Court would be legal subsequent action would be nullity.

10. Similar view has been reiterated in Surjit Singh and others v Harbans Singh and others, 1995 (6) SSC 50 1995 SCFBRC \$30, Govt. of A.P. Gudepu Salic and others, 200 (4) SSC 625, Hansraj Tirathram v. The Administrator, Municipality Jammu, AIR 1963 Kerala 18.

11. Therefore, there is no doubt that the alleged sale deeds are nullity meaning thereby no nest, unenforceable

and in executable and deserve to be ignored."

Therefore, in the light of above-mentioned facts and legal proposition the clarification application is hereby allowed and since the auction dated 17.02.2014 is illegal and all subsequent action of the respondent-Bank is nullity, hence, the auction is hereby quashed and the respondent-bank is hereby directed to refund the amount received from the auction purchaser along with interest @11% from the date of deposit of full amount of the auction.

Applicant to take steps before the Registrar for Incorporation of auction purchaser in the array of parties before the Registrar by 15.5.14.

List on 8.7.14 for final hearing."

(emphasis supplied)

7. The above referred order dated 08.05.2014 was challenged by the bank before Debts Recovery Appellate Tribunal, Allahabad (for short "DRAT") by filing an Appeal No. R-65/2014.

8. Meanwhile, Securitization application filed by borrower was allowed to be withdrawn by order dated 25.06.2014. The order dated 25.06.2014 is mentioned hereinafter :-

"Ld. Counsel for the applicant submits that he has moved an application dated 7.6.14 for withdrawal of the SA.

At this stage Ld Counsel for the auction purchaser vehemently opposed the withdrawal of the SA stating that respondent Bank has not refunded back his money till date.

In reply, Ld Counsel for the respondent-Bank submits that possession of the factory premises was given to the auction purchaser for a period of one month

to remove the movable assets which has already been removed by him. Therefore, he submits that auction purchaser has no ground to object in the matter. He further submits that he has no objection on withdrawal of the S.A.

In the light of submission made by the parties as well as application for withdrawal of the case available on record, the SA is dismissed as withdrawn.

However, the respondent-Bank is hereby directed to ensure the compliance of order dated 8.5.14 of this Tribunal."

(emphasis supplied)

9. Subsequently, the appeal filed by the bank (against order of DRT quashing auction) was allowed by DRAT by an order dated 23.12.2014 and impugned order dated 08.05.2014 and 25.06.2014 therein was set aside and liberty was granted to auction purchaser to challenge auction proceedings. Impleadment application filed by auction purchaser/petitioner was also rejected vide order dated 21.01.2015.

10. Auction purchaser/petitioner filed a Writ Petition No. 807 of 2015 before this Court and the same was disposed of by order dated 30.11.2018. Relevant part of order is quoted hereinbelow :-

"The Court further found that the only controversy which remained to be considered is to the effect that the moveable property, which was purchased by the petitioner in the auction is delivered or not and if not delivered, the money has been refunded back or not.

After going through all the facts and circumstances of the case, this Court is of the definite opinion that the appropriate forum for the respective parties including the auction purchaser, would be the Debt Recovery Tribunal for adjudication of some

factual disputed question of law which has now crept in during pendency of the S.A proceedings before the Tribunal or before the Appellate Tribunal. The question of fact which has originated during litigation before the two Tribunals, can well be settled before them after hearing the rival claims of all the parties. This Court is also not in agreement with the views drawn by the Appellate Tribunal that in the given facts of the case the auction purchaser is now stranger and can seek his remedy elsewhere. In these view of the matter, this Court finds that the all the parties may be relegated before the Tribunal for final adjudication of their rights in the matter.

In view of the above, the petition succeeds and is allowed. The orders impugned dated 21.1.2015 and 23.12.2014 passed by the Debts Recovery Appellate Tribunal as well as order dated 25.06.2014 passed by Debts Recovery Tribunal to the extent of permitting the withdrawal of Securitisation Application No. 160 of 2010, are quashed. The matter is remanded back to the Tribunal for adjudication after hearing the parties including the auction purchaser afresh."

(emphasis supplied)

11. In compliance of above order, the DRT, Lucknow heard the parties and passed following order dated 29.07.2019 on an M.A. filed by auction purchaser and allowed securitization application and directed to refund the money to auction purchaser.

12. The DRT, Lucknow held that :-

"The Respondent bank has failed to explain that when the sale conducted in favour of auction purchaser was set aside vide Tribunal's order drd.08-05-2014 then there was no reason to hand over the

movable assets to the auction purchaser on a subsequent date.

The Respondent bank has failed to produce before the Tribunal any inventory with the signature of auction purchaser in support of handing over the movable items to the auction purchaser.

The Respondent bank has filed affidavit of Shri Rajkumar Saxena as evidence in support of handing over the movable assets. The said affidavit was filed before the Hon'ble High Court. Even with the said affidavit, no inventory duly signed by the Auction purchaser is enclosed in support of handing over the movable goods to him. Hence, merely on the basis of averments of affidavit, it cannot be inferred that the movable assets were ever handed over to the auction purchaser. Since the movable assets were never handed to applicant/auction purchaser, hence over applicant/auction purchaser is entitled to get back the sale consideration deposited by him with the bank."

(emphasis supplied)

13. The bank challenged the above order before DRAT which was allowed by impugned order dated 19.10.2020 that DRT shall adjudicate it first in the light of direction by this Court in Writ Petition No. 807 of 2015 which are referred below -:

"21. It is obvious that the appellant-bank orally prayed on 19.06.2019 for grant of permission to file additional documents but the Tribunal below declined to accept the said prayer stating that the matter was to be decided on the basis of earlier evidences. The Tribunal below has misconstrued the direction dated 30.11.2018 of the Hon'ble High Court. Since the order dated 19.06.2019 was challenged by the appellant-bank in Appeal No. R-55/2019 though, the same became

infructuous after passing of the final order on 29.07.2019 but the bank was free to raise that issue in the instant appeal as the interim order dated 19.06.2019 merged with the final order. The order dated 19.06.2019 is not sustainable hence, is liable to be quashed in the present appeal.

22. It is worthwhile to mention that on 05.07.2019, the appellant-bank filed an application before the Tribunal below with some documents and the respondent No. 2 auction purchaser filed its preliminary objection on 10.07.2019 against the same. The Tribunal below ought to have decided the application dated 05.07.2019 before passing the final order. But without doing so, the Tribunal below has made certain observations with regard to some documents whereas, no finding was recorded with regard to the photographs and other electronics evidences including the videography stated to have been prepared on 05.08.2014 and 23.08.2014 by the appellant-bank. Further, the consideration of such documents without affording an opportunity of hearing to the auction purchaser for rebuttal of the same was another fallacy in the order and was also contrary to the earlier order passed on 19.06.2019 declining to permit the additional evidence.

23. Moreover, it is the specific averment of the appellant- bank that the representative of auction purchaser was present at the time of taking over the possession on 12.06.2014 and also that the videography was conducted on 05.08.2014 and 23.08.2014 in which the presence of authorized representative of auction purchaser is claimed. The electronic evidence including videography and photographs are relevant to decide the real controversy between the parties. However, the same was not considered and have not been allowed to be taken on record. Since

the matter was pending before the Hon'ble High Court since 2014, therefore, the Bank had no opportunity to file evidence/document earlier before the DRT, Lucknow to substantiate their claim of delivery of possession. Thus, the Bank is entitled to be provided an opportunity of furnishing evidences/documents available with them. Simultaneously, the auction purchaser is also entitled for adducing evidence/documents in support of its contention or for rebuttal of the documents filed by the Bank. Since, the finding is to be recorded for the first time by the trial court i.e. Tribunal below therefore, I deem it appropriate to remand the matter back to the DRT, Lucknow to adjudicate afresh after affording opportunity to the parties to adduce the documents/evidences as they may wish to file.

24. In view of the above, the appeal is allowed. The order dated 19.06.2019 and 29.07.2019 passed by the Tribunal below are set aside and the matter is remanded back to the DRT, Lucknow to adjudicate it afresh in the light of the directions given by the Hon'ble High Court in Writ Petition No. 807/2015 after affording opportunity of filing additional evidences/documents and providing right to rebuttal to the same to the parties and then to decide the issue in accordance with law."

14. The above order is impugned in present writ petition at the instance of auction purchaser.

Submissions of Petitioner/Auction purchaser :-

15. Sri Shashi Nandan, Senior Advocate assisted by Sri G.P. Srivastava, learned counsel for petitioner/auction purchaser has submitted that :-

(i) This Court by order dated 30.11.2018 has quashed the orders dated 21.01.2015, 23.12.2014 passed by DRT and order dated 25.06.2014 to the extent of permitting withdrawal of Securitization Application No. 160 of 2010 and matter was remanded back to DRT for adjudication after hearing the parties including the petitioner/auction purchaser afresh.

(ii) On remand, DRT heard the parties on a limited issue about handing over of movable assets and held that since sale conducted in favour of auction purchaser was set aside on 08.05.2014, then there was no reason for bank to handover the movable assets to auction purchaser and that no inventory was filed in support of handing over the movable property.

(iii) This Court has not directed to adduce any new evidence. It has directed only that parties be heard afresh.

(iv) Possession of auction property was never handed over to the petitioner.

(v) Sufficient opportunity was granted to the bank, but no evidence was submitted during proceedings before DRT.

(vi) That the respondent bank on one hand has taken a stand that they have delivered possession to the petitioner company, however, on other hand they made an averment that the possession of the unit was delivered to one Sri Aash Ahmad. The respondent bank has further issued a letter on 19.07.2014 to one of the Director of the applicant company that since the plant and machinery installed at factory premises are huge so Sri Aash Mohd., who has no concerned with the petitioner company had requested for further time of 1 to 1/2 month to remove the same.

(vii) The pendrive submitted by bank before this Court cannot be relied upon.

Submissions of Bank :-

16. Sri Sanjai Singh, learned counsel appearing for bank has submitted that :-

(i) There are sufficient evidence with the bank that possession of land along with machinery was handed over to auction purchaser, which essential to be looked into for proper adjudication of dispute, therefore, there was no illegality in impugned order whereby matter was remanded back for consideration with liberty to submit evidence.

(ii) High Court has directed the DRT to decide afresh after hearing the parties, therefore, it ought to have allowed the bank to submit evidence. In support of their submission that possession was duly handed over.

(iii) Opportunity to place evidence cannot prejudice the auction purchaser as he has been granted liberty is granted to rebut the evidence.

17. Heard learned counsel for parties and perused record.

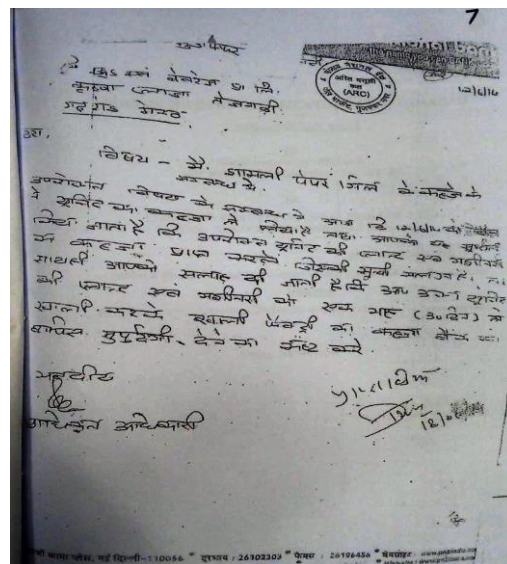
18. Handing over possession of a auction property requires a procedure to be allowed. A possession memo duly signed by representative of bank, auction purchaser and witnesses has to be prepared. To handover possession cannot be an empty formality.

19. In present case, learned counsel for bank alleged that possession of plant and machinery was handed over to auction purchaser/petitioner in presence of authorized representative of auction

purchaser on 12.06.2014 and it was videographed also.

20. A photocopy of above referred possession memo dated 12.06.2014 is annexed as Annexure SA-1 of supplementary affidavit filed by respondents No. 3 and 4. The said document is dated 12.06.2014. It is purportedly signed by authorized signatory without any name/designation as well as same has signed below word 'received', but it is dated 18.06.2014, though by an order dated 08.05.2014, the DRT has held that auction dated 17.02.2014 was illegal, therefore, there was no occasion for bank to handover possession.

21. For reference, alleged possession memo is pasted hereinafter :-



22. The above referred document by any legal acumen could not be considered to be a 'possession memo' as required by due procedure, therefore, any videography of such act would have no consequence. The bank has brought on best evidence in support of their claim that property was

handed over to auction purchaser, however, as referred above, it cannot be construed to be a legal document for possession.

23. The above referred document is not signed by any officer of bank, bank seal is also absent. Name of authorized officer is also not disclosed. The alleged authorized representative of auction purchaser has also not disclosed his name. There is no document on record how he was appointed as authorized representative of auction purchaser as well as there are no witnesses to the process of handing over of auction property; as well as inventory has also not placed on record though it was mentioned in abovereferred letter that inventory was also enclosed, therefore, there is no need to remand the matter to DRT for fresh consideration after giving opportunity to parties to give evidence as the best evidence is before the Court but it could not be considered to be a legal document for handing over possession of property to auction purchaser.

24. Accordingly, writ petition is **allowed** and impugned order dated 19.10.2020 is hereby quashed.

(2023) 5 ILRA 763

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 29.03.2023

BEFORE

**THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Writ-C No. 34859 of 2013

**Netra Pal Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents**

Counsel for the Petitioners:

Sri Satyendra Nath Tiwari, Sri Anupam Kulshreshtha, Sri Mahesh Gautam

Counsel for the Respondents:

C.S.C.

A. Ceiling Law – UP Urban Land (Ceiling and Regulation) Repeal Act, 1999 – Sections 8(4), 10(1) & 10(5) – UP Urban Land Ceiling (Taking of Possession, Payment of Amount and Allide Matters) Direction, 1983 – Abatement of ceiling – Earlier ceiling process was set aside by the appellate court – No possession was taken u/s 10(6) of Act of 1999 – Effect – Held, the St. has not brought on record any material to show that the actual possession was taken from the petitioner in pursuance of the fresh ceiling proceeding initiated on the basis of order dated 10.2.1993 of the competent authority, hence the ceiling proceeding regarding the land of the petitioners, in question has been abated under the Act, 1999. The petitioners are entitled to retain the land and respondents are directed not to interfere in the possession of the above land. (Para 7 and 9)

Writ petition allowed. (E-1)

List of Cases cited:

1. St. of U.P. Vs Hari Ram; (2013) 4 SCC 280

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

1. Heard learned counsel for the petitioners and learned Standing Counsel for the State.

2. The present petition has been filed with the following prayers:-

"i) Issue a writ, order or direction in the nature of mandamus declaring all the proceedings over the land in question

measuring 2971.7566 sq. meter, situated in Village Dhandhupura Tajganj, Tehsil Sadar, District Agra belonging to the petitioners as abated in view of the provisions of Urban Land (Ceiling and Regulation) Repeal Act, 1999.

ii) issue a writ, order or direction in the nature of Mandamus commanding the respondents not to interfere in peaceful occupation and possession over the land in question of the petitioners measuring 2971.7566 sq. meter, situated in Village Dhandhupura Tajganj, Tehsil Sadar, District Agra."

3. The contention of the petitioners is that the ceiling proceeding under U.P. Urban Land (Ceiling and Regulation) Repeal Act, 1999 (hereinafter referred to as "Act, 1999") was initiated against their father Chiddan Singh by order dated 4.7.1979 passed u/s 8(4) of the Act, 1999 declaring 2971.7566 sq. meters as surplus land in Village Dhandhupura Tajganj, Tehsil Sadar, District Agra. Thereafter, proceeding u/s 10(1) and 10(5) of the Act, 1999 were also initiated, but actual and physical possession was not taken.

4. Aggrieved by the order dated 4.7.1979 of the competent authority, the tenure holder Chiddan Singh preferred an appeal before the appellate authority bearing Misc. Appeal No. 146 and the same was allowed and order dated 4.7.1979 of the competent authority was set aside by order dated 16.10.1986 and the matter was remanded back to the competent authority with direction for serving fresh draft statement u/s 8(3) of the Act, 1999. In pursuance of the order dated 16.10.1986, the competent authority again initiated proceedings against Chiddan Singh, declaring 2971.7566 sq. meters as surplus land. Thereafter notice u/s 10(1) was issued

on 15.2.1993, notice u/s 10(3) was issued on 6.7.1993 and thereafter notice u/s 10(5) was issued on 17.2.1994.

5. It is further contended by learned counsel for the petitioners that though notice u/s 10(5) in fresh ceiling proceeding was issued on 17.2.1994 but possession was not taken from the petitioners and till day they are in possession of the aforesaid land which was declared as surplus land. It was also submitted that the father of the petitioners was the original tenure holder and he died on 15.4.2009.

6. On the other hand learned Standing Counsel stated that the possession of the surplus land was taken in the first round of ceiling proceeding on 29.4.1986. But this fact could not be disputed by the Standing Counsel that the possession was not taken after issuance of fresh notice u/s 10(5) dated 17.2.1994.

7. After hearing rival contentions of the parties and on perusal of the record, we are of the opinion that once the initial order of competent authority dated 4.7.1979 was set aside by the appellate court on 16.10.1986 then all consequential proceedings including the possession in first round of the proceeding lapsed and it is undisputed that in fresh round of ceiling proceeding, possession of the land in question was not taken despite the fact that notice u/s 10(5) was issued on 17.2.1994. Therefore, there is no material on record which demonstrates that the State has taken peaceful possession or forceful possession u/s 10(6) of the Act, 1999 in fresh ceiling proceeding in pursuance of the order dated 10.2.1993 of the competent authority. A detailed procedure has been provided under the U.P. Urban Land Ceiling (Taking of Possession, Payment of Amount and Allide

Matters) Direction, 1983 for taking possession, but no such procedure, as prescribed in Direction, 1983, was followed.

8. Hon'ble Supreme Court, in *State of U.P. vs. Hari Ram*, reported in (2013) 4 SCC 280, has clearly observed that unless the actual possession is taken, the land will not be vested in the State and on the enforcement of Act, 1999 proceeding under the Ceiling Act will abate and the tenure holder is entitled to retain the land which was declared surplus.

9. In view of the above fact, we are of the considered view that the State has not brought on record any material to show that the actual possession was taken from the petitioner in pursuance of the fresh ceiling proceeding initiated on the basis of order dated 10.2.1993 of the competent authority, hence the ceiling proceeding regarding the land of the petitioners in Gata Nos. 1631, 1659, 1660 of total area 2971.7566 sq. meters in Village Dhandhupura Tajganj, Tehsil Sadar, District Agra has abated under the Act, 1999. The petitioners are entitled to retain the land and respondents are directed not to interfere in the possession of the above land.

10. With the aforesaid direction, the petition is **allowed**.

(2023) 5 ILRA 765

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 03.04.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 35545 of 2022

Amrita Bharti

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Gautam Kumar

Counsel for the Respondents:

C.S.C., Sri Suresh Singh, Sri Manish Goyal
(Sr. Advocate)

(A) Civil Law - The U.P. Industrial Area Development Act, 1976 - Sections 2(b),2(d),3,6,9,12-A,12-B,18 & 19 - The U.P. Municipalities Act, 1916 - The United Provinces Panchayat Raj Act, 1947 , The Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, The U.P. Land Revenue Act, 1901, The Constitution of India - Article 14,21,31A,243(d),243-Q(1) - When objective of the two legislations is different and they operate in different fields -there is no question of any conflict. (Para - 17)

(B) Civil Law - The U.P. Industrial Area Development Act, 1976 - Section 10 - merely regulates the development and constructions in the area declared as "industrial development area" - does not impose any permanent restriction in raising constructions - Section 10 does not prevent individuals from raising construction in areas under the Authority's jurisdiction - regulates construction activity through regulatory steps to ensure proper planning and public interest - Section 19 - specific provisions for obtaining permission for raising construction, not banning development or construction activity.(Para - 4,19)

Petitioner (co-owner of residential plot) - illegally subdivided and raised constructions - violating Section 10 of Act - Constructions ordered to be removed within 15 days - causing Authority's cost and expense - Petitioner claims - illegal demolition order - violates Nagar Panchayat's powers and property rights - Constitutional validity - under challenge - Section 10 of U.P. Industrial Area Development Act, 1976, notifications issued under constitution , notifications issued by State Government and

orders from Competent Authority. **(Para -2 to 4)**

HELD:-Petitioner raised constructions without Authority approval, causing prejudicial impact on area development, and these findings are not challenged.**(Para - 19)**

Writ Petition dismissed. (E-7)

List of Cases cited:

1. Shri Niwaz Nagar & anr. Vs St. of U.P. & ors. , Writ - C No. 50154 of 2016
2. Rakam Singh Vs St. of U.P. & ors. , Writ - C No. 9899 of 2015
3. Saij Gram Panchayat Vs St. of Guj. & ors. , AIR 1999 SC 826

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

1. The petitioner has challenged the constitutional validity of Section 10 of the U.P. Industrial Area Development Act, 1976 (for short "the Act"); the notification dated 18.12.2015, issued under the proviso to clause (1) of Article 243-Q of the Constitution of India; the notification dated 22.8.2001, issued by the State Government, under Section 2(d) of the Act and the order dated 29.8.2022, passed by the Competent Authority, Yamuna Expressway Industrial Development Authority, Gautam Budh Nagar (respondent no. 3 - for short "the Authority").

BACKGROUND

2. The petitioner claims to be co-owner of a residential plot in Khasra No. 422, area 561.86 square meters, Dankaur, Gautam Budh Nagar on basis of a sale deed dated 12.3.2021, executed in her favour by one Satish Goyal. The impugned order passed by respondent no. 3 dated 29.8.2022

records that an inspection was made by the officials of the Authority on 1.4.2022 and whereupon it transpired that the petitioner had sub-divided the plot and had raised illegal constructions over it. The same was prejudicially affecting the proper planning of the industrial development area and falls within the mischief of Section 10 of the Act. It was held to be violative of Section 9 of the Act and Regulation 1 and 3 of the Yamuna Expressway Development Authority (Construction and Demolition) Regulations, 2010, as no prior approval was taken from the Authority before raising the constructions. There is also a recordal to the effect that the area in question is part of the "industrial development area", so notified by notification dated 24.4.2001 and the notification issued on 18.12.2015, notifying eighty villages, including Village Dankaur as part of "industrial township" under the proviso to clause (1) of Article 243-Q of the Constitution of India. Consequently, the constructions raised were held to be illegal and have been directed to be removed within fifteen days, failing which, the Authority would remove it at the cost and expense of the petitioner.

CONTENTIONS

3. The basic ground of challenge is that the plot in respect of which the impugned order has been passed, is situated in Village Dankaur. The authority competent to grant approval to the constructions was Nagar Panchayat, Dankaur and the petitioner had applied before it on 2.11.2022 for grant of approval of the constructions. The said application is still pending. In these circumstances, the order passed by respondent no. 3 for demolition of the constructions on the ground that the petitioner had not taken permission from the Authority, is wholly

illegal, as it amounts to usurpation of the powers of Nagar Panchayat, Dankaur. It is contended that the Act of 1976 and the U.P. Municipalities Act, 1916 under which Nagar Panchayat, Dankaur would be exercising its power, could not operate simultaneously. The notification issued under Article 243-Q results in divesting the Nagar Palika of its jurisdiction in the matter. It is also contended that Section 10 is violative of Articles 14, 21 and 31A of the Constitution of India, as it has the effect of permanently depriving a person of his/her right to use and enjoy the property or to raise constructions over it.

4. On the other hand, Sri Manish Goyal, learned Senior Counsel, assisted by Sri Suresh Singh, appearing for the respondent Authority, submitted that the vires of the notification dated 18.12.2015, issued under the proviso to clause (1) of Article 243-Q of the Constitution of India, has already been upheld by this Court in **Writ - C No. 50154 of 2016 (Shri Niwaz Nagar and Another vs. State of U.P. and 5 Others)**, decided on 4.7.2017. It is urged that in the said judgment, this Court had considered the interplay between the constitutional scheme and the provisions of the Act and had held that the notification does not violate any provision of the Constitution. He has also placed reliance on another judgment of this Court in **Writ - C No. 9899 of 2015 (Rakam Singh vs. State of U.P. and 6 Others)**, decided on 1.5.2015, wherein the validity of a similar notification dated 14.01.2015 was upheld. It is further contended that Section 10 is a provision which merely regulates the development and constructions in the area declared as 'industrial development area' and does not impose any permanent restriction in raising constructions. Therefore, the submission that the said

provision offends any mandate of the Constitution, is not sustainable. It is also urged that the petitioner having admittedly raised constructions in an area declared as 'industrial development area', without prior approval of the Authority, there is no illegality in the impugned order and the writ petition deserves to be dismissed.

ANALYSIS

5. The impugned notification dated 18.12.2015 was issued in exercise of powers under Article 243-Q(1), which falls under Part IX-A of the Constitution, dealing with the Municipalities. It was inserted by the Constitution (Seventy-fourth Amendment Act), 1992 w.e.f. 1.6.1993. Article 243 (d) defines 'municipality' as an institution of self-government constituted under Article 243Q. Article 243Q envisages three different kinds of municipalities, namely, a Nagar Panchayat for a transitional area, that is to say, any area in transition from a rural area to an urban area; a Municipal Council for a smaller urban area; and a Municipal Corporation for a larger urban area. The proviso to clause (1) of Article 243Q empowers the Governor to constitute a municipality for any area or part thereof where having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as are deemed fit, by public notification, specify to be an industrial township. Article 243Q is extracted below for convenience of reference: -

243Q. Constitution of Municipalities. - (1) There shall be constituted in every State, -

(a) a Nagar Panchayat (by whatever name called) for a transitional

area, that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, "a transitional area", "a smaller urban area" or "a larger urban area" means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part.

6. The proviso to clause (1) of Article 243Q is in nature of an exception to the main provision. Where the Governor specifies an area to be an "industrial township", having due regard to its size and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, a municipality need not be constituted in such area. As a corollary of the above, such an area would stand excluded from the municipal area. Any municipality already constituted for such an area, would cease to exist. Consequently, the municipal services, if

any, being hitherto provided by the Municipality, would be provided by the industrial establishment.

7. The U.P. Industrial Area Development Act, 1976 provides for the constitution of an Authority for the development of certain areas in the State into industrial and urban township and for matters connected therewith. Section 2(b) defines "Authority" as that constituted under Section 3 of the Act. Thereunder, the "Authority" is a body corporate. Section 2(d) defines an "industrial area" as an area declared as such by the State Government by notification. Section 6 of the Act enjoins the Authority to secure planned development of the industrial development areas. Sub-section (2) of Section 6 enumerates some of the functions of the Authority to enable it to achieve its objectives. It includes preparation of plan for development of the industrial area; provide amenities, regulate erection of buildings, prescribe land usage, etc. On 22.3.2016, by U.P. Act No. 10 of 2016, sub-section (2) of Section 6 was amended and the function of providing "municipal service" by the Authority was specifically included. Sub-section (2) of Section 6, as amended, is extracted below: -

(2) Without prejudice to the generality of the objects of the Authority, the Authority shall perform the following functions :-

(a) to acquire land in the industrial development area, by agreement or through proceedings under the Land Acquisition Act, 1894 for the purposes of this Act;

(b) to prepare a plan for the development of the industrial development area;

(c) to demarcate and develop sites for industrial, commercial and residential purpose according to the plan;

(d) to provide infrastructure for industrial, commercial and residential purposes;

(e) to provide amenities and municipal services;

(f) to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes and such other land uses as per master plan;

(g) to regulate the erection of buildings and setting up of industries and land uses as per master plan; and

(h) to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential purpose or any other specified purpose in such area as per the Master Plan.

8. Section 9 of the Act imposes ban on erection of buildings in contravention of Regulations and it reads as follows: -

9. Ban on erection of buildings in contravention of regulations. - (1) No person shall erect or occupy any building in the industrial development area in contravention of any building regulation made under sub-section (2).

(2) The Authority may by notification and with the prior approval of the State Government make regulations to regulate the erection of buildings and such regulations may provide for all or any of the following matters, namely -

(a) The materials to be used for external and partition walls, roofs, floors and other parts of a buildings and their position or location or the method of construction;

(b) Lay out plan of the building whether industrial, commercial or residential;

(c) the height and slope of the roofs and floors of any building which is intended to be used for residential or cooking purposes;

(d) the ventilation in, or the space to be left about any building or part thereof to secure circulation of air or for the prevention of fire;

(e) the number and height of the storeys of any building;

(f) the means to be provided for the ingress and egress to and from any building;

(g) the minimum dimensions of rooms intended for use as living rooms or sleeping rooms and the provision of ventilation;

(h) any other matter in furtherance of the proper regulation of erection, completion and occupation of buildings; and

(i) the certificates necessary and incidental to the submission of plans amended plans and completion reports.

(j) the time limit within which any building shall be required to be erected or repairs, additions, modifications is to be made in an existing building, shall be carried out and after completion thereof a notice of completion of construction of building or repairs, additions or modifications as the case may be, shall be lodged with the Authority and completion certificate obtained therefrom.

9. Section 10 is power of the Authority to ensure proper maintenance of site or building so that it does not prejudicially affect the planned industrial development of the area. Section 10 is extracted below: -

10. Power to require proper maintenance of site or building -

(1) If it appears to the Authority that the condition or use of any site or building is prejudicially affecting or is likely to affect the proper planning of or the amenities in any part of the industrial development area of the interests of the general public there, it may serve on the transferee or occupier of that site or building a notice requiring him to take such steps and within such period as may be specified in the notice and thereafter to maintain it in such manner as may be specified therein and in case such transferee or occupier fails to take such steps or to maintain it thereafter the Authority may itself take such steps or maintain it, and realize the cost incurred on it from such transferee or occupier.

(2) If the State Government considers it necessary or expedient in the public interest it may, by a general or special order, exempt wholly or partly - any such transferee or occupier or any class thereof from the taxes levied under sub-section (1).

10. It is noteworthy that Section 12-A and Section 12-B were inserted by U.P. Act No. 4 of 2001 and U.P. Act No. 10 of 2016, respectively and read as follows: -

12-A. No panchayat for industrial township. - Notwithstanding anything contained to the contrary in any Uttar Pradesh Act, where an industrial development area or an part thereof is specified to be an industrial township under the proviso to clause (1) of Article 243-Q of the Constitution, such industrial development area or part thereof, if included in a Panchayat area, shall, with effect from the date of notification made under the said proviso, stand excluded from such Panchayat area and no Panchayat shall

be constituted for such industrial development area or part thereof under the United Provinces Panchayat Raj Act, 1947 or the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, as the case may be, and any Panchayat constituted for such industrial development area or part thereof before the date of such notification shall cease to exist.

12-B. (1) The Governor may, by notification, specify under Article 243-Q of the Constitution of India, the whole of Special Investment Region or the Industrial Development Area or any part thereof to be an Industrial Township.

(2) Notwithstanding anything to the contrary contained in any Uttar Pradesh Act, where an special investment region or industrial development area or any part thereof is specified to be an Industrial Township under the proviso to clause (1) of Article 243Q of the Constitution of India, such industrial development area or part thereof, falling in a Municipality shall from the date of notification stand excluded from that Municipality area and all powers and functions performed with respect to such area shall be exercised or performed by the Authority.

These provisions make explicit the effect of any area being declared as "industrial township" under the provisions of Article 243-Q. If it was part of the panchayat, it shall stand excluded therefrom and any panchayat constituted for such area or part thereof shall cease to exist from the date of notification under Article 243-Q. The same consequences are to follow in case any area or part comprised in a Municipality is declared as "industrial township". It shall stand excluded from that Municipality from the date of notification and all powers and functions performed with respect to such area shall be exercised by the Authority.

11. Section 18 invests the State Government with the power to make rules for carrying out the purposes of the Act. Section 19 empowers the Authority to make regulations with the previous approval of the State Government, not inconsistent with the provisions of the Act or the Rules for proper administration of the affairs of the Authority. In exercise of the above powers, the 'Authority' has made 'the Yamuna Expressway Industrial Development Area Building Regulations, 2010 and the Yamuna Expressway Authority Demolition Regulations' containing specific provisions regulating the manner in which permission is to be obtained for raising constructions in the 'industrial development area' and the power of the Authority to demolish the constructions made without obtaining approval or contrary to the plans or usage prescribed. Chapter-II Regulation 4 of the Regulations, 2010 which prohibits construction activity in the 'industrial development area' without obtaining approval is extracted below: -

4.0 Building permit - No person shall erect any building or a boundary wall or fencing without obtaining a prior permit thereof, from the Chief Executive Officer or an Officer authorized by the Chief Executive Officer for this purpose.

Regulation 5(i) and (ii) of the Demolition Regulations which empowers the Authority to remove constructions made without permission, approval or sanction is as follows: -

5.(i) Where any development in an industrial development area has been commenced or continued in contravention of the plan without the permission, approval or sanction, referred to in regulation - 1 or in contravention of any condition subject to which such permission,

approval or sanction has been granted then, without prejudice to the provisions of the regulation - 4 and section - 15 of the Act, the Competent Officer may make an order requiring the development to be discontinued from the date of service of the order, and such order shall be complied with accordingly.

(ii) Where such development is not discontinued in pursuance of the order under sub-regulation (I), Competent Officer may require force to remove the person by whom the development has been commenced and all his assistance and workmen from the place of development within such time as may be specified in the regulation.

12. The object and the scheme of the Act demonstrably is to give impetus to the development of industries in certain areas in the State. The State Government declares such areas as 'industrial development area' by issuing notification under Section 2(d) of the Act. The Industrial Development Authority constituted under Section 3 for such area gets invested with the power to carry out development of the said area. As noted above, one of the functions of the Authority is to ensure that the development which takes place in the area is such that it does not have adverse impact on the proper planning of or the amenities in any part of the industrial development area or the interests of the general public there. To achieve the said object, the Authority has also been given power, inter alia, to regulate the building activity in the area by framing regulations. The Regulations framed by the Authority inter alia, provides for the manner in which approval for raising constructions is to be obtained and empowers the 'Authority' to remove the same, if made without obtaining approval.

13. On 24.4.2001, by a notification, the State Government constituted an Authority in the name of "Taj Expressway Development Authority, in exercise of power under Section 3 of the Act. Eight revenue villages were notified as 'industrial development area', falling under its jurisdiction. On 24.8.2001, another notification was issued, notifying more villages as 'industrial development areas'. It included village Dankaur as well, with which we are presently concerned in the instant case. The said notification was issued under Section 2(d) of the Act. The result of the same was that the said area stood excluded from the panchayat area of Nagar Panchayat, Dankaur and the municipal services and building activity in the said area came to be regulated and controlled by the Taj Expressway Development Authority. On 11th July, 2008, by another notification, the name of the Authority was changed to Yamuna Expressway Industrial Development Authority. On 18th December, 2015, by the notification impugned, the Governor in exercise of powers under the proviso to clause (1) of Article 243Q of the Constitution, specified an area comprising of eighty villages, which had earlier been declared as 'industrial development area', as an 'industrial township' w.e.f. the date of publication of the notification. It superseded the earlier notification dated 30.6.2008.

14. In **Rakam Singh** (supra), the notification dated 14.1.2015 notifying certain area of a particular Gram Panchayat as an 'industrial township', was challenged on the ground that it would have the effect of dissolving the Gram Panchayat of that area, a consequence, which is against the spirit of Part IX of the Constitution, which contemplates the creation of Panchayats as

institutions of self-government. The challenge was repelled and it was held as follows: -

What Article 243-Q (1) does, is to provide that a Municipality under clause (1) may not be constituted in respect of an area which has been specified as an industrial township having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment. An industrial township is a subset of an urban area which fulfils the characteristics provided by the proviso to Article 243-Q (1). But for the proviso, a Municipality would have had to be constituted under the substantive part of Article 243-Q (1) in respect of an area which has been specified as an industrial ownership. An industrial township, however, is an area in which an industrial establishment has provided or proposes to provide municipal services and which is so specified by the Governor having regard to the size of the area. Where an industrial township has been specified, the requirement of constituting a Municipality stands lifted. If this constitutional scheme providing for Panchayats on one hand and Municipalities on the other is construed so as to effectuate the purpose and intent of the provisions of Part IX and Part IX-A, there can be no ambiguity about the position. Once a Municipality is constituted in respect of an area under Article 243-Q (1), it would be far fetched to contend that nonetheless, the very same area must necessarily fall within the jurisdiction of a village Panchayat that was constituted under Article 243-B. The whole object of constituting a Municipality is to provide an institution of local self-government in those areas which have ceased to be villages within Part-IX and which do not meet the description of a rural

area. The constitution of an industrial township under the proviso to Article 243-Q (1) obviates the necessity of constituting a Municipality for that area. Once an industrial township is constituted, regulation of that township would take place under the enabling provision of state legislation governing such a township.

15. The constitutional validity of the notification dated 18th December, 2015 impugned herein, whereby the village in question along with other villages had been notified as 'industrial township', was specifically in issue in **Shri Niwaz** (supra). Also under challenge therein were the communication issued by the Government dated 10.9.2016 and 12.9.2016 whereby the Authorities decided not to hold election of panchayats in villages notified as 'industrial development areas'. A Co-ordinate Bench of this Court of which one of us (Manoj Kumar Gupta, J.) was a member, upheld the constitutional validity of the notification relying on the judgment in **Rakam Singh** (supra) and repelled the contention that provisions of the Constitution had been violated. It was observed as follows: -

It has been authoritatively held in **Rakam Singh** (Supra) that " (i) If the area is included in a Panchayat area, it would, with effect from the date of the notification made under the proviso, stand excluded from the Panchayat area; (ii) No Panchayat can be constituted for such an industrial development area or a part under the Act of 1947 or the Adhiniyam of 1961". The impugned orders passed by the Special Secretary dated 10 September 2016 and the Director, Panchayat Raj dated 12 September 2016 simply clarify the legal position which emerges on account of the area being declared as Industrial Township.

Even in the absence of these orders, the legal consequence flowing out of the notification dated 18 September 2015 was inevitable and could not have been avoided by the petitioners.

The validity of the notification is therefore no more res-integra, as rightly pointed out by Sri Manish Goyal, Senior Advocate, appearing on behalf of the Authority.

16. As regards challenge advanced to the notification dated 22.8.2001, the same was issued by the State Government in exercise of power under Section 2(d) of the Act. The vires of Section 2(d) is not in issue. As seen, the Constitution itself envisages development of certain areas as industrial townships and to achieve the said object, it also envisages a separate Authority for such area which would provide municipal services and develop it. The said object of the Constitution is being achieved under the enabling provisions of the State legislation under which initially notification dated 24.4.2001 was issued, notifying eight villages as 'industrial development area'. In sequel to the same, the impugned notification dated 22.8.2001 was issued. It merely includes some more areas within the ambit of the industrial development area falling under the jurisdiction of the Authority. The contention that the said notification is illegal or against the constitutional mandate, does not merit acceptance.

17. We also do not find any merit in the contention that the impugned notifications have the effect of bringing in conflict the provisions of the U.P. Municipalities Act, 1916/U.P. Panchayat Raj Act, 1947 with that of the U.P. Industrial Area Development Act, 1976. As already discussed, the effect of issuance of

the notification under proviso to clause (1) of Article 243Q of the Constitution is that the area covered thereunder ceases to be under the control of the Panchayat or Municipality, as the case may be, and the municipal services and building activities therein gets regulated by the Authority constituted under the Act. The provisions of the U.P. Municipalities Act, 1916/U.P. Panchayat Raj Act, 1947 ceases to apply. Consequently, there is no question of any conflict. In a similar fact situation, the Supreme Court in **Saij Gram Panchayat vs. State of Gujarat and Others** repelled the contention while considering cognate provision of the two legislations in the State of Gujarat. It has been held that the objective of the two legislations is different and they operate in different fields and there is no question of any conflict. It was observed as follows: -

"16. The contention is based on a misconception about the relationship of the provisions of Parts IX and IXA of the Constitution with any legislation pertaining to industrial development. The Gujarat Industrial Development Act operates in a totally different sphere from Parts IX and IXA of the Constitution as well as the Gujarat Panchayats Act, 1961 and the Gujarat Municipalities Act, 1962 - the latter being provisions dealing with local self Government while the former being an Act for industrial development, and orderly establishment and organisation of industries in a State. The industrial areas which have been notified under Section 16 of the Gujarat Industrial Development Act on 7.9.1993 were notified as industrial areas under the Gujarat Industrial Development Act long back in the year 1972. These industrial areas have been developed by the Gujarat Industrial Development Corporation and they can

hardly be looked upon as rural areas covered by Part IX of the Constitution. It is only such industrial areas which can be notified under Section 16 of the Gujarat Industrial Development Act, 1963. If by a notification issued under Section 16, these industrial areas are deemed to be notified areas under the Gujarat Municipalities Act and are equated with industrial township under the proviso to Clause (1) of Article 243-Q, the constitutional scheme is not violated. In fact, under Chapter 3 of the Gujarat Industrial Development Act, 1962, the Gujarat Industrial Development Corporation, has been given power, inter alia, to develop land for the purpose of facilitating the location of industries and commercial centers. It has also been given the power to provide amenities and common facilities in such areas including provision of roads, lighting, water supply, drainage facilities and so on. It may do this either jointly with Government or local authorities or on an agency basis in furtherance of the purposes for which the corporation is established. The industrial area thus has separate provision for municipal services being provided by the Industrial Development Corporation. Once such an area is a deemed notified area under the Gujarat Municipalities Act, 1964, it is equated with an industrial township under Part IXA of the Constitution, where municipal services may be provided by industries. We do not see any violation of a constitutional provision in this scheme."

(emphasis supplied)

18. A feeble attempt was made to challenge the said notification by contending that the provision of the Act shall also come in conflict with the U.P. Land Revenue Act, 1901, but without specifying how it would be so. It is pertinent to note that the U.P. Land

Revenue Act, 1901 deals with land revenue and the jurisdiction of Revenue Officers in the State. The Act does not regulate building activity. The Revenue Authorities are not concerned with planning or development. The contention is thus devoid of merit.

19. Counsel for the petitioner contended that Section 10 of the Act imposes unreasonable restriction on the right of a person to raise constructions over his land. According to him, it is violative of Articles 14, 21 and 31A of the Constitution. The contention does not appear to have any force. Section 10 is not a permanent clog on right of any person to raise construction in areas falling under the jurisdiction of the Authority constituted under the Act. The construction activity only gets regulated by the regulatory steps that are taken by the Authority to ensure proper planning of the area so that it does not predudicially affect the industrial development or interests of the general public there. The Regulations framed by the Authority in exercise of its power under Section 19 of the Act contains specific provisions as regards the manner in which permission for raising construction could be obtained. It does not ban the development or construction activity, but is only a power to regulate.

20. Article 31A is not at all attracted to the facts of the instant case. The contention that the impugned notification has the effect of acquiring the land of the petitioner without paying compensation, does not merit acceptance, inasmuch as, the impugned notification issued under Article 243-Q, notifying 'industrial township' and the limits of the lands included therein, does not have the effect of acquiring such lands or any building or structure standing over it, but only subjects the same to the

regulatory measures prescribed by the Authority to achieve the objective of planned development of the area.

21. Concededly, the petitioner had raised constructions without obtaining previous approval of the Authority. The impugned order specifically records that the constructions raised were prejudicially affecting the planned development of the area. These findings of fact are not under challenge. Consequently, we find no merit in the writ petition.

22. Accordingly, the writ petition is dismissed. No order as to costs.

(2023) 5 ILRA 775

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 10.04.2023

BEFORE

**THE HON'BLE MAHESH CHANDRA
TRIPATHI, J.**

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ-C No. 38168 of 2018

PPS International ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:

Sri Vivek Kumar Singh, Sri Fuzail Ahmad
Ansari, Sri N. Sinha, Sr. Advocate Sri Navin
Sinha

Counsel for the Respondents:

Sri Rajnish Kumar Rai, Sri Sudarshan Singh

(A) Civil Law - The Competition Act, 2002 - Sections 3, 3 (3) (a), 4 (2) (a) (i) , 4 (2) (a) (ii) 4, 19 (1) (b), 26(2) & 53 (1) & (2) - power of High Courts to exercise judicial superintendence over court and tribunal decisions is part of the Constitution's basic

structure - Tribunals' decisions are subject to the High Court's Writ jurisdiction under Article 226/227 - Tribunals also have the power to test the vires of subordinate legislations and rules. (Para -27)

(B) Civil Law -The Competition Act, 2002 - Section 53-T - Appeal to Supreme Court - against "any order passed by the Appellate Tribunal" - Once the respondent had lost the Reference made on similar allegation of excessive pricing on the same materials on record before the CCI, which are referred in the impugned orders - thereafter, the Appeal and Review Application preferred by the CORE before the NCLAT have also been dismissed - the findings recorded by the CCI have attained finality - then the issue involved in the writ petition stood settled and covered by the CCI order and proved/affirmed by the NCLAT.(Para - 29)

Modification Advice/Orders and Demand Orders - alleging excessive pricing and violation of Act, 2002 - CORE filed time-barred appeal and review application against order - dismissed by NCLAT – appeal not yet filed - order reached finality - Quashing of - Modification Advice/Orders & Demand Notice for Purchase Orders - authorities to make payments with 18% interest. **(Para - 3,13)**

HELD:-Respondent/CORE loses reference to excessive pricing allegations on the same material before the CCI. Appeal and review dismissed. CCI's findings reached finality if order not challenged under Section 53T of Act, 2002. Issue settled by the CCI's order. Modification Advice/Orders & Demand Notice for Purchase Orders set aside. **(Para - 33,34)**

Writ Petition allowed. (E-7)

List of Cases cited:

1. U.O.I. Vs Tantia Construction Pvt. Ltd., 2011 (5) SCC 697
2. ABL International Ltd. Vs E.C.G.C.I. Ltd. , 2004 (3) SCC 553

3. M/s K.J. Hospital Vs M/s Technomed International & ors. , Writ Petition No. 7031 of 2018

4. L. Chandra Kumar Vs U.O.I., (1997) 3 SCC 261

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Fuzail Ahmad Ansari, learned counsel for the petitioner and Sri Sudarshan Singh, learned counsel for the respondents.

2. Pleadings have been exchanged and with consent of learned counsel for the parties, this writ petition is being finally disposed of under the Rules of the Court.

3. Present Writ Petition under Article 226 of the Constitution of India is preferred seeking following reliefs:-

"A. issue a writ, order or direction in the nature of certiorari to quash the impugned Modification Advice/Orders dated 12/13.09.2018 in respect of Purchase Order No.CORE/S/1271/5530/20478 dated 27.02.2018, Purchase Order No.CORE/S/1271/5226/20473 dated 12.01.2018 and Purchase Order No.CORE/S/1271/4054/20177 dated 13.09.2013 as well as quash the Demand Notice dated 26.09.2018 in respect of purchase order dated 13.09.2013.

B. issue a writ, order or direction in the nature of mandamus directing the respondent authorities to make the entire payments of the petitioner forthwith alongwith 18% interest from the actual date of dues of the petitioner.

C. issue a writ, order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case.

D. award the cost to the petitioner."

4. The brief facts of the case are that the petitioner is a partnership firm registered under the Partnership Act, 1932 and engaged in business of supply of specialized electrical equipments imported from Europe to the Indian Railways. The petitioner firm is an agent of Arthur Flury, Switzerland, which is an international company engaged in the business of manufacturing several specialized electrical equipments to be used worldwide in the electrification of railways as well as in other fields also. The petitioner firm inter alia procures "Short Neutral Section Assembly" also called "Phase Break", which is approved by the Research Design and Standard Organization (RDSO). This equipment is used to separate two different phases on 25 KV overhead traction of Railways. It is further stated that there is only one approved source for this item in RDSO approved list i.e. M/s Arthur Flury AG Switzerland, the original equipment manufacturer, which sells this product through its authorised Indian distributor i.e. the petitioner firm. The Central Organization for Railway Electrification is an organization established by Ministry of Railways, Government of India in the year 1979 for carrying out the railway electrification over the entire network of Indian Railways. In terms of Railway Board's letter bearing No.RE (S)14/11/82/0012Pt. dated 14.11.2017, SNS Assembly is a centralised procurement item of CORE, where demand of all Zonal Railways is consolidated and procured.

5. The CORE floated an online global tender on their website for supply of 28 sets of SNS Assembly (Phase Breaks). The petitioner firm also participated in the

global tender floated by the CORE and submitted their quotation in Indian currency for the imported material from AF Switzerland. The petitioner quoted the price on the basis of its previous year purchase directly from AF Switzerland in foreign currency. The petitioner made an offer on fixed price basis, which means that any fluctuation on account of foreign currency or custom duty has to be borne by petitioner only. The petitioner also disclosed its price on the basis of calculation on the current Swiss Franc rates at the time of bidding and also submitted the proforma invoice from AF Switzerland, which is claimed to be same price on which the CORE bought the material directly from AF Switzerland some years back. It is also claimed that Arthur Flury Switzerland - AF prices remained same from the years 2011 till 2018 in foreign currency as it had a policy of fixed prices for final customer and re-seller gets the discount on these prices. The bid was opened on 18.10.2017 and the petitioner's offer was accepted by the Competent Authority. Consequently, legally bounded purchase order was given to the petitioner for supply of 28 sets of SNS Assembly (Phase Breaks) vide their purchase order dated 12.1.2018 with detailed terms and conditions for total value of Rs.2.31 crores. It is undisputed that full material was supplied by the petitioner firm. The copy of the challan-cum-tax invoice showing receipt of articles on 15.3.2018 has also been brought on record as Annexure No.7 to the writ petition.

6. Meanwhile, another global tender was advertised by the CORE on their official website and solicited online global bids, which were opened on 29.11.2017 for supply of 238 sets of SNS Assembly (Phase Breaks). The petitioner firm had again

participated in the said global tender. Finally, the Members of the Tender Committee accepted the offer of the petitioner and recommended to procure 176 sets, out of total tender quantity of 238 sets. It is also claimed that the decision of the Tender Committee was accepted by the Higher level Purchase Officer i.e. Principal Chief Material Manager of CORE. Thereafter, the respondent issued the purchase order dated 27.2.2018 with detailed terms and conditions for supply of 170 sets for Rs.14.64 crores. It is not disputed that in response of the purchase order dated 27.2.2018, the petitioner supplied the entire articles through various Challan-cum-Tax Invoices dated 26.6.2018, which is appended as Annexure No.9 to the writ petition. After supply of the materials instead of clearing the outstanding amount to the petitioner firm, the second respondent sent a letter dated 17.05.2018 apprising the petitioner that they have invoked "Book Examination Clause" for the present order as well as the previous order of 2013, which has already attained finality and the payments have also been made to the petitioner in January, 2018 itself, as the respondents felt that the petitioner has made an abnormally high profit while importing the material from AF Switzerland. Thereafter, the CORE has issued impugned modification advice dated 12/13.9.2018, whereby, modification has been made in respect of purchase orders dated 27.2.2018, 12.1.2018 and 13.9.2013. Consequently, the impugned demand order dated 26.9.2018 has been issued, whereby the amendment has been issued by the CORE for lower rates after results of book examination due to discovery of new rates of customs bills of entry @ CHF 6400 for each set vide customs letter dated 22.6.2015 and the petitioner firm was required to deposit Rs.5,19,47,553.80

within 15 days. In case of default to deposit the said amount within stipulated time, the recovery would be made from the pending bills.

7. Record further reveals that in respect of the purchase order dated 13.9.2013, the bank guarantee which was given by the petitioner, was invoked by the CORE. Consequently, the matter was referred to the Arbitrator and finally, an award was given in favour of the petitioner firm directing the CORE to pay the bank guarantee amount to the petitioner within 30 days from the date of award i.e. 21.09.2017. It is not disputed that the said award has not been subjected to challenge by the CORE and the same has attained finality. Meanwhile, the respondents issued a notice to the petitioner on 17.5.2018 for producing books and records in tender under "Book Examination Clause-IRS 3300" qua the articles supplied by the petitioner in view of purchase order dated 13.09.2013 as well as purchase order dated 12.01.2018. Even though against the purchase order dated 13.09.2013 the respondents had already paid the amount and it was a closed contract. Said notice was responded by the petitioner through its response dated 30.05.2018. Thereafter, the respondents issued a letter to the petitioner on 14.06.2018 and reiterated the earlier demand of supplying the documents. In the notice dated 17.05.2018 the respondent had alleged that the petitioner is taking unreasonable higher profits. Consequently, the second respondent had preferred a complaint dated 12.06.2018 under Section 19 (1) (b) of the Competition Act, 2002 before the Secretary, Competition Commission of India alleging that the petitioner flouted the provisions of Sections 3 and 4 of the Act, 2002. The said complaint was treated as a Reference Case

No.05 of 2018 (Central Organisation for Railway Electrification Office of the Principal Chief Materials Manager 1, Nawab Yusuf Road, Civil Lines, Allahabd, U.P vs. M/s PPS International, Greater Noida, UP). Finally, the CCI by its judgment and order dated 27.8.2018 had proceeded to decide the reference holding that no case is made out against the petitioner.

8. The petitioner has preferred the present writ petition in the year 2018 seeking aforementioned reliefs. After filing the writ petition, a time barred Appeal dated 11.10.2019 was filed by the CORE before the National Company Law Appellate Tribunal, New Delhi under Section 53 (1) & (2) of the Act, 2002 against the judgment and order dated 27.8.2018 and the same was registered as Competition Appeal (AT) No.79/2019 (Central Organization for Railway Electrification vs. M/s PPS International). Notice was also issued to the petitioner, in which petitioner had filed its response/objection on 12.12.2019. Finally, the appeal was dismissed by the NCLAT by its judgment and order dated 23.1.2020. Against the said order, a review application was preferred by the CORE before the Appellate Tribunal, which was registered as Review Application No.01/2020 in Competition Appeal (AT) No.79/2019. The said review application was also rejected by the Appellate Tribunal on 13.4.2022.

9. Initially, present matter was taken up on 28.11.2018 and on the said date, a Division Bench of this Court had proceeded to pass an interim order in favour of the petitioner to the following effect:-

"Heard Sri Navin Sinha, learned Senior Advocate assisted by Sri Vivek

Kumar Singh, learned counsel appearing for the petitioner and Sri Rajnish Kumar Rai, learned counsel for the respondents.

By means of this writ petition, the petitioner has come to this Court raising a grievance that for the supply of material imported by the petitioner to the Railway, a contract was entered into between the petitioner and the Railways and rates were fixed. After contract was acted upon, materials were supplied and payments were also made by the Railway to the petitioner. But suddenly an order was passed issuing a show cause to the petitioner stating therein that petitioner is charging inflated rates, why rates should not be revised. Thereafter, the petitioner made a representation, which was not considered and the Railway straightway went before the Competition Commission of India as provided under the Competition Act, 2002. The said act has been enacted to provide, keeping in view of the economic development of the county, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom to trade carried on by other participants in markets, in India, and for matters connected therewith.

The Competition Commission rejected the claim of the Railway by passing an order that no inflated rates have been presented by the petitioner for the Railway to revise the same.

It is to be noted that against the order of Competition Commission, the Railway had the freedom to approach the Tribunal constituted under the Act, which they chose not to and unilaterally revised the rates by passing an order dated 12/13.9.2018 and consequently, has issued a demand notice on 26.9.2018 for a sum of Rs.5,19,47,553.80/-.

It is to be further noted that once the Competition Commission already decided the claim of the Railway, prima facie, we are of the view that without filing an appeal, unilaterally rates could not have been revised.

The matter requires consideration.

Mr. Rajnish Kumar Rai, learned counsel for the respondents prays for and is allowed three weeks' time to file counter affidavit.

List this case after expiry of the aforesaid period.

Considering the aforesaid, no coercive steps shall be taken against the petitioner pursuant to the order dated 26.9.2018 (Annexure No.4 to the writ petition)."

10. Again on 23.1.2023 the Court had directed the parties to bring on record the reference filed by the CORE before the CCI and consequently, supplementary affidavit was filed on 29.1.2023 bringing on record the certified copy of the Reference Case No.05 of 2018 filed by the CORE and order passed in Review Application No.01/2020 as Annexure Nos.SA-4 & 5 to the supplementary affidavit.

11. In this backdrop, Sri F.A. Ansari, learned counsel for the petitioner vehemently contended that in the most arbitrary manner, the respondent had resorted to the "Book Examination Clause" contained in Indian Railway Standard Condition of Contract for procurement of materials and the same could not be invoked as it was not the part of tender condition. Unless the Railways specifically mention the "Book Examination Clause - Special Condition of Contract" and takes the consent of the bidders, they cannot

invoke this "Book Examination Clause" at any point of time. The contracts were awarded after inviting online global tender from worldwide companies and settled after the rates and other terms and conditions were negotiated by the Tender Committee. Accordingly, with proper justification of the prices the same were approved by the Purchase Tender Committee. He submitted that admittedly, the petitioner's bid stood the lowest and technically suitable bid. The "Book Examination Clause" was not included in the earlier contract of the year 2013. Even though the same stood concluded with full and final payments in the month of January, 2018 after the arbitration award was passed by the arbitrator in favour of the petitioner on 21.9.2017. Thereafter, no other issues were ever raised by the CORE in respect of any exorbitant price or making any undue profits by the petitioner firm. The entire action of the respondent authorities was arbitrary with malafide reasons as they did not give any notice in respect of the purchase order dated 27.2.2018 and in most arbitrary manner, they had deducted the amount from the bills of the petitioner. The same is also in violation of principle of natural justice.

12. Sri F.A. Ansari further submitted that in the notice dated 17.05.2018 the respondent had alleged that the petitioner is taking unreasonable higher profits without there being any basis for the same. It is factually incorrect as the rates were finalized through proper negotiation between the parties and after due deliberations the price offered by the petitioner firm was duly accepted by the respondent authorities. Accordingly, the purchase order was issued in favour of the petitioner firm. Moreover, the second respondent had filed detailed complaint

dated 12.06.2018 before the CCI, registered as Reference Case No.05/2018 under Section 19 (1) (b) of the Act, 2002, against the petitioner alleging contravention of provisions of Sections 3 and 4 of the Act, 2002. On the said complaint/reference the enquiry was made by the CCI on the basis of material filed by the respondent and passed an order on 27.8.2018 and rejected the complaint/reference. He submitted that while preferring the reference against the petitioner the CORE has alleged before the CCI, on the basis of purchase orders, to the effect that the petitioner's monopolistic position of single approved source has increased the rates in recent 12 years without any significant inflation in Switzerland. In support of his submission, he has placed reliance on the Reference Case No.05/2018, wherein the CORE had alleged the excessive pricing viz. *"But later on it was revealed vide 'Custom's letter dated C. No.VIII/12/ACC-Import/Gr-VA/Misc./841/2013 dated 22.06.2015 that M/s PPS International has imported the material @ CHF 6400 and jacked up prices taking benefit of its monopoly situation.' Further, it has been stated in the last paragraph that 'From the above it becomes clear that M/s PPS International has misused its dominant position to jack up prices artificially. In the view of above it is requested that a case of misuse of its dominant position to artificially jack up prices may be registered upon M/s PPS International'".*

13. Learned counsel for the petitioner has also drawn attention on the impugned Modification Advice/Orders dated 12/13.09.2018 in respect of (i) P.O. No.CORE/S/1271/5530/20478; (ii) P.O. No.CORE/S/1271/5226/20473 and (iii) P.O. No.CORE/S/1271/4054/20177 as well as Demand Order dated 26.09.2018 in

respect of P.O. No.CORE/S/1271/4054/20177, which state that the amendment has been issued for lower rates after results of book examination due to discovery of new rates of customs bills of entry @ CHF 6400 for each set. The reference is also drawn on the chart supplied by the CORE to the CCI through reference case dated 12.06.2018, wherein the CORE has leveled the same allegation of excessive pricing on the basis of same material against the petitioner. The CORE had also alleged violation of Section 3 (3) (a), 4 (2) (a) (i) and 4 (2) (a) (ii) of the Act, 2002. He has also placed reliance on paras 17, 18 and 19 of the order passed by the CCI. He submitted that after filing the present writ petition and the observations of this Court in the interim order dated 28.11.2018, the CORE preferred a time barred Appeal before the NCLAT under Section 53 (1) and (2) of the Act, 2002 on 11.10.2019 against the order dated 27.08.2018 passed by the CCI. The aforesaid appeal filed by the CORE was dismissed by the NCLAT, New Delhi vide its judgment and order dated 23.01.2020 on the ground of delay as well as on merits also. Against the said order a Review Application was filed by the CORE and the same was also dismissed by the NCLAT on 13.4.2022. While dismissing the review application the NCLAT observed that it is open to the aggrieved party to prefer Civil Appeal before Hon'ble Supreme Court against the judgment dated 23.1.2020. He submitted that till date no appeal is filed and therefore, the order dated 27.1.2018 passed by the CCI has attained finality and findings therein are not amenable to scrutiny of this Court which has been upheld by the NCLAT vide order dated 23.1.2020 and 13.4.2022 (review order) which is not subjected to challenge before the Apex Court under Section 53-T of the

Act, 2002. He submitted with utmost respect that once the remedy has not been availed by the CORE even at this belated stage then this Court does not inhere the power to sit in appeal or to interfere or upset the findings recorded by the CCI in its order dated 27.1.2018.

14. In support of his submission, learned counsel for the petitioner has placed reliance upon the judgment of Apex Court in **Union of India vs. Tania Construction Pvt. Ltd. and ABL International Ltd. vs. Export Credit Guarantee Corporation of India Limited**. He has also relied upon a Division Bench judgment of Madras High Court in **M/s K.J. Hospital vs. M/s Technomed International and others**.

15. On the other hand, Sri Sudarshan Singh, learned counsel for the respondents has vehemently opposed the writ petition and submitted that the petitioner firm is an agent of Arthur Flury, Switzerland since 1st May, 2008. The Arthur Flury, Switzerland (AF) is an international company, which is engaged in the business of manufacturing several specialized electrical equipment to be used worldwide in the electrification of Railway as well as in another field also. The CORE invited an international competitive bid for procurement of Neutral Phase Assembly Break for 347 sets. After opening of the tender in February, 2013 the petitioner's offer stood technically suitable lowest offer. Consequently, the CORE invited the petitioner firm for negotiation with the highest authority and after negotiation the petitioner's bid was accepted. Consequently, a Letter of Intent for the legally binding contract was issued by the Purchase Authority vide letter No.CORE/S/1271/4054 dated 20.08.2013 for supply of 282 sets out of total tendered

quantity of 347 sets and issued a purchase order. Further, several tenders were opened; the company participated and regularly supplied the equipment. There is IRS condition in the contract between the parties, which is essential condition of contract and it manifestly provides that the contract will be governed by IRS General and Special Condition of the bid document. It is submitted that the Ministry of Railways issued Government order/letter No.82/F(F.Ex)24.1/CLW/11 New Delhi dated 16th November, 1982 imposing the condition on the commission payable to the Indian agents of foreign firms.

16. He further submitted that in IRS condition, books and account examination is part of the contract and after examining the books and account of the petitioner, the respondent found that the petitioner concealed the actual rate of the equipment and the petitioner firm had obtained purchase order by giving false documents regarding actual price of material to be supplied by M/s Arthur Flury, Switzerland. The alleged document submitted by the petitioner has been brought on record as Annexure CA-4 to the counter affidavit. Consequently, the recovery was made after the actual price of material imported from M/s Arthur Flury, Switzerland was found to be on much lower side as CHF 6400, CHF 7200 & CHF 7200 against the order rate CHF 8600, CHF 8580 & CHF 8580. The said recovery was done by invoking "Book Examination Clause" as mentioned in Para 3300 of IRS conditions of contract. He has placed reliance on Para-42 of the counter affidavit filed by the CORE, wherein it has been stated that in case of any dispute there is a provision of arbitration clause - 2900 IRS conditions as mentioned in the contract. After the amendment in Arbitration and Conciliation Act, 1996 the

condition clause 2900 was accordingly amended by the Railway Board and the same is applicable being statutory amendment.

17. It has been further submitted that while submitting the offer on behalf of M/s Arthur Flury, Switzerland, the petitioner has given proforma invoice in which higher CHF rate was quoted by the petitioner but at the time of supplying the material they have paid only CHF 6400, CHF 7200, CHF 7200 per unit respectively in purchase orders dated 13.9.2013, 12.1.2018 and 27.2.2018. Further the petitioner has declared in their calculation sheet submitted during the negotiation that they were claiming a profit of 2% over and above the offered prices in the tender i.e. CHF 8600, CHF 8590 and CHF 8590 in purchase orders dated 13.9.2013, 12.1.2018 and 27.2.2018 respectively, whereas the actual prices of these material were CHF 6400, CHF 7200 and CHF 7200. The petitioner had misrepresented the actual prices and on the basis of fraud, they have obtained the purchase order on high rate by concealing the material fact. Due to this difference of prices the Book Examination as per IRS-3300 has been conducted and modified advices have been issued for reduction in the rates of all three purchase orders and bills have been passed on reduced rates. Since for these three purchase orders, supply of material has already been completed and all bills have been paid, a recovery notice of Rs.5,19,47,553.80 has been served on the petitioner for depositing the said amount. The CORE had filed the case in CCI challenging the monopoly and abuse of dominant position of the petitioner under Sections 3 & 4 of the Act, 2002. It is not right to link CCI case with recovery made by invoking "Book Examination Clause", which is

statutory in nature. Learned CCI has not considered the issue of difference of rates quoted by the petitioner in the tender and rates at which the material was actually imported by them. Therefore, both the cases i.e. invoking "Book Examination Clause" and complaint file at CCI are different and CCI case should not be linked with the present case. As mentioned in these purchase orders, this contract is governed by IRS conditions, General conditions & Special conditions of Contract. In para no.26 of General Condition of Contract as well as in Para 2900 of IRS Conditions, it is clearly mentioned that in the event of any question, dispute or differences arising the same shall be referred for approval of arbitrator by GM/CORE/Allahabad. Once the parties entered into the contract then they cannot go beyond the conditions of the contract in view of principles of judicial discipline. Therefore, the present writ petition is not maintainable for contractual dispute and the same is liable to be dismissed on this ground.

18. Heard rival submissions and perused the record.

19. Before proceeding to consider the rival submissions, it would be appropriate to re-produce the relevant provisions of the Act, 2002:-

"3. **Anti-competitive agreements.-**

1. No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

2. Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

3. Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

a. directly or indirectly determines purchase or sale prices;

b. limits or controls production, supply, markets, technical development, investment or provision of services;

c. shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

d. directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

4. Abuse of dominant position.-

1. No enterprise shall abuse its dominant position.

2. There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group,-

a. directly or indirectly, imposes unfair or discriminatory-

i. condition in purchase or sale of goods or service; or

ii. price in purchase or sale (including predatory price) of goods or service.

Explanation.- For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and

unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition.

53A. Appellate Tribunal.- The National Company Law Appellate Tribunal constituted under Section 410 of the Companies Act, 2013 (18 of 2013) shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall-

(a) hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of Section 26, Section 27, Section 28, Section 31, Section 32, Section 33, Section 38, Section 39, Section 43, Section 43A, Section 44, Section 45 or Section 46 of this Act; and

(b) adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under Section 42A or under sub-section (2) of Section 53Q of this Act, and pass orders for the recovery of compensation under Section 53N of this Act.

53B. Appeal to Appellate Tribunal.- (1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a

local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

53T. Appeal to Supreme Court.- The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them:

Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days."

20. So far as the "Book Examination Clause-IRS 3300" is concerned, the same is

incorporated in the letter of the Railway Board dated 27.01.1983, which includes "Book Examination Clause - Special Conditions of Contract". The Book Examination Clause is reproduced hereinafter:-

"BOOK EXAMINATION CLAUSE

(i) The Contractor shall whenever called upon and requiring to produce or cause to be produced for examination by any Government Officer duly authorised in that behalf any cost or other account book of account, voucher, receipt, letter, memorandum, paper or writing or any copy of or extract from any such document and also, furnish information anywise relating to such transaction and produce before the duly authorised Government Officer returns verified in such manner as may be required relating in any way to the execution of this contract or relevant for verifying or ascertaining the cost of execution of this contract (the decision of such Government Officer on the question of relevancy of any document, information or return being final and binding on the parties).

The obligation imposed by this clause is without prejudice to the obligation of the Contractor under any statute, rules or orders shall be binding on the Contractor.

(ii) The Contractor shall, if the authorised Government Officer so requires (whether before or after the prices have been finally fixed), afford facilities to be Government Officer concerned to visit the Contractors works for the purpose of examining the processes of manufacturer and estimating or ascertaining the cost of production of the articles. If any portion of the work be entrusted or carried out by a sub-contractor or any of its subsidiary or allied firm or company, the authorised

Government Officer shall have the power to examine all the relevant book of such sub-contractor or any subsidiary or allied firm or company shall be open to his inspection as mentioned in clause (i).

(iii) If on such examination, it is established that the contract price is in excess of the actual cost plus reasonable margin of profit, the purchaser shall have the right to reduce the price and determine the amount to a reasonable level.

(iv) Whether a contract provided for book examination clause the Contractor or its agency bound to allow examination of its books within a period of 60 days from the date the notice is received by the Contractor, or its agencies calling for the production of documents as under clause (i) above. In the event of Contractor's or his agencies failure to do so, the contract price would be reduced and determined according to the best judgment of the purchase which would be final and binding on the Contractor and his agencies."

(emphasis supplied)

21. We have proceeded to examine the record in question and find that the CORE is an organization under the Ministry of Railways and is entrusted with the responsibility to carry out railway electrification over the entire network of the Indian Railways. The CORE inter alia procures SNS Assembly also called 'Phase Break' for various Railways Zones from M/s Arthur Flury AG Switzerland, which sells this product through its authorised Indian distributor (petitioner firm). In terms of Railway Board letter dated 14.11.2017, SNS Assembly is a centralised procurement item of CORE, where demand of all Zonal Railways is consolidated and procured. The petitioner entered into an agreement with M/s Arthur Flury AG. The CORE floated

the online global tender on their website for supply of 28 sets of SNS Assembly (Phase Breaks). The petitioner firm also participated in the global tender. The bid was opened on 18.10.2017 and the petitioner's bid was accepted. Consequently, the purchase order was given to the petitioner on 12.1.2018 for supply of 28 sets of SNS Assembly (Phase Breaks) for Rs.2.31 crores. Admittedly, the said material was supplied by the petitioner firm. Meanwhile, another global tender was published by the CORE and the global bids were opened on 29.11.2017 for supply of 238 sets of SNS Assembly (Phase Breaks). The petitioner firm again participated in the said global tender and its bid was accepted for supply of 176 sets, out of total tender quantity of 238 sets. The decision of the Tender Committee was accepted by the Principal Chief Material Manager of CORE. Consequently, the respondent issued purchase order dated 27.2.2018 for supply of 170 sets for Rs.14.64 crores. Admittedly, in response of the purchase order dated 27.2.2018, the petitioner supplied the entire articles through various Challan-cum-Tax Invoices dated 26.6.2018 but instead of clearing the outstanding amount to the petitioner firm, the second respondent sent a letter dated 17.05.2018 stating that they have invoked "Book Examination Clause" for the present order as well as the previous order of 2013.

22. This much is also reflected from the record that the matter was referred to the Arbitrator and finally, the award was given in favour of the petitioner firm on 21.09.2017 directing the CORE to pay the bank guarantee amount to the petitioner within 30 days. It is not disputed that the said award has not been challenged by the CORE and the same has attained finality. Meanwhile, the respondents issued notice

to the petitioner on 17.5.2018 for production of books and records under "Book Examination Clause - IRS 3300" qua the articles supplied by the petitioner against purchase order dated 13.09.2013 as well as purchase order dated 12.01.2018. Against the purchase order dated 13.09.2013 the respondents had already paid the amount and it was a closed contract. The petitioner submitted reply to the said notice on 30.05.2018. Thereafter, the second respondent preferred complaint dated 12.06.2018 under Section 19 (1) (b) of the Act, 2002 before the Secretary, CCI against the petitioner for flouting provisions of Sections 3 and 4 of the Act, 2002, registered as a Reference Case No.05 of 2018. Finally, the Commission has decided the reference on 27.8.2018. The operative portion of the judgment dated 27.8.2018 is reproduced hereinafter:-

"8. The Commission has perused the reference and the documents filed therewith and also considered the material available in public domain.

9. At the outset, the Commission notes that though the Informant has alleged contravention of the provisions of both Sections 3 and 4 of the Act, yet looking at the nature of allegations and the relationship of the OP with the OEM, the provisions of Section 3 (3) (a) of the Act are not applicable to the present case as the OP (distributor) and OEM (manufacturer) are operating at different levels of the production chain in different markets. Thus, prima facie the provisions of Section 3 (3) (a) of the Act are not attracted.

10. Next, for the purpose of examining the allegations of the Informant under the provisions of Section 4 of the Act, it is necessary to determine the relevant market at the first instance. Thereafter it is necessary to assess whether

the OP enjoys a position of strength required to operate independently of the market forces in the relevant market. Only when such a position is established, the Commission is required to examine whether the impugned conduct amounts to abuse of dominance or not.

11. The Commission observes that the product involved in the instant case is SNS Assembly, which is used mainly by the Railways to isolate different phases of power supply in adjoining Over Head Equipment (OHE) fed by adjacent substations, which are normally connected to different phases of supply. Thus, it is used in overhead contact lines of the Railways to act as an insulator between different power lines (phases). In this regard, the Commission observes that SNS Assembly is a light weight contact wire insulator of composite type (Rasin bonded glass fibre core protected with wear resistance ceramic beads) with Poly Tetra Fluro Ethylene (PTFE). Thus, its physical characteristics indicate that it is a specialised equipment having a specific function. Moreover, SNS Assembly is a distinct product in itself having no close substitute. Accordingly, the relevant product market in the instant case is 'market for supply of SNS Assembly'.

12. In respect of the relevant geographical market, it may be noted that CORE is a centralised procurement agency for the SNS Assembly as it consolidates the demand of all Railway Zones and centrally procures them. This shows pan India nature of the demand by different Zones of Railways and its subsequent distribution. Thus, the relevant geographic market in this case would be 'India'.

13. Thus, the relevant market in the present case is the 'market for supply of SNS Assembly in India'.

14. On the issue of dominance of the OP in the aforesaid relevant market, the Commission notes that the OP is the sole authorised distributor of M/s Arthur Flury AG, Switzerland in India. Further, it is also observed that there is only one single approved source in the RDSO approved list i.e. M/s Arthur Flury AG and its Indian distributor. The requirement of the RDSO approved sources has also resulted in a situation of high dependence of the Indian Railways for the SNS Assembly on the OP. Thus, the Commission observes that the OP can be said to be dominant in the above defined relevant market.

15. In view of the above assessment, the Commission is of the view that the OP appears to be dominant in terms of the provisions of Section 4 of the Act.

16. To examine the alleged abuse of dominant position by the OP in the relevant market delineated supra, it is noted that the Informant has not specified any specific condition which can be examined within the framework of Section 4 (2) (a) (i) of the Act.

17. **However, on a closer scrutiny of the information, it appears that the Informant is essentially aggrieved by the allegedly high prices charged by the OP for supply of SNS Assembly to CORE. The informant has claimed that the OP has increased the prices in last 12 years without any significant inflation in Switzerland. Thus, the informant has essentially raised the issue of excessive pricing. To support the allegations, it has been pointed out that in purchase order dated 13.09.2013, the OP had supplied 282 sets of SNS Assembly on behalf of M/s Arthur Flury AG on the basic price (excluding all taxes, duties, freight charges, insurance charges & other expenses) i.e. @ 8600 Swiss Franc (CHF)**

per set. But, later on, it was revealed to the informant that the OP had imported the same goods on the basic price of 6400 Swiss Franc per set. Similarly, the informant provided another evidence where the OP in response to the purchase order dated 12.01.2018 had supplied 28 SNS Assembly on the basic price of 8580 Swiss Franc but, later on, it was found through the invoice of M/s Arthur Flury AG & Bill of Entry that the OP had imported the same at 7200 Swiss Franc per set.

18. In order to appreciate the allegation of excessive pricing, the Commission deems it appropriate to examine the percentage increase in the prices of SNS Assembly over period of time i.e. from 2006 to 2018. The table beneath shows the percentage rise in prices of SNS Assembly between 2006-2018:

Table No.2: Percentage change in BSE price.

SN	Year	Basic Price (Quoted by OP in the Purchase Order)	Year on year percentage change in price
1	2006	6602.55 Swiss Franc	-
2	2008	6934.20 Swiss Franc	5.02%
3	2012	8600 Swiss Franc	24.00%
4	2013	8600 Swiss Franc	0.00%
5	2016	8580 Swiss Franc	-0.23%
6	2018	8580 Swiss Franc	0.00%

19. From the above table, it appears that **there has not been a continuous trend of price increase over a period of time which could show excessive prices being charged by the OP. Also between 2013 and 2018, there was either no increase in the prices and rather in year 2016, prices even decreased. Thus, the price trend does not support the allegation of abuse of dominant position made by the informant by artificially determining the sale price in terms of the provisions contained in Section 4 (2) (a) (ii) of the Act.**

20. In view of the above assessment, the Commission is of the view that the **OP does not appear to have abused its dominant position in terms of the provisions of Section 4 of the Act.**

21. Resultantly, the Commission is of the opinion that **no case of contravention of the provisions of Section 4 of the Act is made out against the OP and the matter is ordered to be closed in terms of the provisions contained in Section 26 (2) of the Act.**

22. The Secretary is directed to communicate to the informant, accordingly."

(emphasis supplied)

23. This much is also reflected from the record that against the said order, the Appeal (AT) No.79/2019 was filed by the CORE before the NCLAT and the same was dismissed by the NCLAT on 23.1.2020 with following observations:-

"After hearing learned counsel for the appellant, we find that there is no plausible explanation offered for inordinate delay of 330 days (wrongly described as 350 days) in preferring the appeal. Admittedly, the impugned order was

passed by the Competition Commission of India based at New Delhi and it is inconceivable that the appellant was not aware of the appellate mechanism and the forum empowered to entertain the appeal. The ground sought to be projected for condonation of delay does not constitute a "sufficient cause" so as to warrant condonation as sought. Viewed in that context, we find that the huge delay of 330 days has not been explained satisfactorily and no sufficient cause has been assigned for such delay. The application for condonation of delay is accordingly dismissed.

That apart, on merit we find that the Commission has noticed the trend in decrease of price of the relevant product in 2016 and 2018 and in view of the same, no prima facie case for directing investigation by Director General was made out. We find no reason to disagree with the view taken by the Commission. There being no infirmity in the impugned order, we decline to intervene.

Appeal is accordingly dismissed."
(emphasis supplied)

24. Against the said order, the Review Application No.01/2020 in Competition Appeal (AT) No.79/2019 was preferred by the CORE and the same was also dismissed by the Appellate Tribunal vide its order dated 13.4.2022 with following observations:-

"There is no representation on the side of the review applicant at the time of calling the matter. It comes to be known that on 23.01.2020 this Tribunal has dismissed the application for condonation of delay. Likewise, this Tribunal had also not interfered with the impugned order passed by the concerned authorities.

There being no infirmity in the impugned order and accordingly dismissed the appeal. As such, this Tribunal is of the earnest opinion that **as against the dismissal of the appeal in Competition Appeal (AT) No.79 of 2019 judgment dated 23.01.2020, it is open to the aggrieved party concerned to prefer Civil Appeal before the Hon'ble Supreme Court of India as against the judgment dated 23.01.2020 passed by this Tribunal.**

The instant Review Application No.01 of 2020 in Competition Appeal (AT) No.79 of 2019 is perse not maintainable and the same is hereby dismissed. However, there is no order as to costs."

(emphasis supplied)

25. We further find that while deciding the aforesaid reference on 27.8.2018, the CCI found that there has not been a continuous trend of price increase over a period of time which could show excessive prices being charged by the petitioner between 2013 and 2018, and there were no increase in the prices rather prices were even decreased in year 2016. Thus, the price trend does not support the allegation of abuse of dominant position made by the informant by artificially determining the sale price in terms of the provisions contained in Section 4 (2) (a) (ii) of the Act, 2002. In view of the above assessment, the Commission was of the view that the petitioner does not appear to have abused its dominant position in terms of the provisions of Section 4 of the Act, 2002 and no case of contravention of the provisions of Section 4 of the Act, 2002 was made out against the petitioner, accordingly the matter was ordered to be closed in terms of the provisions contained in Section 26 (2) of the Act, 2002. The judgment of the CCI was challenged before

the NCLAT in Appeal (AT) No.79 of 2019 and finally, the Appellate Tribunal had also dismissed the appeal on the ground that there was no plausible explanation offered for inordinate delay of 330 days in preferring the appeal and no sufficient reason or cause has been assigned for such delay. Consequently, the application for condonation of delay was accordingly dismissed. Further, on merit the NCLAT found that the Commission has noticed the trend in decrease of price of the relevant product in 2016 and 2018 and in view of the same, no prima facie case for directing investigation by Director General was made out. The NCLAT found no reason to disagree with the view taken by the Commission and declined to intervene. The review application was also dismissed by the NCLAT on 13.4.2022 as not maintainable, leaving it open to the aggrieved party to prefer Civil Appeal before the Hon'ble Supreme Court of India against the judgment dated 23.01.2020 passed by the Tribunal in Competition Appeal (AT) No.79 of 2019.

26. It is admitted that the observations and findings returned by the CCI in its order dated 27.8.2018 stood upheld by the NCLAT in its orders dated 23.1.2020 and 13.4.2022. The said orders could only be tested or upset by Hon'ble Apex Court under Section 53-T of the Act, 2002. Therefore, we do not find any justification to entertain the writ petition to sit in appeal or to upset the findings recorded by the CCI in its order dated 27.8.2018, which was affirmed by the NCLAT in the order dated 23.1.2020 and in the review order dated 13.4.2022. In response to the earlier order dated 23.1.2023 supplementary affidavit dated 30.1.2023 was filed by the petitioner bringing on record the certified copy of the Reference Case No.05/2018;

memo of appeal (AT) No.79/2019 preferred before NCLAT. Even at that stage leave was available to the respondents to take a stand before us that they are inclined to prefer an appeal before the Hon'ble Apex Court as provided under Section 53T of the Act, 2002. However, they have filed the reply but there is no whisper that the respondents are inclined to challenge the aforesaid orders before Hon'ble Apex Court.

27. A Constitutional Bench of Hon'ble Supreme Court in **L. Chandra Kumar vs. Union of India** has held that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution and the decisions of Tribunals would be subject to the High Court's Writ jurisdiction under Article 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. Relevant paragraph nos.37, 79, 80, 87, 91, 92, and 93 of the judgment are reproduced hereinafter:-

"37. Certain problems have arisen in the functioning of these Tribunals

especially in respect of the manner in which they exclude the jurisdiction of their respective High Courts. This aspect can be illustrated by briefly advertng to the broad facts of two of the matters before us. C.A. No. 1532-33 of 1993 arises as a result of conflicting orders issued by the West Bengal Taxation Tribunal and the Calcutta High Court. Certain petitioners had challenged the constitutional validity of some provisions in three legislations enacted by the West Bengal Legislature before the west Bengal Taxation Tribunal. After examining the matter and hearing the arguments advanced in response by the State of West Bengal, the West Bengal Taxation Tribunal, by this order dated 9.10.1991, upheld the constitutional validity of the impugned provisions. **Thereafter, the constitutional validity of the same provisions was challenged in a Writ Petition before the Calcutta High Court. During the proceedings, the State of West Bengal raised the preliminary objection that by virtue of Section 14 of the West Bengal Taxation Tribunal Act, 1987, which excluded the jurisdiction of the High Court in all matters within the jurisdiction of the Taxation Tribunal, the Calcutta High Court had no jurisdiction to entertain the writ petition. However, the High Court proceeded with the case and, by its judgment dated 25.11.1992, declared the impugned provisions to be unconstitutional. These developments have resulted in an interesting situation, where the same provisions have alternately been held to be constitutional and unconstitutional by two different form, each of which considered itself to be empowered to exercise jurisdiction.**

79. We also hold that the power vested in the High Courts to exercise judicial superintendence over the

decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.

80. However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental--as opposed to a substitution - role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses Clause (3) of Article 32 of the Constitution which reads as under:

32. Remedies for enforcement of rights conferred by this Part.--(1)..

(2) ..

(3) Without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).

(Emphasis supplied)

87. It is important to realise that though the theory of alternative institutional mechanisms was propounded in Sampath Kumar's case in respect of the Administrative Tribunals, the concept itself--that of creating alternative modes of dispute resolution which would relieve High Courts of their burden while simultaneously providing specialised justice-is not new. In fact, the issue of having a specialised Tax Court has been discussed for several decades; though the

Report of the High Court Arrears Committee (1972) dismissed it as "ill-conceived", the LCI, in its 115th Report (1986) revived the recommendation of setting up separate Central Tax Courts. Similarly, other Reports of the LCI have suggested the setting up of 'Gram Nyayalayas' (1986) LCI, 114th Report , Industrial/Labour Tribunals 1987 LCI, 122nd Report and Education Tribunals (1987) [LCI, 123rd Report .

91. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227

of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

92. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a First Appellate Court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of Tribunals under Article 227 of the Constitution. In R.K. Jain's case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunals on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the afore-stated contentions, **we hold that all decisions of Tribunals, whether**

created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

93. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. **In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution."**

(emphasis supplied)

28. In **L. Chandra Kumar's** case (supra) once a Constitution Bench of the Apex Court declared the law that "all decisions of Tribunals created under Article 323A and Article 323B of the Constitution will be subject to the scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls", then it is impermissible to make any further construction on the said issue. The expression "all decisions of these Tribunals" used by the Constitution Bench will cover and take within its sweep orders passed on applications or otherwise in the matter of transfer of Original Applications from one Bench of the Tribunal to another Bench of the Tribunal in exercise of the power under Section 25 of the Administrative Tribunals Act, 1985. In

other words, any decision of such a Tribunal, including the one passed under Section 25 of the Act could be subjected to scrutiny only before a Division Bench of a High Court within whose jurisdiction the Tribunal concerned falls. This unambiguous exposition of law has to be followed scrupulously while deciding the jurisdictional High Court for the purpose of bringing in challenge against an order of transfer of an Original Application from one bench of Tribunal to another bench in the invocation of Section 25 of the Act.

29. A careful perusal of Section 53T of the Act, 2002 would show that an appeal to the Supreme Court is provided against "any order passed by the Appellate Tribunal". Therefore, the appropriate remedy for the respondent was to file an appeal against the judgment and order dated 23.01.2020 passed by the Tribunal before Hon'ble Supreme Court of India in terms of the aforesaid provisions of the Act, 2002 within the period of limitation prescribed therein. Admittedly, the respondent did not prefer any appeal before Hon'ble Supreme Court neither within the period of limitation nor even any delayed appeal was filed after expiry of the limitation period. Once the respondent had lost the Reference made on similar allegation of excessive pricing on the same materials on record before the CCI, which are referred in the impugned orders; thereafter, the Appeal and Review Application preferred by the CORE before the NCLAT have also been dismissed and the findings recorded by the CCI have attained finality then the issue involved in the present writ petition stood settled and covered by the CCI order dated 27.8.2018 and approved/affirmed by the NCLAT.

30. In **M/s K.J. Hospital vs. M/s Technomed International and others**

(supra) the Madras High Court had dismissed the writ petition on the ground that the petitioner has not given any explanation for not having availed the efficacious alternative remedy by way of appeal under Section 53-T of the Act, 2002 before the Hon'ble Supreme Court of India to challenge the order. Relevant paragraphs of the judgment are reproduced hereinafter:-

"6. Having due regard to this incontrovertible legal position, in the absence of any explanation from the Petitioner for not having availed the efficacious alternative remedy by way of appeal under Section 53-T of the Competition Act, 2002, before the Hon'ble Supreme Court of India to challenge the impugned order, we do not find any justification to entertain the present Writ Petition and accordingly, the same is dismissed. No costs."

31. In **Union of India vs. Tantia Construction Pvt. Ltd.** (supra) Hon'ble Supreme Court has dismissed the SLP on the ground that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. Relevant portion of the judgment is reproduced herein below:-

"27. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative

remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company."

32. In the case of **ABL International Ltd. vs. Export Credit Guarantee Corporation of India Limited** (supra) the Supreme Court has considered the issue of maintainability of the writ petition involving disputed question of fact and grant of the monetary relief claimed by the petitioner. Relevant paragraph nos.28, 29, 53 and 54 of the judgment are reproduced hereinafter:-

"28. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

29. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. [1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

53. On the basis of the above conclusion of ours, the question still remains why should we grant the reliefs sought for by the appellant in a writ petition when a suitable efficacious alternate remedy is available by way of a suit. The answer to this question in our opinion, lies squarely in the decision of this Court in the case of Shri Lekha Vidyarthi (supra) wherein this court held :

"The requirement of Article 14 should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, the

State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. The personality of the State, requiring regulation of its conduct in all spheres by requirement of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirement of Article 14 and contractual obligations are alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. Therefore, total exclusion of Article 14 - non-arbitrariness which is basic to rule of law - from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals. xxx

Unlike the private parties the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably,

there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions. x x x "

54. From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution. Thus if we apply the above principle of applicability of Article 14 to the facts of this case, then we notice that the first respondent being an instrumentality of State and a monopoly body had to be approached by the

appellants by compulsion to cover its export risk. The policy of insurance covering the risk of the appellants was issued by the first respondent after seeking all required information and after receiving huge sums of money as premium exceeding Rs.16 lacs. On facts we have found that the terms of the policy does not give room to any ambiguity as to the risk covered by the first respondent. We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when Kazakhstan Government failed to fulfil its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner."

33. Once the respondent/CORE has lost the reference made on similar allegations of excessive pricing on the same material on record before the CCI, which are referred in the impugned orders, and the appeal and review preferred by the CORE before the NCLAT have also been dismissed, the findings arrived by the CCI has attained finality in the event of the order not challenged before Hon'ble Supreme Court in terms of Section 53T of Act, 2002, then the issue involved in the present writ petition stood settled and covered by the order passed by the CCI dated 27.08.2018.

34. In the aforesaid facts and circumstances, the writ petition deserves to be allowed and the impugned orders dated 12/13.9.2018 as well as demand notice dated 26.9.2018 are liable to be set aside.

35. Accordingly, the writ petition is allowed and the impugned orders dated 12/13.9.2018 as well as demand notice dated 26.9.2018 are set aside. The respondent authorities are directed to make the entire payments to the petitioner forthwith.

(2023) 5 ILRA 797
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.03.2023

BEFORE

THE HON'BLE SURYA PRAKASH
KESARWANI, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-C No. 52674 of 2016
With
Writ-C No. 33571 of 2018
And
Other Connected Cases

General Manager, I.O.C.L., Bulk Oil
Terminal, Chandauli & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Prakash Padia, Sri Anand Tiwari, Sri
Devi Shanker Shukla, Sri Anil Sharma (Sr.
Advocate)

Counsel for the Respondents:

C.S.C.

A. Civil Law - The Standard of Weights and Measures Act, 1976 /the Standard of Weights and Measures (Enforcement) Act, 1985 / "the Act, 2009")-Section 24 - Rule 17(3) of the U.P. Rules, 2011- the petitioners got their storage tanks calibrated. The notices were issued to the petitioners by the senior inspectors for reason that the petitioners did not get reverification even after expiry of the validity of the stamp-Therefore, for verification and stamping of weights or

measures, the fees as provided under Sub Rule 1/sub Rule 2 of Rule 17 of the Rules 2011 was demanded-The storage tanks of the petitioners have been alleged to be merely receptional and except for storing petroleum products, it is not used for any other purpose-the respondents may levy stamp verification/re-verification fee only up to Rs.5,000/- for each storage tank once in 60 months. No additional fee in the form of penalty under Rule 17(3) can be levied since it is not permitted by the Principal Act. Therefore, the impugned orders are arbitrary and illegal and deserves to be quashed Section 16 of the Act, 2009 provides for forfeiture of unverified weight or measure. Section 33 provides for penalty to a maximum of Rs.5,000/- for use of unverified weight or measure. Thus, in absence of a substantive provision in the Act, 2009 providing for penalty of the nature and for amount as provided in Rule 17(3), the penal provision of Rule 17(3) of the U.P. Rules, 2011 being beyond rule making power, is ultra vires to the Principal Act, i.e. the Act, 2009. That apart, Rule 25 of the U.P. Rules, 2011 itself provides that wherever the Rules are in conflict with the provisions of the Act, the Act will prevail upon the Rules.(Para 1 to 35)

The writ petitions are allowed. (E-6)

List of Cases cited:

1. Commr. Hindu Religious Endowments, Madras Vs Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.(1954) SCR 1005 : AIR 1954 SC 282
2. St. of UK Vs Kumaon Stone Crusher (2018) 14 SCC 537
3. Khemka & Co. (Agencies) (P.) Ltd. Vs St. of Mah. (1975) 2 SCC 22
4. St. of U.P. Vs Sitapur Packing Wood Suppliers (2002) 4 SCC 566
5. Mahachandra Prasad Singh (Dr.) Vs Chairman, Bih. Legislative Council (2004) 8 SCC 747
6. V.V.S. Sugars Vs St. of A.P. (1999) 4 SCC 192

7. Indian Carbon Ltd. Vs St. of Assam, (1997) 6 SCC 479

8. J.K. Synthetic Ltd. Vs C.T.O.(1994) 4 SCC 276

9. M/s Shree Steel Rolling Mills Vs Commr. of Central Excise & anr. (2016) 3 SCC 643

10. IOC Ltd. Vs St. of U.P. (2019) 16 SCC 482

11. Veena Kumari Tandon Vs Neelam Bhalla & ors. (2007) 12 SCC 764

12. Vimal Chandra Banerjee Vs St. of M.P.(1970) 2 SCC 467

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Anil Kumar Sharma, learned Senior Advocate assisted by Sri Devi Shanker Shukla, Sri Pramod Kumar Rai, Sri Anand Tiwari, Sri Rakesh Kumar and Sri Komal Mehrotra, learned Counsel for the petitioners, and Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri Pankaj Rai, B.B. Pandey and Suresh Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. With the consent of learned counsels for the parties, the WRIT - C No. - 52674 of 2016 is treated as leading writ petition. However, relief sought in each of the writ petitions in this bunch of cases are briefly noted below.

WRIT - C No. - 33571 of 2018

3. In this writ petition, the notices dated 25.09.2018 and 29.09.2018 issued by the Senior Inspector, Legal Metrology Meerut, requiring the petitioner to get verification of storage tanks and flow meters, has been challenged.

WRIT - C No. - 52674 of 2016

4. In leading Writ - C No. - 52674 of 2016, the petitioners have prayed to quash the order dated 14.10.2013 demanding fee @ Rs.20,000/- per storage tank, stamping fee @ Rs.1,50,000/- per storage tank and late fees @ Rs.1,30,000/- per storage tank. By the impugned notice dated 16.12.2013, the Senior Inspector, Legal Metrology, Mughalsarai, Chandauli required the petitioners to deposit the arrears for certain period alongwith late fees. The petitioners have also prayed to quash the appellate order dated 23.08.2016, passed by the Controller of Legal Metrology Department, U.P., Lucknow dated 23.08.2016 whereby the appeal of the petitioners have been dismissed. Apart from above, the petitioners have also challenged the validity of **Rule 17(3) of Uttar Pradesh Legal Metrology (Enforcement) Rules, 2011.** (hereinafter referred to as the U.P. Rules, 2011)

Writ - C Nos. -54682 of 2016, 54685 of 2016, 54687 of 2016, 57179 of 2016, 57180 of 2016, 57203 of 2016, 57208 of 2016, 57210 of 2016, 57766 of 2016, and Writ - C 61624 of 2016

5. In the above noted writ petitions the relief prayed is similar to the relief as prayed in Writ C No.52674 of 2016.

WRIT - C No. - 32799 of 2018

6. In Writ C 32799 of 2018, Seizure Memo date 24.09.2018 and notices dated 03.08.2018 and 15.09.2018 have been challenged apart from challenging the validity of the aforesaid Rules 17(3).

7. The relief sought in Writ C No.52674 of 2016 is reproduced below:

"(a) a writ, order or direction in the nature of certiorari quashing the order dated 23.8.2016 passed by the Controller, Legal Metrology Department, U.P., Lucknow, respondent no. 2 (Annexure-29 to the writ petition);

(b) a writ, order or direction in the nature of certiorari quashing the notices/orders dated 14.10.13 and 16.12.13 issued by respondent no.4 (Annexure-17 & 20 to the writ petition)

(c) a writ, order or direction in the nature of mandamus directing the respondents not to insist the petitioners-corporation for calibration of vertical storage tanks installed in the depot at Mughalsarai;

(d) a writ, order or direction in the nature of mandamus directing the respondents not to charge any penalty for non-calibration of storage tanks situated at the depot of the corporation;

*(e) a writ, order or direction in the nature of mandamus declaring the provisions or additional fees as null, void, inoperative and unconstitutional as provided under **Rule 17(3) of Uttar Pradesh Legal Metrology (Enforcement), Rules, 2011;***

(f) any other writ, order or direction as this Hon'ble court may deem fit and proper in the Circumstances of the case; and

(g) award cost of the petition to be paid to the petitioners."

FACTS:-

8. Since factual and legal position in this batch of writ petitions are similar, therefore, we proceed to note the facts of leading writ petition i.e. Writ C No.52674 of 2016, as under :

(a) The petitioners have storage tanks to store their petroleum products received from various refineries in the country by railway tank wagons/pipe lines. According to the petitioners, the railway tank wagons through which the products are received in the tank at the depot/terminal are duly calibrated by the competent authority and sales are executed by the corporation for supply of petroleum products through different retail outlets as well as the bulk consumers by tank mounted trucks (tankers) which are duly calibrated by the competent authorities of Weights and Measures departments. **The storage tanks of the petitioners have been alleged to be merely receptational and except for storing petroleum products, it is not used for any other purpose** i.e. neither for transaction nor for any measurement assistance. Therefore, calibration as defined in Section 2(a) of the **Standard of Weights and Measures Act, 1976** (hereinafter referred to as "**the Act, 1976**") is not required. It has been alleged in the writ petition that these storage tanks are just receptational means for storage and are not under any provision of law required to be calibrated. Petroleum products received in the tanks are also sold through calibrated means. However, since various orders were passed by Senior Inspectors, legal metrology of various districts, therefore, the petitioners filed Writ Petition No.34383 of 1996 (IOCL Vs. State of U.P. and others) challenging the orders for compulsory calibration of storage tanks and to deposit the requisite fee.

(b) Initially interim orders were granted by a Division Bench of this Court on 31.10.1996 but ultimately the aforesaid writ petition was dismissed by judgment and order dated 12.04.2007 **holding the Government Order dated 10.04.1996 to be valid**. Against the aforesaid judgment

and order, a SLP was preferred by the Indian Oil Corporation Ltd. before Hon'ble the Supreme Court being **SLP(Civil) No.17393 of 2007**.

(c) It appears that large number of writ petitions in various High Courts were filed by the petitioners herein. Subsequently the petitioners filed a Transfer Petition before Hon'ble Supreme Court being leading Transfer Petition (Civil) No.874 of 2004 (Indian Oil Corporation and another Vs. Inspector Legal Metrology and another). By order dated 10.03.2006, Hon'ble Supreme Court exercising the powers under Article 139 A(1) of the Constitution of India, transferred all the writ petitions pending in High Courts to Supreme Court for hearing. The **aforesaid SLP (Civil) No.17393 of 2007 was also clubbed** with the aforesaid Transfer Petitions. Ultimately, all the Transfer Petitions were **dismissed** by Hon'ble Supreme Court (leading Transfer Case (Civil) No.99 of 2006) by order dated 26.02.2013.

(d) **Thus, the challenge of the petitioners to the action of the respondents for bringing the storage tanks within the purview of the Act 1976, ultimately failed**. The aforesaid order of Hon'ble Supreme Court has attained finality.

(e) After dismissal of the aforesaid cases by Hon'ble Supreme Court, a letter was written to the Legal Metrology Department, Bihar, dated 21.03.2013 for calibration of storage tank situated in depots. The calibration was made by the Legal Metrology Inspector and the calibration fees @ of Rs.5000/- per tank per year was demanded from January 1992 to April 2013. Consequently, the petitioners filed I. As. before Hon'ble Supreme Court challenging the demand notices issued by the authorities of the State of Bihar. All the

I.As. were disposed of by Hon'ble **Supreme Court by order dated 30.08.2013** as under :

"If the applicant-petitioner is aggrieved by the notice demanding fees and penalties for stamping 11 tanks amounting to Rs. 24.20 lakhs, then we feel that this has given rise to a fresh cause of action for which the petitioner may pursue appropriate legal remedy available to it in law. We, accordingly, observe that if the petitioner pursues remedy for redressal of grievance concerning above demand in appropriate forum, the same shall be considered in accordance with law. In that event, the orders passed by this Court shall have no bearing for the consideration of the matter.

I.As. stand disposed of accordingly."

(f) Thus, the **Indian Oil Corporation Ltd. was relegated to avail statutory remedy against the orders creating demand of fees and late fees.**

(g) The impugned notices were issued by the Office of the Senior Inspector, Legal Metrology Department of concerned districts and thereafter demands were created. Aggrieved, the petitioner filed **Writ C No.8356 of 2014** (Deputy General Manager I.O.C. Ltd. & another Vs. State Of U.P. & 3 Others) which was dismissed on the ground of alternative remedy giving liberty to the petitioners to approach the appropriate appellate forum in terms of the provisions of Legal Metrology (General) Act, 2009 read with the Rules, 2011. The **petitioners filed Appeal No.6 of 2014** before the Controller of Legal Metrology Department, Uttar Pradesh, Lucknow, which was **dismissed** by order dated 25.09.2014.

(h) Aggrieved with the aforesaid appellate order, the petitioners filed **Writ - C No.50603 of 2014** which was **allowed** by

this Court **by judgment and order dated 03.12.2015** providing as under :

*"Therefore, this writ petition is allowed to the extent and in the manner indicated above. The impugned order dated 14.08.2014 is set aside and **Appeal No.6 of 2014 is restored for reconsideration** of the Appellate Authority, strictly in accordance with law. The parties through their respective counsel shall stand at notice to appear before the Appellate Authority in the first place on 08.01.2016.*

Having regard to the circumstances of the case, it is also provided in the interest of justice that until final decision by the Appellate Authority in Appeal No.6 of 2014, the interim order passed by this Court on 25.09.2014 shall remain in operation. It would, of course, be required of the Appellate Authority to take final decision in the appeal at the earliest, preferably within two months from the date of appearance of parties."

(i) Pursuant to the aforequoted judgment and order of this Court, the aforesaid **appeal No.6 of 2014 was again decided** by order dated 23.08.2016 and the appeal was **dismissed holding that the petitioners are liable to pay the fees for calibration and also the late fees.**

(j) **Aggrieved with the aforesaid appellate order/demand notices, the petitioners have filed the present writ petition challenging the validity of Rules 17(3) of the Uttar Pradesh Legal Metrology (Enforcement) Rules, 2011** (hereinafter referred to as the **U.P. Rules, 2011**).

9. Learned counsel for the petitioners states that the Writ C No.33571 of 2018 has been filed merely against notices and the petitioners submit reply to it. In view of this statement, the **Writ C No.33571 of 2018 deserves to be dismissed.**

10. In rest of the writ petitions only **the question of legality of the impugned demand notices/appellate orders and the validity of Rule 17(3) of the Rules 2011 remains to be tested.**

11. The Standard of Weights and Measures Act, 1976 and **the Standard of Weights and Measures (Enforcement) Act, 1985** (hereinafter referred to as "**the Act, 1985**") were repealed by Section 57 of the Legal Metrology Act, 2009 (hereinafter referred to as "**the Act, 2009**") with a saving clause. The Act 2009 came into force w.e.f. 1.4.2011.

12. From the impugned appellate order dated 23.08.2016 it is evident that earlier the petitioners got their storage tanks calibrated. The notices were issued to the petitioners by the senior inspectors for reason that the petitioners did not get reverification even after expiry of the validity of the stamp. Therefore, **for verification and stamping of weights or measures, the fees as provided under Sub Rule 1/sub Rule 2 of Rule 17 of the Rules 2011 was demanded.**

13. The appellate authority came to the conclusion that since calibration was not done within the prescribed time, therefore, the petitioners are liable to pay verification fees as well as late fees.

14. **Hence, the petitioners have filed the present writ petitions.**

15. In our order dated 19.01.2022 passed in the leading Writ C No.52674 of 2016 with the consent of the learned counsels for the parties, we have framed the following **questions for determination** in the present writ petitions except in Writ-C No.33571 of 2018, which is dismissed in

view of the statement of learned counsel for the petitioners as noted in Paragraph-9 of the aforesaid order dated 19.11.2022. **The questions as framed in the order dated 19.11.2022; are as under:**

(i) Whether Rule 17(3) of the Rules 2011 is a valid piece of legislation ?

(ii) Whether the demand of fees, late fees or additional fees under the The Standard of Weights and Measures Act, 1976 / The Legal Metrology Act, 2009 read with the Uttar Pradesh Legal Metrology (Enforcement) Rules 2011, is a commercial dispute covered by office memorandum F.No.4(1)/2013-DPE(GM)/FTS-1835, Government of India Ministry of Heavy Industries & Public Enterprises, Department of Public Enterprises dated 22.05.2018 and Consequently the dispute of payment of late fees by the petitioners deserves to be resolved through permanent machinery of Arbitration mechanism (P.M.A. mechanism) ?

(iii) Whether the petitioners are liable to pay fees and late fees ?

Submissions:-

16. **Sri Anil Kumar Sharma, learned Senior Advocate for the petitioners submits** as under:-

(i) Fee for verification under the Act, 2009 and Rules framed thereunder cannot be charged over and above Rs.5,000/- for the specified period i.e., 60 months.

(ii) Since there is no provisions under the Act, 2009 for levy of additional fee or late fee, therefore, Rules 17(3) of the U.P. Rules, 2011 is ultra vires being beyond the power conferred under the Principal Act.

(iii) No fee can be recovered from the petitioners for the period prior to the coming into force of the Act, 2009 inasmuch as all proceedings under the repealed Act, 1976 have lapsed.

(iv) Fee for verification or reverification for the period covered by the Act, 1985 and the U.P. Rules, 1990 cannot be charged.

17. **Sri M.C. Chaturvedi, learned Additional Advocate General for the State** has carried us to various provisions of the Act, 1976, the Rules, 1985, the Act, 1985, the Rules, 1990, the Act, 2009, the General Rules, 2011, the Model Draft Legal Metrology (Enforcement) Rules, 2010 and the U.P. Rules, 2011. He specifically drawn our attention to the provisions of Section 52 and 53 of the Act, 2009 and the General Rules, 2011 and the U.P. Rules, 2011 and submits as under:

(i) There is no rider in the Principal Act with regard to the quantum of fee and the matter has been left for subordinate legislation. The scale of fee has been provided by subordinate legislation. **The State Government in exercise of those powers, framed the U.P. Rules, 2011 adopting the scale of fee as prescribed under the General Rules, 2011 and the Model Rules for the State framed by the Central Government.** It adopted the additional fee prescribed under the power conferred under the Act, 2009 which is inconsequence to the Model Rules framed by the Central Government i.e. Model Rules, 2010. Thus the Rules 17(3) of the Rules, 1990 is well within the legislative powers, conferred upon the State Government.

(ii) There is saving clause under the Act, 2011, and therefore, all the proceedings under the Act, 1976 stands

saved, therefore, petitioners cannot deny the payment of verification fee or the additional fee.

(iii) **The notices issued to the petitioners levying only Rs.5,000/- per each five years, is in accordance with provisions of the Central Rules 2011 and the U.P. Rules, 2011.** The late fee was also re-framed, and late fee has been demanded in terms of the Model Rules, 2010 as adopted by the State Government being U.P. Rules, 2011, therefore, the petitioners are liable to pay the fee and the additional fee. The writ petition is frivolous and the impugned notices and orders are valid. Therefore, the writ petition deserves to be dismissed.

Discussion and Findings:-

18. Before we proceed to examine rival submissions of learned counsels for the parties, it would be appropriate to reproduce the Relevant Provisions having bearing on the controversy involved in the present writ petitions, as under:

Relevant Provisions:-

(a) The Standards of Weights and Measures (Enforcement) Act, 1985

"24. (1)

(2) Every weight or measure referred to in sub-section (1) shall be re-verified at such periodical intervals as may be prescribed.

Explanation-- For the removal of doubts it is hereby declared that no periodical re-verification shall be necessary in relation to any weight or measure which is used exclusively for domestic purposes.

70. Levy of fees.- *The State Government may, by rules made under section 72, levy such fees, not exceeding--*

(a)

(b)

(c)

(d) **five thousand rupees, on a graded scale, for the verification of any weight or measure, having regard to the time and labour which may be involved in making such verification,**

72. (1) **The State Government may, by notification and after consultation with the Central Government, make rules to carry out the provisions of this Act.**

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

.....

(m) **the period within which weights or measures shall be verified or re-verified** as required by sub-section (2) of section 24;

.....

(u) **the amount of fees which may be levied and collected for each of the matters specified in section 70;**

(3) In making any rule under this section, the State Government may provide that a breach thereof shall be punishable with fine which may extend to one thousand rupees."

(b) **The Uttar Pradesh Standards of Weights and Measures (Enforcement) Rules, 1990** (hereinafter referred to as "the U.P. Rules, 1990")

"14. Periodical interval for the verification of weights or measures.- (1) Every weight or measure including bullion, carat, weights, Beam scale, counter machine and liquid capacity measures (dipping measures, pouring measures and conical measures) used or intended to be used in any commercial transaction shall be **verified or re-verified** and stamped at lease **once in a period of 24 months:**

Provided that the fee payable for verification and stamping of above weights

and measures shall be charged at the rate prescribed in schedule XII to be calculated on year basis per year:

Provided further that weights or measures used for industrial production or protection shall be verified or re-verified and stamped at lease once in a year:

Provided also that **storage tanks** including vats shall be verified or re-verified and calibrated or re-calibrated and stamped at lease **once in a period of five years.**

(2) Notwithstanding anything contained in sub-rule (1) every weight or measure which has been verified and stamped in situ shall, if it is dismantled and re-installed before the date on which the verification falls due be duly re-verified and stamped on payment of the prescribed fee, before being put into use.

(3) Notwithstanding anything contained in sub-rule(1) every weight or measure which has been verified and stamped shall if it is repaired before the date on which the verification falls due to be duly re-verified and stamped on payment of the prescribed fee, before being put into use.

17. Fee for verification and stamping.-(1) **Fees payable** for verification and stamping of weight or measure **at the office or camp office** of the Inspector **shall be as specified in Schedule XII.**

(2) **If**, at the request of the user of weight or measure, **verification is done at any premises other than the office or camp office of the Inspector, an additional fee shall be charged at half the rates specified in the Schedule XII** and the user of the weight or measure shall pay the expenses incurred by the Inspector for visiting the premises including the cost of transporting and handling the Working Standard and other equipment subject to a minimum of rupees ten:

Provided that **no additional fee shall be charged** for verification and stamping in situ, of,

(i) vehicle tanks dispensing pumps, weigh-bridges, dormant platform machines and **such other weight or measure which cannot, and should not be moved from its location;**

(ii) Weight or measures in the premises of manufacturer or stockist of such weight or measure.

(3) If a weight or measure is **presented to the Inspector for re-verification after expiry of the validity of the stamp, an additional fee at half the rates specified in Schedule XII shall be payable for every quarter** of the year or part thereof.

(4) No fee shall be payable for re-stamping any weight or measure held in stock with manufacturer or dealer within the period specified in Rule 14 from the date on which it was last stamped, provided that the original stamp was not obliterated under Section (3) of Section 28 of the Act.

(5) A weight or measure which on verification/inspection is found to be incorrect shall be returned to the person concerned for adjustment informing him, in a proforma specified by the Controller of the defects found in the weight or measure, and calling upon him to remove the defects within a period not exceeding seven days. When the necessary adjustment has been carried out, such weight or measure shall be verified on payment of the fees specified in Schedule XII and if found correct shall be stamped."

24. Penalty for contravention of rules- Whoever contravenes any provision of these rule for the contravention of which no punishment has been separately provided in the Act, shall be punished with fine which may extend to one thousand rupees.

SCHEDULE XII (Relevant clause-2 is reproduced)
[See Rule 17(1)]

1.....

2. Capacity Measure (including storage tank, vehicle tanks, Dispensing Measures and Peg Measures)-

Capacity	Fee per piece
50 litres and above	Rs.10.00 for the first 100 litres or part thereof plus Rs.3.00 for every additional 100 Litres or part thereof subject to a maximum of Rs.5,000
201	4.00
101	4.00
51	2.00
21	2.00
11	2.00
500 ml	1.00
200 ml	1.00
100 ml	1.00
50 ml	1.00
20 ml	1.00
10 ml	1.00
5 ml	1.00
2 ml	1.00
1 ml	1.00
18.5 ml	4.00
60 ml	1.00
30 ml	1.00

(c) The Legal Metrology Act, 2009 (This Act repealed the Act, 1985)

Section 2 (v) "verification", with its grammatical variations and cognate expressions, includes, in relation to any weight or measure, the process of comparing, checking, testing or adjusting such weight or measure with a view to ensuring that such weight or measure

conforms to the standards established by or under this Act and also includes re-verification and calibration;

Section 2(w) "weight or measure" means a weight or measure specified by or under this Act and includes a weighing or measuring instrument.

Section 16: Forfeiture.- (1) Every non-standard or unverified weight or measure, and every package made in contravention of section 18, used in the course of, or in relation to, any trade and commerce and seized under section 15, shall be liable to be forfeited to the State Government:

Provided that such unverified weight or measure shall not be forfeited to the State Government if the person from whom such weight or measure was seized gets the same verified and stamped within such time as may be prescribed.

(2) Every weight, measure or other goods seized under section 15 but not forfeited under sub-section (1), shall be disposed of by such authority and in such manner as may be prescribed.

Section 24. Verification and stamping of weight or measure.--(1) Every person having any weight or measure in his possession, custody or control in circumstances indicating that such weight or measure is being, or is intended or is likely to be, used by him in any transaction or for protection, **shall, before putting such weight or measure into such use, have such weight or measure** verified at such place and during such hours as the Controller may, by general or special order, specify in this behalf, **on payment of such fees as may be prescribed.**

(2) The Central Government may prescribe the kinds of weights and measures for which the verification is to be done through the Government approved Test Centre.

(3) The Government approved Test Centre shall be notified by the Central Government or the State Government, as the case may be, in such manner, on such terms and conditions and on payment of such fee as may be prescribed.

(4) The Government approved Test Centre shall appoint or engage persons having such qualifications and experience and collect such fee on such terms and conditions for the verification of weights and measures specified under sub-section (2) as may be prescribed.

CHAPTER V (SECTIONS 25 TO 57)

Section 33: Penalty for use of unverified weight or measure.-Whoever, sells, distributes, delivers or otherwise transfers or **uses any unverified weight or measure shall be punished with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees** and, for the second or subsequent offence, with imprisonment for a term which may extend to one year and also with fine.

Section 52: Power of the Central Government to make rules.

(1)

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a)..

(b)...

(c) physical characteristics, configuration, constructional details, materials, equipment, performance, tolerances, **period of re-verification**, methods or procedures of tests under sub-section (4) of section 7;

Section 53. Power of State Government to make rules.--(1) **The State Government may, by notification, and after consultation with the Central**

Government, make rules to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the time within which the weight or measure may be got verified under proviso to sub-section (1) of section 16;

(b) registers and records to be maintained by persons referred to under sub-section (1) of section 17;

(c) the form, manner, conditions, period, area of jurisdiction and fees for issuance of licence under sub-section (2) of section 23;

(d) fee for verification and stamping of any weight or measure under sub-section (1) of section 24;

(e) manner of notifying Government approved Test Centre, terms and conditions and fee to be paid under sub-section (3) of section 24;

(f) fee for compounding of offences under sub-section (1) of section 48;

(3) In making any rule under this section, the State Government may provide that a breach thereof shall be punishable with fine which may extend to five thousand rupees.

(4) The power to make rules under this section shall be subject to the condition of the rules being made after previous publication in Official Gazette.

(5) Every rule made under this section shall, as soon as may be after it is made, be laid before each House of State Legislature, where there are two Houses and where there is one House of State Legislature, before that House.

Section 57. Repeal of the Standards of Weights and Measures Act,

1976 and Standards of Weights and Measures (Enforcement) Act, 1985.--(1) The Standards of Weights and Measures Act, 1976 (60 of 1976) and the Standards of Weights and Measures (Enforcement) Act, 1985 (54 of 1985), is hereby repealed.

(2) Without prejudice to the provisions contained in the General Clauses Act, 1897 (10 of 1897), with respect to repeals, any notification, rule or order made under the Standards of Weights and Measures Act, 1976 (60 of 1976) and the Standards of Weights and Measures (Enforcement) Act, 1985 (54 of 1985), shall, if in force, at the commencement of this Act, continue to be in force and have effect as if it was made under the corresponding provision of this Act.

(3) Notwithstanding such repeal, any appointment, notification, rule, order, registration, licence, certificate, notice, decision, approval, authorisation or consent made, issued or given under such law shall, if in force at the commencement of this Act, continue to be in force and have effect as if it were made, issued or given under the corresponding provisions of this Act.

(d) The Legal Metrology (General) Rules, 2011 (hereinafter referred to as "the General Rules, 2011") (framed by Central Government in exercise of powers under Section 52(2)(c), (f), (h),(i) and (s) of the Act, 2009)

Rule 25. Scale of fee.-- The scale of fees to be collected for the service specified in column (2) of Twelfth Schedule shall be at the rate specified in column 3 of the said Schedule.

Rule 27. Periodical verification of weights or measures.- (1) Every weight or measure used or intended to be used in any transaction or for protection of living beings or things in clause (k) of Section 2

shall be verified and stamped by the Legal Metrology Officer in the State in which such weight or measure is put to use and shall be re-verified and stamped at periodical Intervals.

(2) The re-verification shall be carried out on the completion of a period of,-

(a) twenty four months for all weights, capacity measures, length measures, tape, beam scale and counter machine,

(b) sixty months for storage tanks, and

(c) twelve months for all weight or measure including tank lorry other than that mentioned In clauses (a) & (b).

(3) Notwithstanding anything contained in sub-rule (2) every weight or measure which has been verified and stamped in situ shall, if it is dismantled and re-installed before the date on which the verification falls due shall be duly re-verified and stamped, before being put into use.

(4) Notwithstanding anything contained in sub-rule (1) every weight or measure which has been verified and stamped shall, if it is repaired before the date on which the verification falls due shall be duly re-verified and stamped before being put into use.

(e) The Uttar Pradesh Legal Metrology (Enforcement) Rules, 2011
(framed by State Government in exercise of powers under Section 53(1) of the Act, 2009)

Rule 14. Periodical interval for the verification of weights or measures shall be as specified in Legal Metrology (General) Rules, 2011.

Rule 17. Fee for verification.-(1) Fees payable for verification and stamping of weight or measure at the office or camp office of the Legal

Metrology Officer shall be as specified in Schedule IX.

(2) If, at the request of the user of weight or measure, verification is done at any premises other than the office or camp office of the Legal Metrology Officer, an additional fee shall be charged at half the rate specified in the Schedule IX and the user of the weight or measure shall pay the expenses incurred by the Legal Metrology Officer for visiting the premises including the cost of transporting and handling the Working Standard and other equipment subject to a minimum of Rupees One hundred:

Provided that no additional fee shall be charged for verification and stamping, in situ, of,

(i) Vehicle tanks for petroleum products and other liquids, Meter for Liquids other than water (Fuel Dispenser, Liquid Petroleum Gas, Milk Dispensers), Compressed Natural Gas Dispensers, Non-automatic Weighing Instruments like weighbridges, platform machines, crane scale, Automatic Gravimetric Filling Instruments, Automatic Rail-weighbridge, Discontinuous Totalizing Automatic Weighing Instruments, and such other weight or measure which cannot, and should not be moved from its location;

(ii) Weight or measure in the premises of manufacturer or dealer of such weight or measure.

(3) If a weight or measure is presented to the Legal Metrology Officer for re-verification after expiry of the validity of the stamp, an additional fee at half the rate specified in Schedule IX shall be payable for every quarter of the year or part thereof.

(4) No fee shall be payable for re-stamping any weight or measure held in stock with manufacturer or dealer within the period specified in Rule 14 from the

date on which it was last stamped, provided that the original stamp was not obliterated.

(5) A weight or measure which on verification/inspection is found to be incorrect shall be returned to the person concerned for adjustment informing him, in a pro forma specified by the Controller, of the defects found in the weight or measure, and calling upon him to remove the defects within a period not exceeding seven days. When the necessary adjustment has been carried out, such weight or measure shall be verified on payment of the fees specified in **Schedule IX** and if found correct shall be stamped."

Rule 25: Whoever contraventions any provision of these rules, for the contraventions of which no punishment has been separately provided in the Act, **shall be punished with fine, which may extend to five thousand rupees. Wherever the rules are in conflict with provisions of the Act, the Act will prevail upon the rules.**

SCHEDULE IX (only relevant portion is reproduced)

[See Rule 17(1)]

1.....

2. Capacity Measures:

Denomination	Fee per piece (Rs.)
(1)	(2)
100 litres and above	Rs.50 for the 1st 100 litres plus Rs.7 for every additional 100 litre or part thereof subject to a maximum of Rs.5000
501	50.00
201	20.00
101	20.00
51	10.00

21	10.00
11	10.00
500 ml	10.00
200 ml	10.00
100 ml	10.00
50 ml	10.00
20 ml	10.00
10 ml	10.00
5 ml	10.00
2 ml	10.00
1 ml	10.00

**Liability under the Act, 1985 AND
The U.P. Rules, 1990:-**

19. Section 24 (2) of the Act, 1985 provides that every weight or measure referred to in sub Section (1) shall be re-verified at such periodical intervals as may be prescribed. Third Proviso to Rule 14(1) of the U.P. Rules, 1990 prescribed for **verification or re-verification** and calibration or re-calibration of **storage tanks** and vats **once in five years**. Thus, storage tanks of the petitioners are required to be **verified or re-verified** or calibrated or re-calibrated once in five years under Section 24(2) of the Act, 1985 read with the Rules 14(1) of the U.P. Rules, 1990. Section 72 (1) of the Act, 1985 confers power upon the State Government to make rules after consultation with the Central Government. Clause (d) of Section 70 of the Act, 1985 provides that the State Government may levy such fee not **exceeding Rs.5,000/-**, on a graded scale, for the verification of the weight and measures, having regard to the time and labour which may be involved in making such verification. **Thus the Principal Act, 1985 provides for levy of fee to a maximum amount of Rs.5,000/- and it does not provide for any additional fee.** The U.P. Standards of Weights and Measures (Enforcement) Rules, 1990 has

been framed in exercise of powers under Section 72 of the Act, 1985.

20. Section 72(2)(a) empowers the State Government to frame rules providing the amount of fees which may be levied and collected for each matters specified in Section 70. **Clause (d) provides for maximum fees of Rs.5,000/-**. Section 72(3) of the Act, 1985 empowers the State Government to frame Rules providing for maximum fine of Rs.1000/- for breach of any rule framed under Section 72 of the Act, 1985. **Thus, Section 72 of the Principal Act, 1985 does not confer power upon the State Government to frame Rules to provide for any additional fee over and above the maximum amount of fees prescribed under Section 70 of the Act, 1985.** Clause (2) of Schedule XII under Rules 17(1) of the U.P. Rules, 1990, prescribes fees for verification and stamping of weights and measures (capacity measure including storage tanks) subject to a maximum of Rs.5,000/-. However, sub-Rule (3) of Rule 17 of the U.P. Rules, 1990, beyond the rule making power; provides for additional fee at half of the rules specified in Schedule XII for every quarter of the year or part thereof where weight or measure is presented to the Inspector for re-verification after expiry of the validity of the stamp. **Therefore, to save the sub-Rule (3) of Rule 17 of the U.P. Rules, 1990, this sub-Rule (3) has to be understood to mean that total fees including additional fee shall not exceed the maximum amount of fees provided under Section 70 of the Principal Act, 1985, which in the present set of facts is Rs.5000/- once in five years for each storage tank.** Accordingly, the impugned orders levying fees including additional fees over and above Rs.5,000/- per storage

tank once in five years, cannot be sustained and deserve to be quashed.

Fees and Additional Fee OR Penalty under the Act, 2009, the General Rules, 2011 AND the U.P. Rules, 2011:-

21. Section 24 read with sub-Section (v) and (w) of Section 2 of the Act, 2009 provides for verification and re-verification of weight or measure on payment of such fees as may be prescribed. Section 52(2)(c) empowers the Central Government to frame rules on certain subjects including "period of re-verification." Rule 27(2)(b) of the General Rules, 2011 provides for re-verification of storage tanks on the completion of a period of sixty months. **Thus, the petitioner's storage tanks need to be re-verified under the Act, 2009 read with the General Rules, 2011, on completion of a period of sixty months.**

22. Section 53(2)(d) of the Act, 2009 empowers State Government to make rules prescribing fee for verification and stamping of any weight or measure under sub-Section (1) of Section 24. Rule 17(1) of the U.P. Rules, 2011 provides fees payable for verification and stamping of weight or measure as specified in Schedule IX. Clause (2) of Schedule IX provides scale of fees for verification/ re-verification for capacity measures (storage tanks) **subject to a maximum of Rs.5,000/-**. **Thus, the respondents may charge and realise verification or re-verification fees for each storage tanks once in sixty months as per scale of fees provided in clause (2) of Schedule IX to the U.P. Rules, 2011 subject to a maximum of Rs.5,000/- per storage tank and any amount of fees over and above it levied or recovered from the petitioners by the respondents is illegal and unauthorised.**

Levy of Additional Fees under Rule 17(3) of the U.P. Rules, 2011:-

23. Thus, maximum amount of fees that can be levied for verification or re-verification of a storage tank is Rs.5,000/- once in sixty months. **Verification or re-verification** [reference: Section 2(v)] in relation to any weight or measure, **is the process of comparing, checking, testing or adjusting such weight or measure with a view to ensure that such weight or measure** conforms to the standards established under the Act, 2009. **For rendering these services, fee is charged under Section 24 of the Act, 2009 at the rates prescribed by The U.P. Rules, 2011. Clause 4(f) of the Statement of Objects and Reasons of the Act, 2009 provides that levy of fee is for various services. Thus, fee for verification or re-verification and calibration under the Act, 2009 has a direct co-relation with the services defined in Section 2(v) read with Section 24 of the Act, 2009. Thus, an element of quid-pro-quo exists for fees chargeable for verification or re-verification of weights and measures under Section 24 of the Act, 2009 read with Rule 17(1) of the U.P. Rules, 2011.**

24. Thus, the levy of fees under Section 24 read with Section 2(b) of the Act, 2009 and Rule 17(1) of the U.P. Rules, 2011 is in return of rendering of specified services. Fee for verification or re-verification is not a duty or tax. Whereas a tax is imposed for public purpose and requires no consideration to support it, fee is generally levied essentially for services rendered and there must be an element of quid-pro-quo between the person who pays it and the public authority that imposes it. In the case of **Commissioner, Hindu Religious Endowments, Madras vs. Sri**

Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., 1954 SCR 1005 : AIR 1954 SC 282 (Paras 46 and 47), a Constitution Bench of Hon'ble Supreme Court held that a 'fee' is generally defined to be charged for a special service rendered to individuals by some governmental agencies. In the case of **State of Uttarkhand vs. Kumaon Stone Crusher, (2018) 14 SCC 537** (Paras-153, 154, 161 to 186), Hon'ble Supreme Court considered the concept of fee, difference between tax and fee and when a fee can be said to be confiscatory and thereafter held transit fees provided by the Vth Amendment Rules to be confiscatory.

25. In the case of **Khemka and Co. (Agencies) (P.) Ltd. vs. State of Maharashtra, (1975) 2 SCC 22** (Paras-25, 31, 37 and 39), a Constitution Bench of Hon'ble Supreme Court held that the **imposition of penalty gives rise to a substantive liability, which can be viewed either as an additional tax or as a fine for infringement of the law.** The imposition of a pecuniary liability which takes form of a penalty or fine for a breach of a legal obligation, cannot be relegated to the region of mere procedure and machinery for realisation.

26. In the case of **State of Uttar Pradesh vs. Sitapur Packing Wood Suppliers, (2002) 4 SCC 566 (Para-10)**, Hon'ble Supreme Court laid down the law that **"The penalty cannot be beyond what is permissible in the Act."**

27. The U.P. Rules, 2011 is a delegated legislation. It is settled law that no rule can be validly framed, which has the effect of either enlarging or restricting the rule making power conferred under the principal Act. Being subordinate legislation, the Rules cannot make any

provision, which may have the effect of curtailing or enlarging the content and scope of the substantive provision. Reference in this regard may be had to the judgment of Hon'ble Supreme Court in the case of **Mahachandra Prasad Singh (Dr.) vs. Chairmnan, Bihar Legislative Council**, (2004) 8 SCC 747 (Paras-13 and 16).

28. In the case of **V.V.S. Sugars vs. State of A.P.** (1999) 4 SCC 192, **Indian Carbon Ltd. vs. State of Assam**, (1997) 6 SCC 479, **J.K. Synthetic Ltd. vs. C.T.O.**, (1994) 4 SCC 276 and **M/s Shree Steel Rolling Mills vs. Commissioner of Central Excise and another**, (2016) 3 SCC 643 (Paras-30 and 31), Hon'ble Supreme Court laid down the law that **interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax, makes a substantive provision** in this behalf. There being no substantive provision in the Act for the levy of interest on arrears of tax, no interest could be levied.

29. The aforesaid judgments have been followed by Hon'ble Supreme Court in a recent judgment in the case of **Indian Oil Corporation Ltd. vs. State of U.P.**, (2019) 16 SCC 482 (Paras-60 and 61). It is settled principle of law that **a legislative Act shall prevail over the subordinate legislation, vide Veena Kumari Tandon vs. Neelam Bhalla and others**, (2007) 12 SCC 764 (Para-11). In **Vimal Chandra Banerjee vs. State of M.P.**, (1970) 2 SCC 467 (Para-14), Hon'ble Supreme Court has held, as under:

"No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the

imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it."

30. But Rule 17(3) of the U.P. Rules, 2011 provides for an **additional fee at half the rate specified in Schedule IX** to be payable for every quarter of the year or part thereof, if a weight or measure is presented to the Legal Metrology Officer for **re-verification** after expiry of the validity of the stamp. There is no element of quid-pro-quo in providing the aforesaid penal fee terming it as additional fee. Fee for five years is Rs.5,000/-, which comes to Rs.250/- per quarter. Additional fees per quarter for delay in verification would be Rs.2500/- per quarter or 1000% per quarter. Thus, the additional fee provided under Rule 17(3) of the U.P. Rules, 2011 being 1000% per quarter is, arbitrary, unreasonable, confiscatory and it being penal in nature is a penalty. **Therefore, we hold that the fee provided under Rule 17(3) of the U.P. Rules, 2011 is a penalty for delay in presenting a weight or measure** to the Legal Metrology Officer for re-verification after expiry of the validity of the stamp.

31. Sections 25 to 47 under Chapter V of the Act, 2009 provides for penalty. Section 33, which has been reproduced above; **provides penalty for use of unverified weight or measure**. Section 53 confers power upon State Government to make rules. **Sub-Section (3) of Section 53 specifically provides that the State Government may provide that breach of the rules shall be punishable with fine**

which may extend to five thousand rupees. Therefore, for breach of any provision of the U.P. Rules, 2011, the State Government may provide by rules for imposition of fine which may extend to five thousand rupees.

32. Section 16 of the Act, 2009 provides for forfeiture of unverified weight or measure. Section 33 provides for penalty to a maximum of Rs.5,000/- for use of unverified weight or measure. Thus, in absence of a substantive provision in the Act, 2009 providing for penalty of the nature and for amount as provided in Rule 17(3), the penal provision of Rule 17(3) of the U.P. Rules, 2011 being beyond rule making power, is ultra vires to the Principal Act, i.e. the Act, 2009. That apart, Rule 25 of the U.P. Rules, 2011 itself provides that wherever the Rules are in conflict with the provisions of the Act, the Act will prevail upon the Rules.

33. For all the reasons aforesaid, we hold that the respondents may levy stamp verification/re-verification fee only up to Rs.5,000/- for each storage tank once in 60 months. No additional fee in the form of penalty under Rule 17(3) can be levied since it is not permitted by the Principal Act. Therefore, the impugned orders are arbitrary and illegal and deserves to be quashed. Consequently, all the impugned appellate orders dated 23.08.2016 and also other orders/notices impugned in all the abovenoted writ petitions, except Writ Petition No.33571 of 2018, are hereby quashed. Sub-rule (3) of Rule 17 of the Uttar Pradesh Legal Metrology (Enforcement) Rules, 2011 is declared ultra vires. **WRIT - C No. - 52674 of 2016, WRIT - C No. - 54682 of 2016, WRIT - C No. - 54685 of 2016, WRIT - C No. - 54687 of 2016, WRIT -**

C No. - 57179 of 2016, WRIT - C No. - 57180 of 2016, WRIT - C No. - 57203 of 2016, WRIT - C No. - 57208 of 2016, WRIT - C No. - 57210 of 2016, WRIT - C No. - 57766 of 2016, WRIT - C No. - 61624 of 2016, and WRIT - C No. - 32799 of 2018, are allowed.

34. Respondents are directed to determine fees payable by the petitioners under Rule 17(1) of the U.P. Rules, 2011 within three weeks from today in terms of this judgment and communicate it to the petitioners within next one week. Petitioners are directed to deposit the entire verification/reverification fees under Rule 17(1) of the U.P. Rules, 2011, within next one month and shall continue to get verified/reverified storage tanks in time as per provisions of the Act, 2009 and the U.P. Rules, 2011. Liberty is granted to the respondents for initiating action against the petitioners for penalty/fine for delayed verification/reverification of storage tanks in accordance with the relevant provisions of Chapter-V of the Act, 2009 and relevant provisions of the U.P. Rules, 2011.

35. The **Writ Petition No.33571 of 2018** being merely against notice, is dismissed.

**(2023) 5 ILRA 813
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.05.2023**

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Application u/s 482 No. 3922 of 2023

**Mohd. Aarif @ Aarif
Versus
State of U.P. & Anr.**

**...Applicant
...Opp. Parties**

Counsel for the Applicant:

Manoj Kumar Singh

Counsel for the Opp. Parties:

G.A., Abhishek Srivastava

7. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr.; 2005 SCC (Cr.) 283 (Para 10)

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

A. Criminal Law – Protection of Children from Sexual Offences Act, 2012 – Sections 19, 21(1) & 33 – Criminal Procedure Code, 1973 – Section 190(1) – Complaint case – Summoning order u/s 204 Cr.P.C. was issued by the Trial court after record of St.ment u/s 200/202 Cr.P.C. – Validity challenged – Jurisdiction of POCSO Court to entertain a complain case was questioned – Held, although it is duty of the Magistrate as well as police officer concerned to pass the order for registration of F.I.R. but if it is not done so, then it cannot be said that allegation against the applicant/accused is not maintainable – High Court opined that the cognizance/summoning order can be passed against the applicant in complaint case – S. 33 of POCSO Act also relied upon. (Para 14 and 15)

Application disposed of. (E-1)

List of Cases cited:

1. Application u/s 482 Cr.P.C. No. 12864 of 2021; Soni Vs St. of U.P. & 10 ors. decided on 07.04.2022

2. Application u/s 482 Cr.P.C. No. 2804 of 2022; Anand Vs St. of U.P. & anr. decided on 19.5.2022

3. Naresh Kumar Valmiki Vs St. of U.P. & ors.; (2023) 241 AIC 946

4. R.P. Kapur Vs St. of Pun.; A.I.R. 1960 S.C.866

5. St. of Haryana Vs Bhajan Lal; 1992 SCC (Cr.) 426

6. St. of Bihar Vs P.P.Sharma; 1992 SCC (Cr.) 192

1. Heard Sri Manoj Kumar Singh, learned counsel for the applicant, Sri Abhishek Srivastava, learned counsel for the opposite party no.2 and Shri Vijai Prakash Dwivedi, learned AGA for the State as well as perused the material available on record.

2. The present application under Section 482 Cr.P.C. has been preferred against the impugned summoning order dated 31.5.2022 passed by/pending in the court of learned Additional Sessions Judge/Special Judge (POCSO Act) Bahraich in Complaint Case No. 97 of 2021 in Re:- Smt. Karima Vs. Aarif under Sections 452, 376 (AB), 323, 504, 506 I.P.C. and Section 5 (m)/6 of the Protection of Children from Sexual Offences Act (in short " the POCSO Act"), Police Station-Hardi, District- Bahraich as well as application under Section 156 (3) Cr.P.C. dated 26.8.2021 vide complaint no. 97 of 2021 and further proceedings of the case in pursuance thereof.

3. Brief facts of the case is that the opposite party no 2 filed an application under Section 156 (3) Cr.P.C. on 26.8.2021 in the court of learned Additional Sessions Judge/Special Judge (POCSO Act) Bahraich. The application under Section 156 (3) Cr.P.C. has been moved alleging that the opposite party no. 2 and the petitioner are relatives. Petitioner and his family members used to come at house of the opposite party no. 2. On 6.8.2021 at about 1:00 p.m. minor daughter of the

opposite party no. 2, aged about 11 years was alone at the house. Petitioner entered into the house and started outraging modesty of her daughter, on objection, petitioner pushed her on earth, undressed her, and forcefully committed rape against her wishes and extended abuses and threat of life in case she told about the same to anywhere. When the opposite party no. 2 reached her house, then her daughter told the whole story to the opposite party no.2. Immediately, the opposite party no. 2 gave information at Police Station-Hardi on the same day but when no action was taken then on 11.8.2021 she gave an application to the Superintendent of Police, Bahraich through registered post, but till date no action has been taken. Then, the application under Section 156 (3) Cr.P.C. has been moved then the trial court treated the application under Section 156 (3) Cr.P.C. as a complaint case.

4. In the aforesaid complaint case, the statement of the complainant was recorded under Section 200 Cr.P.C. on 22.10.2021 (annexed as Annexure No. 4). The statement of the witnesses, namely, P.W.-1-Jakir and P.W.-2-Aarif were also got recorded under the provisions of Section 202 Cr.P.C. on 23.11.2021 and 17.12.2021 respectively. The statement of the P.W.-3 victim was also recorded under Section 202 Cr.P.C. on 5.4.2022. On the basis of the statement recorded under Section 200 and 202 Cr.P.C., the trial court passed the summoning order under Section 204 Cr.P.C. as aforesaid on 31.5.2022

5. Learned counsel for the applicant raises the preliminary objection that the POCSO Court has no jurisdiction to entertain the application under Section 156 (3) Cr.P.C. as a complaint case under Section 190 (1) (a) Cr.P.C., because the

only option is available to the POCSO Court to direct the concerned police station to register and investigate the matter. He further submitted that the POCSO Court may pass the cognizance order and summoning order only on the basis of the investigation done by the Investigating Officer and the report submitted under Section 173 (2) Cr.P.C. He further submitted that in this regard in POCSO Act special procedure has also been mentioned under Section 19 of the POCSO Act. The procedure of Section 19 of the POCSO Act reads as under:-

"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,--

(a) the Special Juvenile Police Unit; or
(b) the local police.

(2) Every report given under subsection(1) shall be--

(a) ascribed an entry number and recorded in writing;
(b) be read over to the informant;
(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under subsection(1) is given by a child, the same shall be recorded under subsection(2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by

the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1)."

6. To give the strengthen to his submissions for the procedure under Section 19 of the POCSO Act, learned counsel for the applicant drew the attention of the Court to the procedure of Section 21 (1) of the POCSO Act. The provision of Section 21 (1) of the POCSO Act reads as under :-

" Punishment for failure to report or record a case.-

(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails

to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both."

7. In support of his submission he relied upon a judgment and order dated 7.4.2022 of this Court passed in Application under Section **482 Cr.P.C. No. 12864 of 2021 (Soni Vs. State of U.P. and 10 others)** in which this Court is of the view that in the case related to the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act (in short " the S.C./S.T. Act"), if an application under Section 156 (3) Cr.P.C. is moved by the aggrieved party then it is bounden duty of the trial court to pass the order for register the case and to direct the police authority to investigate the matter, as apart from this the trial court has no other option. He further submitted that the POCSO Act is also an special Act and the provision of POCSO Act is also analogous to the S.C./S.T. Act. So, the trial court has no power to treat the application under Section 156 (3) Cr.P.C. as complaint case.

8. In support of his submission he also relied upon a **judgment dated 19.5.2022** passed in **Application under Section 482 Cr.P.C. No. 2804 of 2022 (Anand Vs. State of U.P. and another)**. The relevant paragraph of the said judgment is extracted below:-

"Learned counsel for the applicant has further submitted that as per the prosecution case, victim was doing the course of B.Pharm. She was a prudent girl and was in relation with the applicant on her own, and some dispute arose in between them, then the applicant was challaned under Sections 151/107/116

Cr.P.C. on 23.09.2020. He further submitted that the application of the prosecutrix under Section 156(3) Cr.P.C. was treated as a complaint case and after recording the statement under Sections 200 & 202 Cr.P.C., summoning order was passed by the learned court below. He also drew attention of the court on the provision of Sections 19 & 21 of Chapter- V of the POCSO Act and submitted that Section 19 of the POCSO Act provides that in case any offence related to the provision of POCSO Act is reported to the local police, then the same shall be registered and Section 21 of the POCSO Act also provides that in case, complaint is not registered, then officer concerned shall be prosecuted meaning thereby that if any offence is alleged under the provision of POCSO Act, then registration of the F.I.R. is mandatory and no such case can be treated as a complaint case, as done by the learned court below. Therefore, the learned court below has committed error in treating the application of the prosecutrix as a complaint case. In such circumstances, kind indulgence of this Court is necessary."

9. In support of his submission, learned counsel for the applicant also relied upon a judgment dated 11.10.2022 of this court passed in Criminal Revision No. 1052 of 2022 (Ram Karan Vs. State of U.P. and 4 others). He submitted that in that revision the grievance of the revisionist was same as raised by the present applicant and in that revision, proceedings against the revisionist was stayed on the basis of the law laid down by this Court in **Soni Vs. State of U.P. and 10 others (Supra)** and **Anand Vs. State of U.P. and another (Supra)** and it was also observed that POCSO Court cannot take cognizance on the basis of complaint.

10. Lastly, learned counsel for the applicant submitted that only F.I.R. can be

lodged against the applicant and complaint case cannot be lodged, therefore, only on this account the summoning order against the applicant may be quashed.

11. Learned A.G.A. and learned counsel for the respondent no. 2 in support of his submission relied upon the procedure of Section 33 (1) of the POCSO Act. As per Section 33 (1) of the POCSO Act a Special Court may take cognizance of any offence, without the accused being committed to it for trial, **upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.** Learned counsel for the respondent no. 2 relied upon the procedure of Section 33 (1) of the POCSO Act submitted that POCSO court exercising its power of complaint case can pass appropriate order. In support of his submission, learned counsel for the respondent no.2 relied upon the judgment of this Court passed in the case of **Naresh Kumar Valmiki Vs. State of U.P. and others (2023) 241 AIC 946** in which this Court has held that that the submission that an application under Section 156(3) Cr.P.C. cannot be treated as a complaint case is incorrect. The court concerned while exercising its judicial discretion can treat the said application as a complaint case also and can pass appropriate order.

12. So far as question of lodging of the F.I.R. or filing of an application under Section 156 (3) Cr.P.C. in the case of sexual harassment/POCSO Act is concerned, I am of the view that specially in the case of sexual harassment and violence it is bounden duty of the police officer to lodge F.I.R. because in the case of sexual assault, the victim faces social stigma and she has already been traumatized, therefore, the court concerned should not be give further burden upon the complainant/victim and

the court concerned/special court should direct the police authority concerned to investigate the matter fairly. The court should pass the order for investigation, because the documentary and other evidence are generally in the physical possession of the accused or other individual and on the basis of those evidences, the police should investigate the matter and retrieve its power under the Code of Criminal Procedure.

13. Under Section 154 Cr.P.C. the Police Officer cannot exercise any discretion when they receive a complaint which discloses the commission of cognizable offence- whether or not offence complained is made out is to be determined at the stage of investigation and/or trial. After conducting the investigation the police found that no offence is made out then they may submit final report under Section under Section 173 (2) Cr.P.C., however, it is not open to them to decline to register an F.I.R.

14. Considering the entire facts and circumstances of the case and considering the fact that although it is duty of the Magistrate as well as police officer concerned to pass the order for registration of F.I.R. but if it is not done so then it cannot be said that allegation against the applicant/accused is not maintainable, therefore, I am of the view that cognizance/summoning order may be passed against the applicant in complaint case.

15. So far as regards the contention of the learned counsel for the applicant is concerned that only to harass the applicant the present case has been lodged by the mother of the victim is concerned, I am of the view that it cannot be said that such

type of offence cannot be committed by the applicant, therefore, such type of every defence cannot be entertained necessarily. Concludingly, I am of the view that the trial court has ample power to treat the application under Section 156 (3) Cr.P.C. as a complaint case, therefore, in the POCSO Act proceedings of complaint case can be launched, as in this regard a statutory provisions under Section 33 of the POCSO Act already exists. As per Section 33 of the POCSO Act, a Special Court may take cognizance of any offence, without the accused being committed to it for trial, **upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.** Thus, on the perusal of the entire provisions of POCSO Act it appears that there is no bar for prosecution and cognizance in the matter related to complaint under Section 190 (1) (a) Cr.P.C. Ultimately, I am of the view that the previous view of the courts that in POCSO Act cognizance cannot be taken is not a good law, as this question has already been settled that there is no bar for treating the application under Section 156 (3) Cr.P.C. as a complaint case under Section 190 (1) (a) Cr.P.C. Thus, the preliminary objection of the learned counsel for the applicant that in the POCSO Act proceedings of complaint case is not maintainable has no substance.

16. Before arguing the case on merits, learned counsel for the petitioners while pressing the present petition submits that the trial court while summoning the petitioner has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the trial court without dwelling into material and visualizing the case on the touch stone of probability

should not summon accused person to face criminal trial. It is further submitted that the trial court has not taken into consideration the material placed before the trial court and, therefore, the trial court has materially erred in summoning the petitioner.

17. So far as quashing of entire proceedings is concerned, from the perusal of the material on record and looking into the facts of the case at this stage, it cannot be said that no offence is made out against the petitioners. All the submission made relates to the disputed question of fact, which cannot be adjudicated upon by this Court. At this stage, only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of *R.P. Kapur Vs. State of Punjab*, A.I.R. 1960 S.C. 866, *State of Haryana Vs. Bhajan Lal*, 1992 SCC (Cr.) 426, *State of Bihar Vs. P.P.Sharma*, 1992 SCC (Cr.) 192 and lastly *Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10)* 2005 SCC (Cr.) 283. The disputed defence of the accused cannot be considered at this stage. Moreover, the petitioners have got a right of discharge according to the provisions prescribed in Cr.P.C., as the case may be, through a proper application for the said purpose and he is free to take all the submissions in the said discharge application before the trial court.

18. So far as the summoning order passed by the learned trial court is concerned, at the stage of taking cognizance, trial court can simply form an opinion as to whether the case is fit for taking and committing the matter for trial or not. In the present case, learned trial court clearly expressed his opinion that he perused all the record and clearly indicated that the material placed before him is sufficient to proceed the case. Thus, the cognizance order is not a

proforma order. Every aspect is touched by learned trial court and petitioner failed to adduce any evidence which caused prejudiced to him. So, the cognizance and summoning order is perfectly valid and there is no occasion to quash the same.

19. The prayer for quashing the impugned summoning order as well as impugned proceedings is refused.

20. However, considering the facts and circumstances of the case, it is provided that if the applicant/petitioner appear before the trial court and apply for bail, then bail application shall be considered and decided in accordance with law propounded by the Apex Court in *Satender Kumar Antil Vs. Central Bureau of Investigation and another (Special Leave to Appeal (Crl.) No.5191 of 2021, decided on 07.10.2021*. In this case Hon'ble the Apex Court has already laid down guidelines for grant of bail, without fettering the discretion of the courts concerned and the statutory provisions governing consideration in grant of bail, no specific directions need be issued by this Court as it is expected that the court concerned will take into consideration the necessary guidelines already issued by the Apex Court.

21. Accordingly, the application under Section 482 Cr.P.C. is **disposed of**.

(2023) 5 ILRA 819

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 28.04.2023

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Application u/s 482 No. 4201 of 2023

Sallahuddin

...Applicant

Versus

State of U.P. & Ors.

...Opp. Parties

Counsel for the Applicant:

Salil Kumar Srivastava, Rahul Srivastava

4. Adalat Prasad Vs Rooplal Jindal & ors.; (2004)
7 SCC 338**Counsel for the Opp. Parties:**

G.A.

(Delivered by Hon'ble Ajai Kumar
Srivastava-I, J.)

A. Criminal Law – Criminal Procedure Code, 1973 – Section 231(2) – Evidence Act, 1872 – Sections 135 & 138 – Cross examination – Trial court deferred the cross examination of all the witnesses in bulk – Permissibility – Cryptic order, how far can be sustained – Held, the impugned order dated 14.03.2023 is cryptic, by means of which, cross-examination of 73 prosecution witnesses has been deferred in bulk without recording existence of any such tenable ground as has come to be recognized by the Hon'ble Supreme Court in paragraph No. 23 of Rasheed's case. (Para 16)

B. Criminal Law - Criminal Procedure Code, 1973 – Section 482 – Scope of interference – Abuse of process of law – Remedy of filing recall application, how far can bar the exercise of inherent power – Held, power u/s 482 Cr.P.C. is an extraordinary power vested with the High Courts in order to prevent abuse of process of the Court or failure of justice – The power vested with the learned trial court under Section 231(2) Cr.P.C. is a discretionary power, which should be exercised judiciously – Further held, it cannot be said that the remedy seeking recall of impugned order dated 14.03.2023 is available to the applicant in view of restriction contained in Section 362 Cr.P.C. (Para 17, 18 and 19)

Application allowed. (E-1)**List of Cases cited:**

1. St. of Orissa Vs Dhaniram Luhar; (2004) 5 SCC 568
2. St. of Kerala Vs Rasheed; (2019) 13 SCC 297
3. Lal Harsh Deo Narain Singh & anr. Vs St. of U.P. & ors.; 2004 SCC OnLine All 2085

1. Heard Sri Salil Kumar Srivastava, learned counsel for the applicant, Sri Shiv Nath Tilhari, learned A.G.A. for the State and perused the entire record.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicant for quashing the order dated 14.03.2023 passed by the learned Special Judge (NIA/ ATS)/ Additional Sessions Judge-V, Lucknow in S.T. No.13751 of 2021 titled as State vs. Salahuddin and others arising out of Case Crime No.09 of 2021, under Sections 417, 120-B, 153-A, 153-B, 295-A, 298, 121-A, 123 I.P.C. and Sections 3/5/8 of U.P. Prohibition of Unlawful Conversion of Religion Act, 2021, Police Station ATS, Gomti Nagar, pending in the court of learned Special Judge (ATS/ NIA Court)/ Additional Sessions Judge-V, Lucknow.

3. The brief facts giving rise to the instant application under Section 482 Cr.P.C. also is that the present applicant is standing trial for the offences under Sections 417, 120-B, 153-A, 153-B, 295-A, 298, 121-A, 123 I.P.C. and Sections 3/5/8 of U.P. Prohibition of Unlawful Conversion of Religion Act, 2021, which emanated from Case Crime No.09 of 2021. Vinod Kumar has been examined as prosecution witness-1 in the learned trial court. The learned trial court has passed the impugned order dated 14.03.2023 stating therein that examination-in-chief of P.W.-1, Vinod Kumar has been done and his cross-examination is yet to be completed. Due to his absence on 14.03.2023, the cross-

examination of P.W.-1, Vinod Kumar was deferred. The learned trial court also observed in the impugned order dated 14.03.2023 that as there is a direction of this Court to get the trial expedited, therefore, the learned trial court directed that the examination in chief of all the prosecution witness would be recorded first. Admittedly, there are 73 witnesses listed in the charge sheet. Their cross-examination will stand deferred and once the examination-in-chief of all the prosecution witnesses has been done, they would be summoned for their cross-examination.

4. Aggrieved by the aforesaid impugned order dated 14.03.2023, the applicant has filed the instant application under Section 482 Cr.P.C.

5. Learned counsel for the applicant has submitted that the impugned order dated 14.03.2023 is patently illegal insofar as it is not reasoned and speaking order and the same does not disclose any reason for doing so.

6. His further submission is that the statutory scheme for examination of witnesses is contained in Sections 135 and 138 of Indian Evidence Act. The provisions contained in Section 231(1) Cr.P.C. is an exception to the general rule for examination and cross-examination of witnesses. Therefore, while passing such sweeping order in exercise of its discretionary power, the learned trial court ought to have acted with utmost circumspection and care, which is not reflected from the impugned order dated 14.03.2023.

7. In order to buttress his aforesaid submission, learned counsel for the

applicant has placed reliance upon the judgments of the Hon'ble Supreme Court in **State of Orissa vs. Dhaniram Luhar**¹ and **State of Kerala vs. Rasheed**².

8. Learned counsel for the applicant has also submitted that the impugned order dated 14.03.2023 is also against the provisions contained in proviso to Section 309 Cr.P.C., therefore, the impugned order dated 14.03.2023 being patently illegal and an abuse of process of this Court, deserves to be quashed.

9. Per contra, learned A.G.A. for the State has vehemently opposed the prayer by submitting that the impugned order dated 14.03.2023 is a reasoned and speaking order, which has come to be passed in the peculiar facts and circumstances of this case where the prosecution has to examine as many as seventy three witnesses and the trial is to be concluded expeditiously, therefore, the same cannot be said to be arbitrary.

10. His further submission is that an application seeking recall of impugned order dated 14.03.2023 moved by the present applicant is pending disposal with the learned trial court. Therefore, also the present application is not maintainable and deserves to be dismissed.

11. In order to buttress his aforesaid submission, learned A.G.A. has placed reliance upon the judgment of this Court in **Lal Harsh Deo Narain Singh and another vs. State of U.P. and others**³.

12. Having heard the learned counsel for the applicant, learned A.G.A. for the State and upon perusal of record, it transpires that the present applicant is standing trial for the offences under

Sections 417, 120-B, 153-A, 153-B, 295-A, 298, 121-A, 123 I.P.C. and Sections 3/5/8 of U.P. Prohibition of Unlawful Conversion of Religion Act, 2021, which emanated from Case Crime No.09 of 2021. Vinod Kumar has been examined as prosecution witness-1 in the learned trial court. The learned trial court has observed in the impugned order dated 14.03.2023 that examination-in-chief of P.W.-1, Vinod Kumar has been recorded and his cross-examination is yet to be completed. Due to his absence on 14.03.2023, the cross-examination of P.W.-1, Vinod Kumar was deferred. The learned trial court also observed by means of impugned order dated 14.03.2023 that as there is a direction of this Court to get the trial expedited, therefore, the learned trial court directed that the examination in chief of all the prosecution witness would be recorded first. Their cross-examination will stand deferred and once the examination-in-chief of all the prosecution witnesses has been recorded, they would be summoned for their cross-examination.

13. Being germane to the present controversy, Sections 135 and 138 of Indian Evidence Act are quoted herein below:-

"135. Order of production and examination of witnesses.—The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

138. Order of examinations.—Witnesses shall be first examined-in chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief."

14. The ambit of provision contained in Section 231(2) Cr.P.C. came to be considered by the Hon'ble Supreme Court in a judgment rendered in **Rasheed's case (supra)**. Paragraph Nos.15, 17, 18, 19 and 23 of **Rasheed's case (supra)**, being relevant, are quoted herein below:-

"15. Section 231 CrPC indicates that the Judge is given the discretion to defer cross-examination of a witness, until any other witness or witnesses have been examined. Section 231 is set out hereinbelow:

"231. Evidence for prosecution.—(1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.

(2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination." (emphasis supplied)

The phraseology of Section 231(2) mirrors Section 242(3) ["242. Evidence for prosecution.—(1)-(2) * * (3) On the date so fixed, the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution:Provided that the Magistrate may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination."]* CrPC which provides for a similar discretion to a Magistrate in the trial of a warrant case under Chapter XIX CrPC."

17. The Karnataka High Court in *Shamoon Ahmed Sayed v. Intelligence Officer* [*Shamoon Ahmed Sayed v. Intelligence Officer*, 2008 SCC OnLine Kar 371 : 2009 Cri LJ 1215 : ILR 2008 KAR 4378], delivered by Shantanagoudar, J. (as he then was), had observed that Section 231(2) as well as Section 242(3) CrPC must be interpreted in light of the legislative intent behind the enactment of Section 251-A of the Code of Criminal Procedure, 1898.

18. What follows from the discussion is that the norm in any criminal trial is for the examination-in-chief of witnesses to be carried out first, followed by cross-examination, and re-examination if required, in accordance with Section 138 of the Indian Evidence Act, 1872. Section 231(2) CrPC, however, confers a discretion on the Judge to defer the cross-examination of any witness until any other witness or witnesses have been examined, or recall any witness for further cross-examination, in appropriate cases. Judicial discretion has to be exercised in consonance with the statutory framework and context while being aware of reasonably foreseeable consequences. [A Constitution Bench of this Court in *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465 had elucidated upon the nature and manner of exercise of judicial discretion in para 21. The relevant extract has been reproduced hereunder : (SCC p. 584, para 21)“21. ... Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent

exercise of judicial discretion.”(emphasis supplied)] The party seeking deferral under Section 231(2) CrPC must give sufficient reasons to invoke the exercise of discretion by the Judge, and deferral cannot be asserted as a matter of right.

19. Several High Courts have held that the discretion under Section 231(2) CrPC should be exercised only in “exceptional circumstances” [*Sisir Debnath v. State of W.B.*, 2017 SCC OnLine Cal 21442; *Shamoon Ahmed Sayed v. Intelligence Officer*, 2008 SCC OnLine Kar 371 : 2009 Cri LJ 1215 : ILR 2008 KAR 4378], or when “a very strong case” [*Amit Kumar Shaw v. State of W.B.*, 2010 SCC OnLine Cal 2632] has been made out. However, while it is for the parties to decide the order of production and examination of witnesses in accordance with the statutory scheme, a Judge has the latitude to exercise discretion under Section 231(2) CrPC if sufficient reasons are made out for deviating from the norm.

23. While deciding an application under Section 231(2) CrPC, a balance must be struck between the rights of the accused, and the prerogative of the prosecution to lead evidence. The following factors must be kept in consideration:

(i) possibility of undue influence on witness(es);

(ii) possibility of threats to witness(es);

(iii) possibility that non-deferral would enable subsequent witnesses giving evidence on similar facts to tailor their testimony to circumvent the defence strategy;

(iv) possibility of loss of memory of the witness(es) whose examination-in-chief has been completed;

(v) occurrence of delay in the trial, and the non-availability of witnesses, if

deferral is allowed, in view of Section 309(1) CrPC [“309. Power to postpone or adjourn proceedings.—(1) In every inquiry or trial the proceedings shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:”See also Vinod Kumar v. State of Punjab, (2015) 3 SCC 220 : (2015) 2 SCC (Cri) 226 : (2015) 1 SCC (L&S) 712; and S.J. Chaudhary v. State (UT of Delhi), (1984) 1 SCC 722 : 1984 SCC (Cri) 163.] .

These factors are illustrative for guiding the exercise of discretion by a Judge under Section 231(2) CrPC.

(emphasis supplied)”

15. It is also useful to refer to a judgment rendered by the Hon’ble Supreme Court in **Dhaniram Luhar’s case (supra)**. Paragraphs No.7 and 8, being relevant, are extracted herein below:-

“7. Reason is the heartbeat of every conclusion, and without the same it becomes lifeless. (See Raj Kishore Jha v. State of Bihar [(2003) 11 SCC 519 : 2004 SCC (Cri) 212 : (2003) 7 Supreme 152] .)

8. Even in respect of administrative orders Lord Denning, M.R. in Breen v. Amalgamated Engg. Union [(1971) 1 All ER 1148 : (1971) 2 QB 175 : (1971) 2 WLR 742 (CA)] observed: “The giving of reasons is one of the fundamentals of good administration.” In Alexander Machinery (Dudley) Ltd. v. Crabtree [1974 ICR 120 (NIRC)] it was observed: “Failure to give reasons amounts to denial of justice.” “Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.” Reasons substitute subjectivity

by objectivity. The emphasis on recording reasons is that if the decision reveals the “inscrutable face of the sphinx”, it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The “inscrutable face of the sphinx” is ordinarily incongruous with a judicial or quasi-judicial performance.”

16. Thus examined in the light of aforesaid settled legal position, it transpires that the impugned order dated 14.03.2023 is cryptic, by means of which, cross-examination of 73 prosecution witnesses has been deferred in bulk without recording existence of any such tenable ground as has come to be recognized by the Hon’ble Supreme Court in paragraph No.23 of **Rasheed’s case (supra)**.

17. So far as the objection of learned A.G.A. for the State to the effect that the recall application is still pending with the learned trial court, therefore, the instant application cannot be maintained, is concerned, it is needless to mention that power under Section 482 Cr.P.C. is an extra-ordinary power vested with the High Courts in order to prevent abuse of process of the Court or failure of justice.

18. The ratio of a judgment rendered by the Hon’ble Supreme Court in **Adalat**

Prasad vs. Rooplal Jindal and others⁴ is that any criminal court does not have power to recall its own order, which is substantive in nature like order issuing summon. Therefore in the considered opinion of this Court, the law laid down by this Court in **Lal Harsh Deo Narain Singh's case (supra)** is distinguishable insofar as in the instant case, it cannot be said that the remedy seeking recall of impugned order dated 14.03.2023 is available to the applicant in view of restriction contained in Section 362 Cr.P.C.

19. It is needless to mention that the power vested with the learned trial court under Section 231(2) Cr.P.C. is a discretionary power, which should be exercised judiciously. Therefore, the learned trial court will always be at liberty to pass appropriate order, in accordance with law laid down by the Hon'ble Supreme Court in **Rasheed's case (supra)**.

20. The upshot of aforesaid discussion is that the instant application under Section 482 Cr.P.C. deserves to be **allowed** and is, accordingly, allowed. Consequently, the impugned order dated 14.03.2023 passed by the learned Special Judge (NIA/ ATS)/ Additional Sessions Judge-V, Lucknow in S.T. No.13751 of 2021 titled as State vs. Salahuddin and others arising out of Case Crime No.09 of 2021, under Sections 417, 120-B, 153-A, 153-B, 295-A, 298, 121-A, 123 I.P.C. and Sections 3/5/8 of U.P. Prohibition of Unlawful Conversion of Religion Act, 2021, Police Station ATS, Gomti Nagar, is, hereby, set aside.

21. The learned trial court concerned is also directed to proceed with the trial of S.T. No.13751 of 2021 titled as State vs. Salahuddin and others expeditiously having regard to the provisions contained in Section 309 Cr.P.C.

(2023) 5 ILRA 825
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.05.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 6981 of 2022

Ajit Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:

Ishan Baghel, Veena Vijayan Rajes

Counsel for the Opp. Parties:

Anurag Kumar Singh, Shailendra Misra, Shiv P. Shukla

A. Criminal Law – Criminal Procedure Code – Sections 320 (5) & 482 – Inherent power – Scope of interference – Conviction order was passed for non-compoundable offences – Complaints of wrongful deprivation of the corporate and commercial rights in the Company by certain acts of forgery was made – The disputes was of a civil nature – The wrongs did not amount to commission of offence against the society at large – Relevance – Settlement was taken place between the parties – Quashing of proceeding sought – How far, High Court can exercise inherent power – Held, the Trial Court cannot compound non-compoundable offences, but the High Court can quash proceedings of criminal case involving non-compoundable offences. Similarly, as the appellate Court could have compounded the offences even after conviction, had the offences been compoundable, applying the same analogy, this Court can quash the proceedings involving non-compoundable offences even after conviction by the trial Court, where the proceedings deserve to be quashed keeping in view the principles laid down by the Hon'ble Supreme Court

in this regard – High Court quashed the conviction order and the entire proceedings against the applicants by exercising inherent powers u/s 482 Cr.P.C. (Para 20, 21, 22 and 23)

Application allowed. (E-1)

List of Cases cited:

1. B. S. Joshi Vs St. of Har.; (2003) 4 SCC 675
2. Nikhil Merchant Vs Central Bureau of Investigation & anr.; (2008) 9 SCC 677
3. Gian Singh Vs St. of Pun.; (2012) 10 SCC 303
4. Parbatbhai Aahir Vs St. of Guj.; (2017) 9 SCC 641
5. St. of M. P. Vs Laxmi Narayan; (2019) 5 SCC 688
6. P. Dharamaraj Vs Shanmugam & ors.; 2022 SCC OnLine SC 1186

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

1. Heard Sri I. B. Singh, Senior Advocate, assisted by Awinash Vishen Advocate, the learned counsel for the applicant and Sri Shiv P. Shukla, the learned counsel for the respondent- C.B.I and perused the record.

2. By means of an instant application filed under Section 482 Cr.P.C, the applicant has prayed for quashing of the judgment and order of conviction dated 06.06.2019, passed by learned Special Judicial Magistrate, C.B.I. Lucknow in Case No.4603 of 2009, arising out of F.I.R. registered as RC No.01(S)/2006/CBI/SCB/LKO dated 12.01.2006, under Sections 120-B, 420, 466, 467, 468, 471, 477-A I.P.C. and all the consequent proceedings, on the ground that the informant and the accused persons have entered into a settlement.

3. The aforesaid case was registered on the basis of a complaint lodged by the opposite party no. 2 - Arvind Mohan Jauhari, against the applicants alleging that some documents relating to annual returns of M/s Carlton Hotel Private Limited (hereinafter referred to as 'the Company') have been forged for the years 1997, 1998 and 1999. After carrying out a preliminary inquiry, the C.B.I. lodged an F.I.R on 12.01.2006, against one V. K. Gupta, F.C.A (applicant no. 3) and some unknown persons, alleging that in the annual returns made up to 30.09.1997, 29.09.1998 and 30.09.1999 filed by the Company, some papers were inserted or changed subsequently, evidencing forgery by the named accused V. K. Gupta, who had inspected the documents of the Company on 22.03.2001 and 10.04.2001.

4. The C.B.I. has submitted the charge-sheet stating that the applicant no. 1 Ajit Singh, was Managing Director of the Company and the applicant no. 2 Udaijit Singh, was its Joint Managing Director. They were the beneficiaries of the aforesaid act committed by the applicant no. 3, as they benefited by removal of the names of the complainants Anand Krishna Johari and Arvind Mohan Johari from the annual returns of the 1997, 1998 and 1999.

5. The trial court passed a judgment and order dated 06.06.2019 holding applicants guilty of commission of offences under Sections 120-B, 420, 466, 467, 468, 471, 477A of the Indian Penal Code and all of them were sentenced to undergo simple imprisonment for a period of one year and a fine of Rs.1000/- for offence under Section 120-B I.P.C., two years' simple imprisonment and a fine of Rs.2000/- for offence under Section 420 I.P.C., two years' simple imprisonment and a fine of

Rs.2000/- for offence under Section 466 I.P.C., three years' simple imprisonment and a fine of Rs.4000/- for offence under Section 467 I.P.C., two years' simple imprisonment and a fine of Rs.1000/- for offence under Section 468 I.P.C., two years' simple imprisonment and a fine of Rs.1000/- for offence under Section 471 I.P.C. and two years' simple imprisonment and a fine of Rs.1000/- for offence under Section 477A I.P.C. The applicants have challenged an aforesaid judgment and order dated 06.06.2019 by filing Criminal Appeal No. 221 of 2019 in the court of Sessions Judge, Lucknow and the applicants have been granted bail during pendency of the Appeal.

6. During pendency of the Appeal, the complainants Arvind Mohan Johari, Anand Krishna Johari and Gyanendra Nath Johari have entered into a settlement with Ajit Singh, Udaijit Singh, Sona Singh, Rahul Jit Singh, Kamini Singh and Carlton Hotel Private Limited, stating that due to certain disputes between the Singh group and Johari group, the following litigations have been initiated between the parties: -

1) Company Petition No. 76/2002 before the Company Law Board New Delhi, titled 'Arvind Mohan Johari & Ors. vs. Carlton Hotels Pvt. Ltd. & Ors.';

2) Company Petition No. 11(ND)/111/2011 before the Company Law Board, New Delhi, titled 'Arvind Mohan Johari & Anr. vs. Carlton Hotels Pvt.Ltd. & Ors.';

3) Company Appeal No.1/2015 before the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench titled 'Carlton Hotels Pvt. Ltd. & Ors. vs. Arvind Mohan Johari & Ors.';

4) Company Petition no. 354/2001 before the Hon'ble High Court of Delhi,

titled 'Registrar of Companies vs. Cyberspace Ltd. & Ors.';

5) Criminal Case no. 4603/2009 before Special Judicial Magistrate CBI, Lucknow, titled 'State through CBI vs. Udaijit Singh & Ors.';

6) Criminal Appeal no. 220/2019 in the Court of District & Session Judge, Lucknow, titled 'Udaijit Singh vs. State of UP through CBI';

7) Criminal Appeal no. 221/2019 in the Court of Session Judge, Lucknow titled, 'Ajit Singh vs. State of UP through CBI'.

7. The settlement records that after various rounds of discussion, both the parties have settled their disputes in respect of Carlton Hotel to maintain peace and harmony and the terms of settlement have been recorded in the aforesaid memorandum of settlement. It is specifically mentioned in the memorandum of settlement that:-

"6. The Parties hereto had confirmed and declared that all the disputes and differences between them in respect of Carlton Hotel stood settled and that none of the parties has any further or other dispute, difference, dues, claims, demands, proceedings under arbitration or any proceedings pending in any Court of law including complaints / applications made to statutory authority inter se the Parties of any nature whatsoever against the other or others of them in that regard and if there is any, the same shall be unconditionally withdrawn and would deem to have been terminated between the parties."

8. On 03.09.2022, the applicant filed an application before the Special Judge C.B.I 5th Lucknow annexing therewith a copy of the memorandum of settlement and praying that the proceedings be terminated

in terms of the compromise. However, no order has been passed on the application by the trial court and, therefore, the applicants have approached this Court seeking quashing of the criminal proceedings against them in view of the compromise entered into between the parties.

9. The offences involved in the present case are non-compoundable offences and, therefore, the Trial Court could not have compounded the same. Moreover, as the applicants already stand convicted by the trial Court and the parties have arrived at a settlement during pendency of an appeal against the conviction, there is no occasion for compounding of the offences by the trial Court.

10. Sri I. B. Singh, the learned Senior Advocate representing the applicants, has submitted that Section 320 (5) of the Criminal Procedure Code provides that “when the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.” Relying on the aforesaid provision, Sri. Singh, has submitted that there is no absolute prohibition against compounding of the offence even after conviction of the accused persons by the trial court. However, since some of the sections for which the applicants have been convicted, are non-compoundable, the Appellate Court would not quash the proceedings on the basis of the compromise.

11. The a law regarding quashing of criminal proceedings involving non-compoundable offences has been

enunciated by the Hon’ble Supreme Court in various pronouncements, which are being referred hereinbelow.

12. In **B. S. Joshi v. State of Haryana, (2003) 4 SCC 675**, the Hon’ble Supreme Court held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing.

13. In **Nikhil Merchant versus Central Bureau of Investigation and Another, (2008) 9 SCC 677**, the CBI had filed a charge-sheet against five accused persons, including three accused are officials of Andhra Bank, under Section 120-B read with Sections 420, 467, 468, 471 of the Penal Code, 1860 read with Sections 5(2) and 5(1)(d) of the Prevention of Corruption Act, 1947 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The allegations under the charge-sheet indicated that the accused persons conspired with each other in fraudulently diverting the funds of Andhra Bank. Offences alleging forgery were also included in the charge-sheet. The Bank had filed a suit for recovery of money, in which the parties had entered into a compromise and the suit was decreed accordingly. Clause 11 of the compromise read as follows: -

“11. Agreed that save as aforesaid neither party has any claim against the other and parties do hereby withdraw all the allegations and counter-allegations made against each other.”

14. Consequent upon the compromise of the suit and having regard to the contents of Clause 11 of the consent terms, the appellant herein filed an application for

discharge from the criminal complaint, in respect of which charge-sheet had been filed by CBI, but the application was rejected by the Trial Court. The Hon'ble Supreme Court held that: -

“30. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved herein has overtones of a civil dispute with certain criminal facets. The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?”

31. On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in B.S. Joshi case² and the compromise arrived at between the Company and the Bank as also Clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise.”

15. In **Gian Singh v. State of Punjab**, (2012) 10 SCC 303, the Hon'ble Supreme Court extensively discussed the judgments on this point, including B. S.

Joshi and Nikhil Merchant (Supra) and held that: -

“61. The position that emerges from the above discussion can be summarised thus : the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz. : (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising

from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

62. In view of the above, it cannot be said that B.S. Joshi, Nikhil Merchant and Manoj Sharma were not correctly decided. We answer the reference accordingly. Let these matters be now listed before the Bench(es) concerned.”

(Emphasis supplied)

16. In **Parbatbhai Aahir v. State of Gujarat**, (2017) 9 SCC 641, the Hon'ble Supreme Court summarized the principles in this regard as follows: -

“16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

16.2. The invocation of the jurisdiction of the High Court to quash a first information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised (i) to secure the ends of justice, or (ii) to prevent an abuse of the process of any court.

16.5. The decision as to whether a complaint or first information report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

16.6. *In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.*

16.7. *As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing insofar as the exercise of the inherent power to quash is concerned.*

16.8. *Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.*

16.9. *In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and*

16.10. *There is yet an exception to the principle set out in propositions 16.8. and 16.9. above. Economic offences involving the financial and economic well-being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash*

where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.”

17. In the case of *State of M. P. v. Laxmi Narayan*, (2019) 5 SCC 688, the Hon’ble Supreme Court reiterated the law in this regard as follows: -

“15. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

15.1. That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3. Similarly, such power is not to be exercised for the offences under the special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4. Offences under Section 307 IPC and the Arms Act, etc. would fall in the

category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act, etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge-sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paras 29.6 and 29.7 of the decision of this Court in *Narinder Singh* [*Narinder Singh v. State of Punjab*, (2014) 6 SCC 466 : (2014) 3 SCC (Cri) 54] should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5 [Ed.: Para 15.5 corrected vide Official Corrigendum No. F.3/Ed.B.J./22/2019 dated 3-4-2019.]
While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-

compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise, etc.”

18. Per contra, Sri Shiv. P. Sukla, the learned counsel for the respondent - C.B.I has relied upon a decision of the Hon’ble Supreme Court in **P. Dharamaraj Versus Shanmugam and Others** 2022 SCC OnLine SC 1186, wherein the Hon’ble Supreme Court held that: -

“44. Thus it is clear from the march of law that the Court has to go slow even while exercising jurisdiction under Section 482 Cr.PC or Article 226 of the Constitution in the matter of quashing of criminal proceedings on the basis of a settlement reached between the parties, when the offences are capable of having an impact not merely on the complainant and the accused but also on others.

* * *

46. It is needless to point out that corruption by a public servant is an offence against the State and the Society at large. The Court cannot deal with cases involving abuse of official position and adoption of corrupt practices, like suits for specific performance, where the refund of the money paid may also satisfy the agreement holder. Therefore we hold that the High Court was completely in error in quashing the criminal complaint.”

19. The applicants are not public servants and, therefore, the law laid down

by the Hon'ble Supreme Court in P. Dharamaraj that (Supra) that corruption by a public servant is an offence against the State and the Society at large and when the offences are capable of having an impact not merely on the complainant and the accused but also on others, the Court has to go slow even while exercising jurisdiction under Section 482 Cr.P.C. for quashing of the proceedings, is not applicable to the facts of the present case.

20. Had the offences been compoundable, there would be no bar against the same being compounded by the appellate court even after conviction of the applicants in view of the provision contained in Section 320 (5) of the Criminal Procedure Code. However, in the present case, the appellate Court cannot compound the offences only because the offences are non-compoundable.

21. Because of the compromise between the parties, the possibility of conviction being upheld in appeal is remote and bleak and continuation of the criminal proceedings would put the applicants to great oppression and prejudice despite full and complete settlement and compromise with the victim. The Trial Court cannot compound non-compoundable offences, but this Court can quash proceedings of criminal case involving non-compoundable offences. Similarly, as the appellate Court could have compounded the offences even after conviction, had the offences been compoundable, applying the same analogy, this Court can quash the proceedings involving non-compoundable offences even after conviction by the trial Court, where the proceedings deserve to be quashed keeping in view the principles laid down by the Hon'ble Supreme Court in this regard.

22. When we examine the facts of the present case in the light of the above referred law laid down by the Hon'ble Supreme Court, what we find is that the offences involved in the present case arise out of complaints made by private persons alleging a wrongful deprivation of their corporate and commercial rights in the Company by certain acts of forgery etc. committed by the applicant no. 3 for the benefit of the applicants no. 1 and 2. The complainants have already entered into a comprehensive settlement with the applicants for maintaining peace and harmony and the terms of settlement record that *all the disputes and differences between them in respect of Carlton Hotel stood settled and that none of the parties has any further or other dispute, difference, dues, claims, demands, proceedings under arbitration or any proceedings pending in any Court of law including complaints / applications made to statutory authority inter se the Parties of any nature whatsoever against the other or others of them in that regard and if there is any, the same shall be unconditionally withdrawn and would deem to have been terminated between the parties.* The disputes appear to be inherently of a civil nature with an overwhelmingly and predominately civil flavour. The wrongs alleged do not amount to commission of offence against the society at large.

23. Therefore, this Court is of the considered opinion that the conviction order and the entire proceedings against the applicants deserve to be quashed by this Court in exercise of its inherent powers under Section 482 of the Code, keeping in view the law laid down by the Hon'ble Supreme Court in the judgments referred to above.

24. In view of the aforesaid discussion, the application under Section 482 Cr.P.C. stands allowed.

25. The order of conviction dated 06.06.2019, passed by learned Special Judicial Magistrate, C.B.I. Lucknow in Case No.4603 of 2009, arising out of F.I.R. registered as RC No.01(S)/2006/CBI/SCB/LKO dated 12.01.2006, under Sections 120-B, 420, 466, 467, 468, 471, 477-A I.P.C. and all the subsequent proceedings from the aforesaid judgment are hereby quashed.

(2023) 5 ILRA 834
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 30527 of 2021

Ravikant & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:

Sri Vinod Singh, Sri Abhinav Gaur, Sri Vibhu Rai,
 Sri Ankit Shukla, Sri Anoop Trivedi(Sr.Advocate)

Counsel for the Opp. Parties:

G.A. Sri Pandey, Balkrishna

A. Criminal Law – Indian Penal Code – Sections 147, 452, 354-B, 323, 504 & 506 – In the criminal proceeding arising out of the FIR lodged on the application u/s 156(3) Cr.P.C., IO submitted Final Report, against which Protest petition was filed, which was treated as complaint – Summon issued – Validity challenged – Ground of delay of two months in filing of the application u/s 156(3) was taken – Effect – Defence of delay was taken that one family member of applicant, being in police service, influenced the local police

authority to not to lodge FIR of opposite party and when by the order of the court, FIR was lodged, further influenced the IO to submit the final report – Effect – Held, an offence took place on the same date, time and place for which both the parties have initiated criminal proceedings. The truth would appear only after appraisal of the evidence. It does not appear that the impugned criminal proceeding initiated on behalf of opposite party no. 2 is an abuse of process of Court. The grounds taken by applicants are not sufficient to throw away the case of opposite party no. 2. (Para 17 and 19)

Application dismissed. (E-1)

List of Cases cited:

1. Pepsi Food Ltd. & ors. Vs Special Judicial Magistrate & ors.; (1998) 5 SCC 749
2. Sunil Bharti Mittal Vs C.B.I.; (2015) 4 SCC 609
3. M/s G.H.C.L. Employees Stock Option Trust Vs M/s India Infoline Ltd.; AIR 2013 SC 1433
4. Lallan Kumar Singh Vs St. of Mah.; 2022 Livelaw (SC) 833
5. Krishna Lal Chawla & ors. Vs St. of U.P. & ors.; Manu/SC/0161/2021
6. Vineet Kumar & ors. Vs St. of U.P. & ors.; Manu/SC/0351/2017
7. Sundar Babu & ors. Vs St. of T.N.; (2009) 14 SCC 244
8. Ahmad Ali Quraishi & anr. Vs St. of U.P. & anr.; (2020) 13 SCC 435
9. M.N. Ojha & ors. Vs A.K. Srivastava & anr.; (2009) 9 SCC 682

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

1. This application under Section 482 Cr.P.C. Has been moved by the accused-

applicants of Crl. Complaint Case No. 523 of 2019 (State Vs. Ravikant and Others) u/s 323, 354, 504 and 506 I.P.C. Police Station-Khurja Dehat, District- Bulandshahar.

2. In brief, facts of the case are that opposite party no. 2 Smt. Kripa Devi moved an application u/s 156(3) Cr.P.C. against the applicants regarding the incident dated 16.2.2017 to lodge the F.I.R. against the applicants which was allowed and an F.I.R. had been lodged at Crime No. 176 of 2017 under Section 147, 452, 354 B, 323, 504 and 506 I.P.C. P.S. Khurja Dehat, Bulandshahar, with the allegations that on 16.2.2017 at about 6:00 p.m. when the complainant went to the back side of her house for feeding to her cattle, the applicants entered her house, molested her and also assaulted her family members due to which they sustained injuries.

3. The police started investigation, recorded the statement of the informant and other witnesses such as Kallu, Triloki, Brahmpal, Bholaram, Ashok, Pushpa Devi and Devendra.

4. The I.O., Munna Lal Sagar, submitted final report concluding that the contents of the F.I.R. were not correct and the F.I.R. was lodged only to pressurize the applicants but the higher officials ordered for further investigation which was conducted by S.I. Awadhesh Kumar who again finding the allegations false, submitted final report before A.C.J.M. Khurja which was registered as F.R.No. 322 of 2017 on 27.5.2017.

5. The learned A.C.J.M. after perusal of the record accepted the final report on 20.11.2018 but the order of the learned A.C.J.M. was challenged by opposite party no.2 by filing Crl. Revision No. 436 of

2018 (Smt. Kripa Devi Vs. State of U.P. And 5 Others) which was allowed on 6.4.2019 by Additional Sessions Judge, Khurja, Bulandshahar, and the learned Magistrate was directed to decide the final report afresh in the light of the judgment of the revisional Court.

6. In compliance of the order of the revisional Court, the protest petition was treated as complaint case and opposite party no. 2, Smt. Kripa Devi, was examined under Section 202 Cr.P.C. and Anil Kumar and Jallu were examined as P.W.1 and P.W.2 under Section 202 Cr.P.C. Considering the evidence of the witnesses and allegations levelled against the applicants, they were summoned vide order dated 12/20.10.2021 as accused for appearance on 22.11.2021.

7. Being aggrieved, the impugned order dated 12/20.10.2021 has been challenged on the grounds that Manoj, husband of opposite party no.2 and his family members brutally assaulted applicant no.1, Ravikant and caused serious injuries to him for which applicant no. 4 Ratibhan, father of Ravikant, applicant no. 1 lodged F.I.R. against them at Crime No. 58 of 2017 under Section 147, 148, 149, 342, 308, 323 and 325 I.P.C. in which after submission of charge-sheet S.T. No. 219 of 2017 (State Vs. Manoj and Others) was started and the charges have been framed. In the aforesaid case, the applicants are witnesses. After that opposite party no.2 tried to initiate false and fabricated prosecution against the applicants by moving application u/s 156(3) Cr.P.C. with an unexplained delay of two months.

8. It is pertinent to mention that Dalchand, father-in-law of opposite party no.2 who is one of the accused of Crime

No. 58 of 2018, lodged an F.I.R. at Crime No. 353 of 2015 against the unknown persons in which final report has been submitted against which Dalchand moved protest petition on 9.7.2018 in which he first time said that the applicants Ravikant, Vijayveer and one Yashwant were involved in the said offence and the learned Magistrate summoned them as accused on 16.10.2018 under Section 308 and 506 I.P.C. which was challenged by the applicant Ravikant before the High Court in Criminal Misc. Application U.S 482 No. 21664 of 2019 and the proceeding of the impugned case was stayed which was extended time to time.

9. On the instigation of the family members of the opposite party no. 2, another case has been falsely lodged against the applicant Vijayveer alias Ankit at Crime No. 271 of 2018 on 5.10.2018 under Section 376 I.P.C. in which the High Court granted bail to him vide order dated 3.4.2019.

10. There was no material available on record to indicate that opposite party no.2 or her family members sustained any injury and in absence of any injury, it is clearly established that the applicants were falsely implicated in the present case. It is also pertinent to mention that in Case Crime No. 271 of 2018 u/s 376 I.P.C., the applicant Vijayveej has been acquitted vide judgment and order dated 25.11.2020. The applicants have no criminal antecedents, they have falsely been implicated in the present case for ulterior motive hence the entire proceeding and the impugned summoning order be quashed.

11. All the records referred in the application have been annexed with the Affidavit filed in support of the application.

12. Heard Sri Anoop Trivedi, learned Senior Counsel, assisted by Sri Vibhu Rai and Ankit Shukla, Advocates, for the applicants Sri Pandey Balkrishna learned counsel for opposite party no.2 and learned AGA for the State and perused the record.

13. It is case of opposite party no.2 that when she was feeding the cattle in the backyard of her house, accused persons committed the alleged occurrence and disrobed her and compelled her to be naked. It is noteworthy that in the F.I.R lodged by opposite party no.2, the applicant no.1 Ravikant is accused no.1. This point appears to be key point of both the cases as to how Ravikant was found in the Gher of opposite party no.2. According to opposite party no.2, when Ravikant alongwith other accused persons molested her and torn her clothes and when she called her family members, her husband and brother in-laws Mahesh and Bablu reached there. Seeing them except Ravikant, rest accused persons succeeded in escaping and Ravikant was caught hold by her husband, then accused person reached there with stick and lathi and started beating her husband and brother in-laws. Hearing the noise, villagers Anil and Jallu reached there and saved them.

14. Contrary to that it is allegation of the applicants that Ravikant was taken to the Gher of opposite party no.2 where he was severely assaulted by which several grievous and fatal injuries were caused to him.

15. It is nowhere mentioned in the F.I.R. lodged by the applicants that on which reason, the accused had taken Ravikant to their Gher. No motive or reason has been assigned by the applicants for it. At this point learned counsel for the opposite party no. 2 and learned A.G.A.

contended that if Ravikant would have been taken forcefully from his house to the Gher of opposite party no.2, the occurrence would have taken place at the house of Ravikant, not in the Gher of opposite party no.2. Ravikant was not a child, ill or sick person that he could be easily taken away by the family members of the opposite party no.2. Their argument is that virtually the facts of the F.I.R. of the applicants do not contain correct facts of the case as Ravikant with other accused persons committed the alleged crime against opposite party no.2 and when it came into the knowledge of the family members of opposite party no.2, they tried to save the dignity and honour of opposite party no.2 and in such a situation, seeing the nature and gravity of the alleged crime, family members of opposite party no. 2 also used force in their defence. Hence, some injuries would have been sustained by Ravikant. It does not mean that in the aforesaid circumstances, if the applicants side received more and severe injuries than the side of opposite party no.2, it can be said that the family members of opposite party no.2 were the assailants or they exceeded the limit of private defence. It could only be decided during the course of trial. It is also a matter of concern as to why only Ravikant was caught hold and rest are said to be escaped. In this regard, if fact of the case of opposite party no.2 is scrutinized, the fair picture appears that Ravikant had been caught hold by the family members of the victim, opposite party no.2 on account of the impugned alleged occurrence.

16. It is noteworthy that it is not a case where an F.I.R. about any past incident had been lodged from the side of opposite party no.2. Both the F.I.Rs. have been lodged about the offence alleged to have been occurred on the same date, place and

time. In such a situation, it can only be decided after taking evidence during the trial as to which party was the aggressor and right culprit and which party acted in defence and which party started the commission of crime about which both the parties have lodged the F.I.R.

17. A very common but serious charge has been levelled from the side of opposite party no. 2 that since the brother of Vijayveer is in police service hence in spite of best efforts from the side of opposite party no.2, their F.I.R. could not be lodged and when the police was directed to lodge the F.I.R. under Section 156 (3) Cr.P.C., both the I.O. tried to save the family members of the said police personnel and submitted final report. So far as this allegation is concerned, normally no evidence can be produced in this regard but it is again noteworthy that the applicants have not denied that brother of the applicant accused Vijayveer is not in police service. Since no adverse presumption can be drawn in accordance with law, hence, no such presumption is drawn by the Trial Court or this Court but it is open for the side of opposite party no.2 to adduce evidence that the denial from lodging the F.I.R. and submission of final report was the result of unfair practice.

18. Learned counsel for the applicants has relied on the following rulings'

(a) In ***Pepsi Food Ltd. And Other Vs. Special Judicial Magistrate and Others, (1998) 5 SCC 749***, it has been held that summoning of an accused in a criminal case is a serious matter. The magistrate should examine the nature of allegations, the oral and documentary evidence. He should not act as silent spectator, he has to scrutinize the evidence carefully and may

himself put question to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations and to examine as to whether any prima facie case of commission of crime by the accused is made out or not.

On the basis of above discussion this Court is of the view that the principles laid down in this precedent do not apply in favour of the applicants.

(b) ***Sunil Bharti Mittal Vs. C.B.I., (2015) 4 SCC 609; M/s G.H.C.L. Employees Stock Option Trust Vs. M/s India Infoline Ltd., AIR 2013 SC 1433; Lallan Kumar Singh Vs. State of Maharashtra, 2022 Livelaw (SC) 833.*** In first case the matter was remanded to the Magistrate and in all the cases it was held that Magistrate must duly apply his mind to form and record an opinion that there is sufficient basis for proceeding through the order though there is no need to pass a detailed order.

In first three above citations the matter was in respect of commission of economic offences.

(c) In ***Krishna Lal Chawla and Others Vs. State of U.P. And Others, Manu/SC/0161/2021,*** there was matrimonial dispute between the wife and the husband and F.I.R. had been lodged by both the parties against each other, both were living separately. The Apex Court was of the view that no useful purpose would be served by keeping the matter pending, hence the F.I.R. and the entire criminal proceedings were quashed. Here the facts are quite different. Hence the principles laid down in this precedent can not be applied in favour of the applicants.

(d) In ***Vineet Kumar and Others Vs. State of U.P. and Others, Manu/SC/0351/2017,*** the accused were summoned under Section 452, 376 D and 323 IPC and revision against the summoning order was dismissed, hence the appeal was preferred. On the basis of facts and circumstances of the case the appeal was allowed by the Apex Court considering the fact that there were financial transaction between the accused and the complainant, her husband and son, and on dishonourment of cheque issued by the complainant's husband and son, proceeding under Section 138 N.I. Act were already initiated by the accused. There was nothing on record except the bald allegation of the victim, hence the appeal was allowed and the entire criminal proceedings were quashed. The facts of this case are quite different even it is not denied by the applicants that any occurrence had not taken place on the alleged date, time and place.

(e) In ***Sundar Babu and Others Vs. State of Tamilnadu (2009) 14 SCC 244,*** the dispute was matrimonial in nature u/s 498-A and Section 4 D.P. Act, 1961, the Apex Court found that the proceedings were malafidy and it was maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. In this case the facts and evidence are quite different, hence, this precedent is not applicable in favour of the applicants.

(f) In ***Ahmad Ali Quraishi and Another Vs. State of U.P. and Another, (2020) 13 SCC 435,*** the complaint was found to be malafide and animus in nature due to animosity arising out of partition of family properties. In this case facts are quite different and the principles laid down

in this case do not apply in favour of the applicants.

(g) In ***M.N. Ojha and Others Vs. A.K. Srivastava and Another***, (2009) 9 SCC 682, the complaint was found to be as counter blast to the action taken by the appellants in their official capacity for realizing the loan amount due against the complainant. Facts of this case are totally different from the facts of the cited case. Hence, due to difference of facts and circumstances of both the cases, this ruling can not be applied in favour of the applicants.

19. On the basis of above discussion, this Court is of the view that an offence took place on the same date, time and place for which both the parties have initiated criminal proceedings. The truth would appear only after appraisal of the evidence. It does not appear that the impugned criminal proceeding initiated on behalf of opposite party no.2 is an abuse of process of Court. The grounds taken by applicants are not sufficient to throw away the case of opposite party no.2. By quashing the impugned criminal proceedings, no useful purpose would be served. Let the truth prevail after completion of trial.

20. Thus this Court is of the view that the present application is devoid of merits and is not sustainable in the eye of law and is liable to be dismissed.

Order

The present Application U/S 482 Cr.P.C. is hereby **dismissed** without prejudice to the merit of the case.

(2023) 5 ILRA 839
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.05.2023

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Crl. Misc. Bail Application No. 6693 of 2023

Moharpal Maurya ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Sri Nagendra Kumar Singh

Counsel for the Respondents:
Sri Sunil Srivastava, A.G.A., Ms. Maimoona
Fatima

A. Criminal Law - Indian Penal Code, 1860-Sections 366, 120B, 176, 372, 373 & 376AB Protection of Children from Sexual Offences Act, 2012-Section 5/6 - The Immoral Traffic (Prevention) Act, 1956-Section 5-immoral trafficking of the victim aged about 14 to 15 years-victim was sold to accused persons one after another and they solemnized marriage of convenience with victim-her confessional statement as well as consistent statement recorded u/s 161 and 164 CrPC narrates the same version of FIR-It is settled law that consent of a minor girl is immaterial.(Para 1 to 20)

The application is rejected. (E-6)

List of Cases cited:

1. St. of Raj, Jaipur Vs Balchand @ Balia (1977) AIR 2447, 1978 SCR (1) 535
2. Ram Govind Upadhyay Vs Sudarshan Singh (2002) 3 SCC 598
3. Neeru Yadav Vs St. of U.P. (2013) 15 SCC 422
4. Gurcharan Singh Vs St.(Delhi Admin.) (1978) 1 SCC 118
5. St. of U.P. Vs Amar Mani Tripathi (2005) 8 SCC 21

6. Manno Lal Jaiswal Vs St. of U.P. & anr.. (2022) SCC Online SC 89

7. Ashim Vs NIA (2022) 1 SCC 695

8. Ishwarji NagaJi Mali Vs St. of Guj. & anr..(2022) SCC Online SC 55

9. Prahlad Singh Bhati Vs NCT of Delhi & ors. (2001) 4 SCC 280

10. Mahipal Vs Rajesh Kumar (2020) 2 SCC 118

11. Ms. Y Vs St. of Raj. & ors. (2022) SCC Online SC 458

12. Manoj Kumar Khokhar Vs St. of Raj. & ors. (2022) 3 NCC 501

13. Deepak Yadav Vs St. of U.P. & anr.. (2022) 8 SCC 559

14. Rajendra Agarwal @ Bablu Vs St. of U.P. & ors., Bail Application No. 833 of 2023

15. Manoj Kumar Khokhar Vs St. of Raj. & anr. (2022) 3 SCC 501 a Brijmani Devi Vs Pappu Kumar(2022) 4 SCC 497

(Delivered by Hon'ble Saurabh Shyam
Shamshery, J.)

1. Facts of the present case are disturbing which indicate that this case is of immoral child trafficking. Victim is a minor girl aged about 14 to 15 years and was working as an scavenger. According to F.I.R., lodged by father of victim, she was missing since 29.9.2020 and one of the co-accused Chhabinath was a suspected person that he has enticed the victim and kidnapped her from lawful guardianship.

2. It appears that victim returned on 25.2.2022 i.e. after 1 year 5 months. Statement of victim were recorded under Sections 161 and 164 Cr.P.C. wherein she narrated her entire ordeal of repeated

sexual assault and how she was sold from one accused to another.

3. According to victim, her ordeal of immoral trafficking was commenced when co-accused Gaurav alias Sonu kept her for about 45 days in a house belonging to his brother where he repeatedly raped her and later on sold to present applicant for ₹ 60,000/-.

4. Thereafter, applicant solemnised marriage with victim and she stayed for about 1 year along with him and thereafter co-accused Gaurav again contacted her and sold to other co-accused viz., Surendra Kumar Singh @ Shani for Rs. 50,000/- where she again lived as his wife for about 3-4 months, however, he repeatedly assaulted her and on one day, victim slipped away from that place and when she met co-accused Rinku. The victim solemnised Court marriage with him and lived there as husband and wife and thereafter was traced from his house.

5. Sri Nagendra Kumar Singh, learned counsel for applicant has submitted that applicant has not purchased the victim on payment, rather they lived together as husband and wife after solemnizing marriage without any force and she left his company on her own will. In the statements also, victim has not stated that applicant has committed any cruelty with her or he assaulted her or entered into physical relationship against her will. He is not part of any child trafficking.

6. Learned counsel has also submitted that co-accused Surendra Kumar @ Shani, who has been alleged by victim that not only he married to her but he assaulted her also, has already been granted bail by co-ordinate Bench of this Court. Therefore,

applicant who is in jail since 16.10.2022 may be released on bail.

7. Sri Sunil Srivastava, learned A.G.A. for State as well as Ms. Maimoona Fatima, learned counsel for High Court Legal Services Committee have opposed the bail and submitted that it was a case of child trafficking, wherein victim was sold to accused persons one after another and accused persons have solemnised marriage of convenience with victim and sexually assaulted the victim also. All accused persons were acting like a gang and one of the co-accused (Gaurav) was kingpin, who acted like a broker. The victim has narrated her ordeal in details in her statement recorded under Sections 161 and 164 Cr.P.C. Therefore, applicant may not be released on bail and this Court may deal with accused persons strictly.

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

9. LAW ON BAIL - A SUMMARY

(A) The basic rule may perhaps be tersely put as bail, not jail.

(B) Power to grant bail under Section 439 Cr.P.C., is of wide amplitude but not an unfettered discretion, which calls for exercise in a judicious manner and not as a matter of course or in whimsical manner.

(C) While passing an order on an application for grant of bail, there is no need to record elaborate details to give an impression that the case is one that would result in a conviction or, by contrast, in an acquittal. However, a Court cannot completely divorce its decision from material aspects of the case such as allegations made against accused; nature and gravity of accusation; having common object or intention; severity of punishment

if allegations are proved beyond reasonable doubt and would result in a conviction; reasonable apprehension of witnesses being influenced by accused; tampering of evidence; character, behaviour, means, position and standing of accused; likelihood of offence being repeated; the frivolity in the case of prosecution; criminal antecedents of accused and a prima facie satisfaction of Court in support of charge against accused. The Court may also take note of participation or part of an unlawful assembly as well as that circumstantial evidence not being a ground to grant bail, if the evidence/ material collected establishes prima facie a complete chain of events. Parity may not be an only ground but remains a relevant factor for consideration of application for bail.

(D) Over crowding of jail and gross delay in disposal of cases when undertrials are forced to remain in jail (not due to their fault) may give rise to possible situations that may justify invocation of Article 21 of Constitution, may also be considered along with other factors.

(See, **State Of Rajasthan, Jaipur vs. Balchand @ Baliay** (AIR 1977 SC 2447 : 1978 SCR (1) 535; **Gurcharan Singh vs. State (Delhi Administration)**, (1978) 1 SCC 118); **State of U.P. vs. Amarmani Tripathi**, (2005) 8 SCC 21; **Prasanta Kumar Sarkar vs. Ashis Chatterjee and Anr** (2010)14 SCC 496; **Mahipal vs. Rajesh Kumar**, (2020) 2 SCC 118; **Ishwarji Mali vs. State of Gujarat and another**, 2022 SCC OnLine SC 55; **Manno Lal Jaiswal vs. The State of U.P. and others**, 2022 SCC OnLine SC 89; **Ashim vs. National Investigation Agency** (2022) 1 SCC 695; **Ms. Y vs. State of Rajasthan and Anr** :2022 SCC OnLine SC 458; **Manoj Kumar Khokhar vs. State of Rajasthan and Anr**. (2022) 3

SCC 501; and, Deepak Yadav vs. State of U.P. and Anr. (2022) 8 SCC 559)

10. The Court has taken note of apathy of the victim. The Court has summoned Chairperson, CWC, Shahjahanpur in order to verify whether the Committee has discharged all responsibilities towards victim diligently or not? It was informed that victim was communicated her rights and that she can avail facility of a support person by a written communication. However, the victim has denied. She has given statement before the members of C.W.C. and narrated same version as stated her statement recorded under Sections 161 and 164 Cr.P.C. and that she wants to live along with her mother.

11. This Court has passed certain directions in regard to working of C.W.C. in the judgement of **Rajendra Agarwal Urf Bablu vs. State of U.P. and others, Bail Application No. 833 of 2023** and relevant parts thereof are mentioned hereinafter -:

"25. The above referred procedure of Committee and additional functions and responsibilities of Committee entrusted a great responsibility to Child Welfare Committee that it shall hold its sittings in the premises of a children's home or, at a place in proximity of children's home or, at a suitable premises in any institution run under the Act for children in need of care and protection. It further provides that it shall be ensured that no person or persons unconnected with case remains present in room when session is in progress and only those persons shall be allowed to remain present, in presence of whom child feels comfortable. Committee shall hold its sittings in a child friendly premises which

shall not look like a Court Room in any manner. Committee has to review the Children's Suggestion Book atleast once in a month.

26. Concept of Child Welfare Committee has important factor in implementation of JJ Act, 2015 and JJ Rules, 2019. In the present case considering gravity of allegations, victim does require a very special and effective counselling by an experienced counsellor.

27. In the backdrop of above referred statutory provisions it is clear that Child Welfare Committee has a great responsibility when it is dealing with a case of minor girl victim, as the case in hand, who has suffered mental and physical trauma of repeated assault for many years. In such cases it would not be a mere formality of Child Welfare Committee to comply with above referred statutory provisions but it would require more cautious approach. In such cases victim should be dealt with extra care and responsibility and for that members of Child Welfare Committee required a trained support system, who can undertake counselling of such victims keeping in view their sufferings.

28. National Commission for Protection of Child Rights (NCPCR) has launched a training module for Child Welfare Committee. The module will be more beneficiary if it includes a requisite training to deal with minor victims of sexual assault.

29. Effect of act/ offence of rape is not momentary but it got pasted on mind, heart, body and soul of the victim and the object of Child Welfare Committee is to undertake such endeavours to erase such memories by counselling and it should be done by well trained counsellors who have experience of treating such minor victims under proper guidance.

30. In view of above, Ministry of Women and Child Development, Government of U.P., Lucknow through its Secretary is directed to ponder on above referred issue by initiating process of interaction with all stakeholders in order to make Child Welfare Committee and its Members more competent, more responsible, more generous and more compassionate to deal with such cases, as the case in hand.

31. While undertaking above exercise it shall also take note the provisions of Rule 35 of JJ Rules, 2019 which provides mental health for children at Child Care Institution. Sub-rule (5) thereof provides that every Institution shall have the services of trained counsellors or collaboration with external agencies such as child guidance centres, psychology and psychiatric departments or similar Government and non-Governmental agencies, for specialized and regular individual therapy for child.

32. The object of above exercise is to provide sincere and appropriate counselling to minor victim and exercise shall not be limited to above observations. It is up to the senior officers of Department to come up with a concrete plan in order to achieve the above referred observations of this Court."

12. Considering above referred factual aspects of this case as well as submission of learned counsel for rival parties and law as referred above, it transpires that in the present case, a minor girl has suffered a lot not only her body was ravished many times by number of persons but she has suffered mental trauma also. From the facts as referred above, it is evident that victim was sold to accused persons one after another and they solemnised marriage of convenience and sexually assaulted the victim and some accused persons have physically assaulted

her also. There are evidence that victim was sold and purchased like a commodity. This act of selling the human being like a commodity was nothing but a dark huge black spot on society and accused persons including applicant are not only accused of the offence committed against victim but they are accused to the entire society as well.

13. The applicant and co-accused have treated a minor girl like a vegetable sold in an open market and not only entered a marriage of convenience but made physical relationship with her with or without consent which was illegal as the settled position of law is that consent, if any, of a minor girl for physical relationship is immaterial.

14. In the present case, the only relationship between accused persons including applicant and victim was a relationship with her body only. There was no relationship of mind or emotions.

15. Contention of learned counsel for applicant that victim had stayed along with him on her own will and he was not part of any child trafficking appears to be contrary to the evidence on record including the confessional statement as well as consistent statement of victim recorded under Sections 161 and 164 Cr.P.C.

16. It has also been brought on record that co-accused Surendra Kumar @ Shani has already been granted bail by co-ordinate Bench of this Court, however, reasons given therein do not appear to be in terms of judgement of Supreme Court in the cases of **Manoj Kumar Khokhar vs. State of Rajasthan and Anr. (2022) 3 SCC 501** and **Brijmani Devi vs. Pappu Kumar, (2022) 4 SCC 497** wherein

Supreme Court has held that while granting bail to accused persons, High Court should give specific findings/reasons in this regard. The reasons given by co-ordinate Bench in co-accused case are as follows :-

"After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail."

17. Considering the reasons given by co-ordinate Bench as well as law as held in *Manoj Kumar Khokhar and Brijmani Devi (supras)*, it appears that certain relevant facts were not brought on record before co-ordinate Bench as well as that it was a case of child trafficking, therefore, this Court is declining prayer for bail on the ground of parity.

18. As discussed above and considering that applicant is part of child trafficking nexus and it is not only a crime against victim, a minor girl, but it is a crime against society and, therefore, the Court is of considered opinion that no case of bail is made out in favour of applicant in Case Crime No. 438 of 2020 under Sections 366, 120-B, 176, 372, 373, 376 AB I.P.C., Section 3/4 of POCSO Act and Section 5 of Immoral Traffic (Prevention) Act, 1956, Police Station- Nigohi, District- Shahjahanpur.

19. Before parting with this judgement, some reference is required to the menace of child trafficking in India.

20. The National Crime Record Bureau complies crime statistics reported

by different States and Union Territories and same are published in its manual publication. In the report of 2022, it was reported that number of cases in which children below 18 years trafficked during 2018 to 2020 were 941, 883 and 750 respectively as well as number of children traffic below 18 years during 2018 to 2020 were 2772, 2863 and 2222 respectively. It also gives the profile of child below 18 years rescued in India from 2018 to 2020 were 2383, 2693 and 2135 respectively. All the above details are based on consolidated report from all the States.

21. If we look the anti trafficking laws in India, they are Article 21 of the Constitution of India which prohibits trafficking in human beings and beggar and other similar forms of forced labour and in contravention of this provision, there shall be a punishable offence in accordance with law. There is an Act viz., Immoral Traffic (Prevention) Act, 1956 which indicates that with the prior object to abolish the traffic as an organized means of living. There are other laws viz., Child Labour (Prohibition and Regulation) Act, 1986, etc.

22. The Government of India as well as a State Government are having dedicated Ministries as well as Commissions and there are number of Non Government Organisation who are actively trying to eradicate the trafficking of human being of child as well as to rescue the children from the web of illegal trafficking. Still a lot has to be done. The child trafficking is a crime against humanity and Society, therefore, each citizen of the country has to give some effort in order to check and to stop such trafficking and for that citizens have to kept their eyes open and in case of any suspected movement of children or otherwise is found, they have to report

immediately to the concerned police station or NGO or any other appropriate place as well as we have to discourage child labour, child beggars to create a movement in the society so that nexus between web of child trafficking maybe cracked and innocent children may not be trapped in their web as well as we have to take care as the society to help the rescued child/children.

23. Accordingly, the outcome of above discussion is that bail application of applicant is **rejected** with above observations.

(2023) 5 ILRA 845
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.05.2023

BEFORE

THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Crl. Misc. Bail Application No. 31499 of 2022

Jagdish **...Applicant**
Versus
State of U.P. **...Respondent**

Counsel for the Applicant:
 Sri Pawan Kumar Shukla, Sri Ram Kumar

Counsel for the Respondent:
 Sri Rishi Chaddha, A.G.A., Sri Lalit Kumar Shukla

A. भा०द०सं०- धारा 302, 307 एवं धारा 27/30 आयुध अधिनियम-सूचनाकर्ता का चचेरा भाई जब खेत जोतकर अपना ट्रैक्टर लेकर गाँव आ रहा था, तो गाँव के ही आठ नामित अभियुक्त अंधाधुंध फायरिंग शुरू कर दी, जिसमें आठ लोग गम्भीर रूप से घायल हो गये जिसमें उसका एक पड़ोसी रूप सिंह भी था, जिसकी उपचार के दौरान मृत्यु हो गई-अपराध में वर्तमान आवेदक के पुत्र ने उसकी लाईसेंस बंदूक लाकर दी और जिससे उसने अंधाधुंध गोलियाँ बरसायीं और चोटिल गवाहों को भी

गोली लगी एवं मृतक की भी गोली लगने से ही मृत्यु हुई। शेष नामित अपराधियों के विरुद्ध आरोपपत्र नहीं दाखिला किया गया है व आरोप पत्र केवल वर्तमान आवेदक और उसके पुत्र के विरुद्ध ही दाखिल किया गया है-मृतक का सूचनाकर्ता से कोई भी सम्बन्ध नहीं है, जबकि वह आवेदक का जानकार है। वास्तव में सूचनाकर्ता के लोग आवेदक के लोगों के साथ मारपीट करने आए और फायरिंग की, जिससे मृतक की मृत्यु हो गई जो बीच बचाव करने आया था और इस सम्बन्ध में मृतक के भाई ने प्रथम सूचना रिपोर्ट भी दर्ज करायी थी, परन्तु उसमें अंतिम रिपोर्ट प्रेषित कर दी गई और वर्तमान में एक विरोध याचिका दाखिल की गई है, जिसपर अभी निर्णय आना शेष है-प्रथम सूचना रिपोर्ट एक कथित चक्षुदर्शी ने दर्ज करायी थी, जिसमें आठ लोगों को अपराधी के रूप में नामित किया गया था और शस्त्र भी नामित किये गये थे, परन्तु मात्र आवेदक और उसके पुत्र को छोड़कर बाकी सभी के विरुद्ध कोई साक्ष्य न मिलने के कारण कोई कार्यवाही नहीं की गई अतः सूचनाकर्ता द्वारा अभियोग पक्ष में अतिशयोक्ति की गई है, जिसका अर्थ यह है कि अभियोजन कथानक पूर्ण रूप से मिथ्या है- प्रारम्भ में आवेदक और उसके पुत्र के अतिरिक्त और लोग भी अपराधी के रूप में नामित किये गये थे, परन्तु अन्वेषण के दौरान साक्ष्य के बयानों के आधार पर आरोपपत्र केवल वर्तमान आवेदक और उसके पुत्र के विरुद्ध दाखिल किया गया और विशिष्ट रूप से यह आरोप लगाया गया कि आवेदक के पुत्र ने आवेदक को उसकी लाईसेंस बंदूक लाकर दी, जिससे आवेदक ने अंधाधुंध फायरिंग की, जिसके कारण एक व्यक्ति की मृत्यु हो गई और छह अन्य घायल हो गए। सभी को आग्नेयास्त्र की चोटें लगीं- केवल इस कारण कि प्रथम सूचना रिपोर्ट में ज्यादा व्यक्ति अपराधी के रूप में नामित किये गये हैं, सम्पूर्ण अभियोजन कथानक को झूठा नहीं करार दिया जा सकता। आवेदक के विद्वान अधिवक्ता का यह कथन कि वास्तविकता कुछ और अलग है, इस आधार पर विश्वसनीय नहीं मानी जा सकती क्योंकि मृतक के भाई द्वारा लिखायी गई प्रथम सूचना रिपोर्ट पर अन्वेषण के बाद अंतिम रिपोर्ट लगा दी गई है-अतः आवेदक का घटना स्थल पर उपस्थित होना

व उसके द्वारा अंधाधुन्ध गोली चलाना व जिसके कारण एक व्यक्ति की मृत्यु हो जाना एवं छह अन्य लोगों का घायल हो जाना को प्रथम दृष्टया असत्य मानने का कोई कारण नहीं है और यह देखते हुए कि यह एक संगीन अपराध है, अतः वाद के गुण-दोष को प्रभावित किये बगैर इस जमानत याचिका को निरस्त किया जाता है। (1 Is 12)

B. जमानत देने के लिये विचारात्मक कारक है, अपराध होने की परिस्थितियों की प्रकृति और गंभीरता ; पीड़ित और गवाहों के संदर्भ में आरोपी की स्थिति और हैसियत ; आरोपी के न्याय प्रक्रिया से भागने की संभावना ; अपराध दोहराने की संभावना ; मामले में संभावित सजा की कठोर संभावना के साथ अपने स्वयं के जीवन को खतरे में डालना ; गवाहों के साथ छेड़छाड़ ; मामले का इतिहास और साथ ही इसकी जांच और अन्य प्रासंगिक आधार, जो अन्य महत्वपूर्ण कारकों पर ध्यान करते हुए, व्यापक रूप से निर्धारित नहीं किये जा सकते हैं। प्रासंगिक कारक कौन से हो सकते हैं, इसका कोई निर्धारित नियम (स्ट्रेट जैकेट फॉर्मूला) कभी भी नियत नहीं किया जा सकता है, हालांकि, कुछ महत्वपूर्ण कारक जिन्हें अन्य कारकों के साथ हमेशा विचारणीय माना जाता है, वो हैं, प्रथम दृष्टया अभियुक्त की संलिप्तता, आरोप की प्रकृति और गंभीरता, सजा की कठोरता, आरोपी का चरित्र, स्थिति और उसकी अवस्थिति से संबंधित है। (10, 12) (E-6)

उद्धृत मामलों की सूची:

1. राजस्थान राज्य, जयपुर बनाम बलचंद @ बलिया (1977 एआईआर 2447, 1978 एससीआर (1) 535)।
2. राम गोविंद उपाध्याय बनाम सुदर्शन सिंह: (2002) 3 एससीसी 598 और नीरू यादव बनाम उत्तर प्रदेश शासन (2013)15 एससीसी 422)।
3. उत्तर प्रदेश शासन प्रति अमरमणि त्रिपाठी, (2005) 8 एससीसी 21)।
4. गुरचरण सिंह बनाम राज्य (दिल्ली प्रशासन), (1978) 1 एससीसी 118)।

5. मन्नो लाल जायसवाल बनाम उत्तर प्रदेश शासन और अन्य: 2022 एससीसी ऑनलाइन एससी 89 आशिम बनाम राष्ट्रीय जांच एजेंसी : (2022) 1 एससीसी 695

6. ईश्वरजी नागाजी माली बनाम गुजरात राज्य और अन्य, 2022 एससीसी ऑनलाइन एससी 55)।

7. प्रहलाद सिंह भाटी बनाम एनसीटी आफ दिल्ली और अन्य:(2001) 4 एससीसी 280)।

8. महिपाल बनाम राजेश कुमार, (2020) 2 एससीसी 118 और सुश्री वाई बनाम राजस्थान राज्य और अन्य: 2022 एससीसी ऑनलाइन एससी 458)।

9. मनोज कुमार खोखर बनाम राजस्थान राज्य और अन्य (2022)3 एनसीसी 501, दीपक यादव प्रति उत्तर प्रदेश राज्य व एक अन्य (2022)8 एससीसी 559)।

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. आवेदक के विद्वान अधिवक्ता श्री पवन कुमार शुक्ला, ब्रीफ होल्डर श्री राम कुमार, सूचनाकर्ता की तरफ से विद्वान अधिवक्ता श्री ललित कुमार शुक्ला एवं राज्य की तरफ से विद्वान अपर शासकीय अधिवक्ता श्री ऋषि चड्ढा को ध्यानपूर्वक सुना गया तथा पत्रावली का अवलोकन किया गया।

2. वर्तमान आपराधिक प्रकीर्ण प्रथम जमानत याचिका आवेदक/अभियुक्त जगदीश द्वारा मु०अ०सं० 328, वर्ष 2021, अंतर्गत धारा 302, 307 भा०दं०सं० एवं धारा 27/30 आयुध अधिनियम, थाना बलदेव, जिला मथुरा के अंतर्गत न्यायालय सत्र न्यायाधीश, मथुरा द्वारा उसके जमानत प्रार्थनापत्र संख्या- 370, वर्ष 2022 को आदेश दिनांक 17.02.2022 के द्वारा निरस्त करने के उपरान्त इस न्यायालय के समक्ष दाखिल किया गया है।

3. प्रथम सूचना के तथ्य से विदित होता है कि सूचनाकर्ता का चचेरा भाई दिनांक 25.10.2021 को जब खेत जोतकर अपना ट्रैक्टर लेकर गाँव आ रहा था, तो गाँव के ही आठ नामित अभियुक्त जो अपने हाथ में लाईसेंस बंदूक, देशी अवैध बंदूक, अवैध पौना, देशी तमन्चा, देशी बंदूक लिये हुए थे, जिनमें से चार पुरुष और चार महिलाएं थीं, सभी उसके चचेरे भाई के पीछे दौड़ कर आए और जैसे ही वह ट्रैक्टर से उतर कर घर की तरफ भागा, उन्होंने अंधाधुंध फायरिंग शुरू कर दी, जिसमें आठ लोग गम्भीर रूप से घायल हो गये जिसमें उसका एक पड़ोसी रूप सिंह भी था, जिसकी उपचार के दौरान मृत्यु हो गई।

4. आवेदक के विद्वान अधिवक्ता श्री पवन कुमार शुक्ला ने प्रबलतापूर्वक आवेदन किया कि मजरूब गवाह के बयानों में भी केवल इतना बताया गया है कि अपराध में वर्तमान आवेदक के पुत्र ने उसकी लाईसेंस बंदूक लाकर दी और जिससे उसने अंधाधुन्ध गोलियाँ बरसायीं और चोटिल गवाहों को भी गोली लगी एवं मृतक की भी गोली लगने से ही मृत्यु हुई। शेष नामित अपराधियों के विरुद्ध आरोपपत्र नहीं दाखिला किया गया है व आरोप पत्र केवल वर्तमान आवेदक और उसके पुत्र के विरुद्ध ही दाखिल किया गया है।

5. आवेदक के विद्वान अधिवक्ता ने आगे कहा कि मृतक का सूचनाकर्ता से कोई भी सम्बन्ध नहीं है, जबकि वह आवेदक का जानकार है। वास्तव में सूचनाकर्ता के लोग आवेदक के लोगों के साथ मारपीट करने आए और फायरिंग की, जिससे मृतक की मृत्यु हो गई जो बीच बचाव करने आया था और इस सम्बन्ध में मृतक के भाई ने प्रथम सूचना रिपोर्ट भी दर्ज करायी थी, परन्तु उसमें अंतिम

रिपोर्ट प्रेषित कर दी गई और वर्तमान में एक विरोध याचिका दाखिल की गई है, जिसपर अभी निर्णय आना शेष है।

6. प्रथम सूचना रिपोर्ट एक कथित चक्षुदर्शी ने दर्ज करायी थी, जिसमें आठ लोगों को अपराधी के रूप में नामित किया गया था और शस्त्र भी नामित किये गये थे, परन्तु मात्र आवेदक और उसके पुत्र को छोड़कर बाकी सभी के विरुद्ध कोई साक्ष्य न मिलने के कारण कोई कार्यवाही नहीं की गई। अतः सूचनाकर्ता द्वारा अभियोग पक्ष में अतिशयोक्ति की गई है, जिसका अर्थ यह है कि अभियोजन कथानक पूर्ण रूप से मिथ्या है।

7. बहस का विरोध शासन की तरफ से विद्वान अपर शासकीय अधिवक्ता श्री ऋषि चड्ढा एवं श्री ललित कुमार शुक्ला ने किया कि सभी मजरूब साक्ष्यों ने पूर्ण रूप से अभियोजन कथानक का समर्थन किया है कि वर्तमान आवेदक घटनास्थल पर मौजूद था, उसी के बेटे ने घर से बंदूक लाकर उसको दी और बाद में उसके द्वारा अंधाधुन्ध फायरिंग की गई, जिसके कारण एक व्यक्ति की मृत्यु हो गई और छह अन्य लोग गोली लगने के कारण घायल हो गए। मृत्यु पश्चात शव विच्छेदन प्रपत्र व चोट प्रपत्र से प्रथम-दृष्टया यह विदित होता है कि सभी को आग्नेयास्त्र की चोट लगी थी। अतः आरोप की गम्भीरता व आवेदक का कृत्य देखते हुए यह याचिका निरस्त की जाए।

जमानत की विधि

8.(क) सारगर्भित धारणा से संभवतः मूल नियम, जमानत है न कि कारागार (देखें : राजस्थान राज्य, जयपुर बनाम बलचंद @ बलिया (1977 एआईआर 2447, 1978 एससीआर (1) 535)।

भा.दं.सं. की धारा 439 के तहत जमानत देने की शक्ति के व्यापक आयाम हैं तथा न्यायालय को असीमित तो नहीं परन्तु पर्याप्त विवेकाधिकार प्रदान किये गये हैं, जिसका उपयोग न तो सामान्य रूप से और न ही मनमाने रूप से, परन्तु न्यायसंगत रूप से करने के लिए प्रस्तावित किया गया है। (देखें: **राम गोविंद उपाध्याय बनाम सुदर्शन सिंह: (2002) 3 एससीसी 598 और नीरू यादव बनाम उत्तर प्रदेश शासन (2013) 15 एससीसी 422**)।

(ख) जमानत देने के लिये विचारात्मक कारक है, अपराध होने की परिस्थितियों की प्रकृति और गंभीरता ; पीड़ित और गवाहों के संदर्भ में आरोपी की स्थिति और हैसियत ; आरोपी के न्याय प्रक्रिया से भागने की संभावना ; अपराध दोहराने की संभावना ; मामले में संभावित सजा की कठोर संभावना के साथ अपने स्वयं के जीवन को खतरे में डालना ; गवाहों के साथ छेड़छाड़ ; मामले का इतिहास और साथ ही इसकी जांच और अन्य प्रासंगिक आधार, जो अन्य महत्वपूर्ण कारकों पर ध्यान करते हुए, व्यापक रूप से निर्धारित नहीं किये जा सकते हैं। (देखें : **गुरचरण सिंह बनाम राज्य (दिल्ली प्रशासन), (1978) 1 एससीसी 118**)।

(ग) प्रासंगिक कारक कौन से हो सकते हैं, इसका कोई निर्धारित नियम (स्ट्रेट जैकेट फॉर्मूला) कभी भी नियत नहीं किया जा सकता है, हालांकि, कुछ महत्वपूर्ण कारक जिन्हें अन्य कारकों के साथ हमेशा विचारणीय माना जाता है, वो हैं, प्रथम दृष्टया अभियुक्त की संलिप्तता, आरोप की प्रकृति और गंभीरता, सजा की कठोरता, आरोपी का चरित्र, स्थिति और उसकी अवस्थिति से संबंधित है। (देखें: **उत्तर प्रदेश शासन प्रति अमरमणि त्रिपाठी, (2005) 8 एससीसी 21**)।

(घ) **मन्नो लाल जायसवाल बनाम उत्तर प्रदेश शासन और अन्य: 2022 एससीसी ऑनलाइन**

एससी 89 में उच्चतम न्यायालय ने कहा है कि, जब अभियुक्तों को भारतीय दंड संहिता की धारा 149 के तहत दंडनीय अपराधों के लिए आरोपित किया गया है और जब उनकी उपस्थिति स्थापित हो जाती है और यह कहा गया हो कि वो विधि विरुद्ध जमाव के सदस्य थे, तो उनकी व्यक्तिगत भूमिका और/या व्यक्तिगत आरोपी द्वारा किया गया अत्युक्ति महत्वपूर्ण और/या प्रासंगिक नहीं होती है।

(ङ) **आशिम बनाम राष्ट्रीय जांच एजेंसी : (2022)**

1 एससीसी 695 में उच्चतम न्यायालय ने कहा है कि एक बार जब यह स्पष्ट हो जाये कि समयोचित विचारण संभव नहीं हो पायेगा और आरोपी कारागार में एक दीर्घ अवधि व्यतीत कर चुका है, तो न्यायालय आम तौर पर उसे जमानत पर छोड़ने के लिए बाध्य हो जाते हैं।

(च) आरोपी को जमानत पर रिहा करने का आधार मात्र इसलिए कि अभियोजन का मामला, परिस्थितिजन्य साक्ष्य पर आधारित है, नहीं हो सकता है, अगर जांच के दौरान साक्ष्य/तथ्य एकत्र किये गये हों और प्रथम दृष्टया घटनाओं की पूरा श्रृंखला स्थापित हो गई है। (देखें: **ईश्वरजी नागाजी माली बनाम गुजरात राज्य और अन्य, 2022 एससीसी ऑनलाइन एससी 55**)।

(छ) यह भी ध्यान रखा जाना चाहिए कि जमानत देने के लिए विधायिका ने "साक्ष्य" के स्थान पर "विश्वास करने के लिए उचित आधार" शब्दों का प्रयोग किया है, जिसका अर्थ है कि जमानत देने से संबंधित न्यायालय केवल इतनी संतुष्टि कर सकता है कि क्या आरोपी के खिलाफ कोई वास्तविक मामला है और अभियोजन पक्ष आरोप के समर्थन में प्रथम दृष्टया साक्ष्य पेश करने में सक्षम होगा। (देखें: **प्रहलाद सिंह भाटी बनाम एनसीटी आफ दिल्ली और अन्य:(2001) 4 एससीसी 280**)।

(ज) मुक्त न्याय का एक मौलिक आधार है, जिसके लिए हमारी न्यायिक प्रणाली प्रतिबद्ध है, कि वो कारक

जो न्यायाधीश के मानस में जमानत को अस्वीकृत या स्वीकृत करने के लिए मूल्यांकित किये गये, वो पारित आदेश में उल्लेखित किये जायें। मुक्त न्याय इस धारणा पर आधारित है कि न्याय न केवल किया जाना चाहिए, बल्कि स्पष्ट और निस्संदेह रूप से होता हुआ दिखना भी चाहिए। न्यायसंगत निर्णय देने का न्यायाधीशों का कर्तव्य इस प्रतिबद्धता का हृदय है। (देखें: **महिपाल बनाम राजेश कुमार, (2020) 2 एससीसी 118 और सुश्री वाई बनाम राजस्थान राज्य और अन्य: 2022 एससीसी ऑनलाइन एससी 458**)।

(झ) जमानत के आवेदन पर आदेश पारित करते समय विस्तृत विवरण का उल्लेख, इस धारणा के नाते नहीं किया जा सकता है कि मामला ऐसा है, जिसके परिणामस्वरूप दोषसिद्धि हो सकती है या इसके विपरीत, दोषमुक्ति हो सकती है। हालांकि, जमानत के आवेदन पर निर्णय लेने वाला न्यायालय मामले के भौतिक पहलुओं से अपने निर्णय को पूरी तरह से अलग नहीं कर सकता, जैसे आरोपी के खिलाफ लगाए गए आरोप ; अगर आरोप यथोचित संदेह से परे साबित होते हैं और इसके परिणामस्वरूप दोषसिद्धि होती है तो सजा की कठोरता ; अभियुक्त द्वारा गवाहों को प्रभावित करने की उचित आशंका ; साक्ष्यों से छेड़छाड़ ; अभियोजन के मामले में निराधारता ; आरोपी का आपराधिक पूर्ववृत्त ; और आरोपी के विरुद्ध आरोप के समर्थन में न्यायालय की प्रथम दृष्टया संतुष्टि। (देखें: **मनोज कुमार खोखर बनाम राजस्थान राज्य और अन्य (2022)3 एससीसी 501, दीपक यादव प्रति उत्तर प्रदेश राज्य व एक अन्य (2022)8 एससीसी 559**)।

9. उपरोक्त तथ्यों की पृष्ठभूमि में यह विदित होता है कि प्रारम्भ में आवेदक और उसके पुत्र के अतिरिक्त और लोग भी अपराधी के रूप में नामित किये गये थे, परन्तु अन्वेषण के दौरान साक्ष्य के बयानों के आधार पर आरोपपत्र केवल वर्तमान आवेदक और उसके पुत्र के

विरुद्ध दाखिल किया गया और विशिष्ट रूप से यह आरोप लगाया गया कि आवेदक के पुत्र ने आवेदक को उसकी लाईसेंस बंदूक लाकर दी, जिससे आवेदक ने अंधाधुंध फायरिंग की, जिसके कारण एक व्यक्ति की मृत्यु हो गई और छह अन्य घायल हो गए। सभी को आग्नेयास्त्र की चोटें लगीं।

10. केवल इस कारण कि प्रथम सूचना रिपोर्ट में ज्यादा व्यक्ति अपराधी के रूप में नामित किये गये हैं, सम्पूर्ण अभियोजन कथानक को झूठा नहीं करार दिया जा सकता। आवेदक के विद्वान अधिवक्ता का यह कथन कि वास्तविकता कुछ और अलग है, इस आधार पर विश्वसनीय नहीं मानी जा सकती क्योंकि मृतक के भाई द्वारा लिखायी गई प्रथम सूचना रिपोर्ट पर अन्वेषण के बाद अंतिम रिपोर्ट लगा दी गई है।

11. अतः आवेदक का घटना स्थल पर उपस्थित होना व उसके द्वारा अंधाधुन्ध गोली चलाना व जिसके कारण एक व्यक्ति की मृत्यु हो जाना एवं छह अन्य लोगों का घायल हो जाना को प्रथम दृष्टया असत्य मानने का कोई कारण नहीं है और यह देखते हुए कि यह एक संगीन अपराध है, अतः वाद के गुण-दोष को प्रभावित किये बगैर इस जमानत याचिका को **निरस्त** किया जाता है।

(2023) 5 ILRA 849
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.05.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 3 of 1991

Ganga Ram		...Appellant
	Versus	
State of U.P.		...Respondent

Counsel for the Appellant:

Sri R.B. Sahai, Sri Radheshyam Yadav, Sri Radheshyam Yadav (A.C.), Sri Sudhir Bharti

Counsel for the Respondent:

D.G.A., A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Section 302 - Challenge to-Conviction-accused armed with a farsa came from his house and attacked the deceased over the issue of goat grazed the crop-accused alongwith a farsa was brought to the police station-statement of the eyewitnesses PW-1 and PW-2 supports the prosecution version-Postmortem report shows that the injuries caused death of the deceased and it was a homicidal death-appellant cannot be said to have a motive or intention to do away with the deceased who was his relative, the motive is not spelt out from any of the evidence-Total period of incarceration of the accused is four years without remission, the incident is of the year 1978, and now the accused is of 75 years of age, the sentence is reduced to the period already undergone by the accused-The reformatory theory of punishment is to be adopted keeping in view of the 'doctrine of proportionality'.(Para 1 to 34)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Khokan@ Khokhan Vishwas Vs St. of Chattisgarh (2021) LawSuit (SC) 80
2. Anversingh Vs St. of Guj, (2021) 3 SCC 12
3. Pravat Chandra Mohanty Vs St. of Ori. (2021) 3 SCC 529 Pardeshiram Vs St. of M.P.(2021) 3 SCC 238
4. Tukaram & ors. Vs St. of Mah. (2011) 4 SCC 250
5. B.N. Kavatakar & anr. Vs St. of Karn. (1994) SUPP 1 SCC 304

6. Veeran & ors. Vs St. of M.P. (2011) 5 SCC 300

7. Mohd. Giasuddin Vs St. of A.P. (1977) SC 1926

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

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

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

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

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

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

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

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

1. Present criminal appeal challenges judgment and order dated 17.04.1979 passed by the VIth Additional Sessions Judge, Fatehpur, in Sessions Trial No.287 of 1978, whereby the learned VIth Additional Sessions Judge, Fatehpur has convicted the accused-appellant, Ganga Ram for commission of offence under Section 302 of Indian Penal Code, 1860 (for short 'IPC') and sentenced him to life imprisonment.

2. Heard Sri Radheshyam Yadav, learned counsel for the accused-appellant and learned A.G.A. for the State.

3. Brief facts of the case are that the deceased, Bhanna @ Manna Yadav was the resident of village Budhramau, Police Station Asothar, District Fatehpur. The

accused Ganga Ram is the son of elder brother of the deceased and their houses are adjacent to each other. On 7.4.1978, there was a quarrel between the deceased and the accused because the goat of the accused had entered in the field of the deceased and grazed the crop. On 08.04.1978, in the evening, deceased Bhanna was milking the buffaloes at the door of his House. His daughter, Km. Meena, the complainant/informant (P.W.-1) was also standing in front of the hutment of Islam and was talking to Sheo Bhajan (P.W.-3). Bhulli (P.W.-2), the nephew of the deceased was also sitting at the door of the deceased. All of sudden, the accused armed with a Pharsa came from his house and started attacking the deceased. On receiving the first blow, the deceased fell down on the ground and was further attacked by the accused. When he was almost dead, the accused left and ran away towards south of the village. Bhanna immediately died and his dead body was placed on a cot inside the Chaupal.

4. The F.I.R. was lodged at Police Station Asothar at about 11.00 P.M. on the same day against the accused on the oral report of the informant/P.W.-1, which was scribed by Ram Sajivan Upadhya (P.W.-7) and the investigation was carried out. On investigation being put into motion, Sri Sadanand Roy, the Investigation Officer recorded the statements of Km. Meena (P.W.-1), complainant/informant and other witnesses Bhulli (P.W.-2), who had accompanied the complainant/informant. The Investigating Officer arrived at the place of occurrence on the same night and started further investigation on 9.4.1978 at 6:00 A.M. The inquest report (Exh. Ka-2) was prepared and the dead body was sealed and sent for postmortem. The blood stained and plain earth (Exh. 4 and 5) were also

collected and sealed and recovery memo (fard) (Exh. Ka-8) was prepared. At that very time, an information was received that the accused Ganga Ram was hiding in a Matth towards south of the village. The Investigating Officer accompanied with Kedar Prasad @ Lakkar and Tej Narain went there and arrested the accused. On the pointing out of the accused the Pharsa with which he had committed the murder, was recovered of which recovery memo was prepared and marked as Exhibit-Ka/9. The statement of the witnesses were recorded. The accused alongwith the Pharsa was brought to the police station and the F.I.R. (Exh. Ka-11) under Section 25 of the Arms Act was lodged.

5. On 28.05.1978, the statement of other eye-witness Sheo Bhajan (P.W.-2) was recorded under Section 161 Cr.P.C.

6. The Investigation was completed and the charge-sheet (Exh. Ka.-12) came to be submitted against the accused-appellant.

7. After submission of the charge-sheet the concerned Magistrate took cognizance and on 18.12.1978, the case was committed to the court of Sessions as the offence alleged to have been committed were triable by the Sessions Court. On 16.03.1978 the learned Sessions Judge has framed the charges against the accused under Section 302 I.P.C.

The accused pleaded not guilty to the charge and demanded trial.

8. The trial started and the prosecution has examined seven witnesses, who are as follows:-

1	Km. Meena, the complainant, daughter of	PW1

	deceased.	
2	Bhulli (eye witness of the incident)	PW2
3	Sheo Bhajan (eye witness of the incident)	PW3
4	Kedar Prasad (witness of the arrest of the accused)	PW
5	Sadanand Roy (Investigating Officer)	PW5
6	Dr. M.M.S.A. Khan, who has conducted the post mortem and prepared the post mortem report.	PW6
7	Ram Sajiwan Upadhya, who has recorded the F.I.R. and also registered the case under Section 302 I.P.C.	PW7

9. In support of ocular version following documents were filed and proved:

1	First Information Report dated 08.04.1978	Ex.Ka.-1
2	Recovery memo of blood stained and plain earth dated 09.04.1978	Ex.Ka.-8
3	Recovery memo of 'Farsa' dated 09.04.1978	Ex. Ka.-9
4	Panchayatnama dated 09.04.1978	Ex.Ka.-2
5	Site plan with index dated 09.04.1978	Ex.Ka.-7
6	Site plan with index dated 09.04.1978	Ex. Ka.-10
7	Post Mortem Report dated 10.04.1978	Ex. Ka.-13

8	Report of Chemical Examiner & Serologist	Ex.Ka.-17
9	Affidavit of Maqsood Arif, dated 03.04.1979	Ex. Ka-19
10	Affidavit of Shiv Ratan Lal, dated 03.04.1979	Ex. Ka-21
11	Affidavit of Shyam Lal Yadav, dated 04.04.1979	Ex. Ka-18
12	Affidavit of Ram Ashcharya Pandey, dated 04.04.1979	Ex. Ka-20

10. The accused in his statement recorded under Section 313 Cr.P.C. has denied to have committed the alleged offence. He has stated that he had gone to his sister's place on the previous evening and when he returned to his house, he found the dead body of the deceased. At that time, the Investigating Officer was also present, who brought him to the police station and falsely implicated him at the instance of the Pradhan of the village.

11. The trial court on the basis of evidence so led by the prosecution has found the guilt of the accused-appellant to have been proved beyond reasonable doubt after recording its finding that the injuries received by the deceased were caused by the accused-appellant and has convicted the accused-appellant and sentenced him to undergo life imprisonment for the offence punishable under Section 302 I.P.C. In fact Ganga Ram was an under trial prisoner during the period of trial and that is how he was incarcerated for 15 years and some months.

His counsel did not appear before the court and that is why the Court issued non-bailable warrant against him and since 27.01.2020 he has been languishing in jail.

12. The incident occurred in the year 1978.

13. The submission of the counsel that the informant is the daughter of the deceased and they were inimical to the accused. The evidence of P.W.-5 also would go to show that the appellant has been roped in the offence. In the statement recorded under Section 313 Cr.P.C., the accused-appellant has stated that he has not committed any offence. The informant/P.W.-1 is the daughter of deceased and she has named the accused Ganga Ram to be the assailant and author of the crime when as a matter of fact the deceased was looking after him and was nurturing him. The statements of the accused-appellant under Section 313 Cr.P.C. have totally been ignored by the trial court while returning the impugned judgment of conviction. Accused-appellant, Ganga Ram, is now again in jail since 27.01.2020 after he was granted bail by this Court pursuant to his conviction, he was arrested as none appeared for him.

14. It is further submitted that prosecution has not established any motive for the accused to commit the murder of the deceased and it creates a reasonable doubt about the version of the prosecution.

15. It is further submitted that conviction under Section 302 IPC is not made out as no overt act as per Section 300 I.P.C. is made out. In alternative, it is submitted that at the most, the death event is homicidal death it would not amount to murder and would be punishable under Section 304 II or Section 304 I of I.P.C. If the Court decides that the accused is guilty under Section 302 of IPC, then the accused may be granted fixed term punishment of

incarceration as it is not a gruesome act on the part of the accused.

16. Learned counsel for the State has submitted that there is no reason for false implication of the accused and the complainant had no motive to falsely implicate the accused. There is reliable oral testimony supported by the recovery of the weapon of assault at the instance of the accused, thus the argument that absence of motive creates a doubt about the version of the prosecution, has no legs to stand. Evidence of other prosecution witnesses will not permit this Court to show any leniency in the matter. It is further submitted by learned A.G.A. that the ingredients of Section 300 of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

17. The post-mortem of the dead body of deceased Bhanna @ Manna Yadav was conducted by Dr. M.M.S.A. Khan, Medical Officer, District Hospital, Fatehpur on 10.04.1978 at about 2:15 P.M. The postmortem report Exh. Ka-13 was prepared and the following ante-mortem injuries were found on the body of the deceased:-

1. Abraded contusion 7.5 cm x 5 cm bones underneath fractured present over the left temporal region. 5 cms. Above the left ear, tissue shows extension of blood.

2. Abraded contusion 7.5 cm x 2.5 cm present over the right side of forehead. 1.25 cm above the right eye brow. Bones underneath fractured.

3. Incised wound 6.5 cm x 1.5 cm x bone deep present obliquely over the left cheek extending from 1.25 cm above the left angle of mouth upto the middle of left

cheek. Margins clean cut, bones underneath clean cut, wound gaping.

4. Incised wound 5 cm x 1.5 cm x bone deep present 2.5 cm below the injury no.3 over the left chin.

5. Abraded contusion 5 cm x 3.5 cm present over the right side of face and over the nose, bones underneath fracture.

6. Incised wound 5 cm x 0.8cm x skin deep present over the left side of chest 7.5 cm above the left nipple. Margin clean cut.

7. Incised wound 10 cm x 0.8 cm x skin deep present obliquely over the outer scapular region. Margins clean cut."

18. In the opinion of the doctor, the deceased was aged about 50 years and the duration of injuries was about two days. On external examination the doctor found the following injuries:-

The deceased was of average built body. Rigor mortis was absent. Eyes were closed and mouth were also closed. Abdomen was distended and greenish discolouration was present at the iliac fossae.

19. While considering the evidence of P.W.1 to P.W.7 in cumulative nature, the death can be said to be homicidal death. Postmortem report goes to show that the injuries on the body of the deceased would be the cause of death and that it was homicidal death.

20. We are convinced that it was homicidal death but, it would be seen whether it is homicidal death punishable under Section 302 or Section 304 Part I or Part II of IPC?

21. It would be relevant to refer to Section 299 of the Indian Penal Code, which read as under:

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

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

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the

	harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

23. In latest decision in **Khokhan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80**, where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and altered the sentence. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Decisions in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

24. On overall scrutiny of the facts and circumstances of the present case

coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that it was a case of homicidal death not amounting to murder.

25. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that his act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

26. We come to the definite conclusion that the death was not premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

27. This takes us to the alternative submission of learned counsel for the appellant that the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

28. In **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]**, explaining

rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

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

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

30. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, the Supreme Court

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

sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

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

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

We may also record that while going through the factual scenario the appellant cannot be said to have a motive or intention to do away with the deceased who was his relative. The motive is not spelt out from any of the evidence.

33. Therefore, on totality of the facts and circumstance and the oral testimony of the eye-witnesses coupled with the medical evidence permit us to convert the

conviction of the accused-appellant from 302 I.P.C. to Section 304 Part-I I.P.C. The fact that the accused-appellant was incarcerated post trial after passing of the impugned judgment for more than 2 years and some months before he was ordered to be enlarged on bail on 05.02.1993 and thereafter he has been incarcerated in jail since 27.01.2020 after issuance of non-bailable warrant, meaning thereby the total period of incarceration of the accused-appellant is approximately four years now without remission. The incident is of the year 1978, the fact that the accused-appellant is of 75 years of age, the sentence is reduced to the period already undergone by the accused-appellant i.e. approximately four years with remission. Fine of Rs. 5000/- to be deposited within four weeks of release from incarceration. If fine is not deposited within four weeks he shall be enlarged in jail to undergo default sentences of three months.

34. In view of the above, this criminal appeal is **partly allowed**. Record and proceedings be sent back to the Court below forthwith.

35. Sri Radheshyam Yadav, learned Amicus Curiae has ably assisted this Court and would be entitled to his fee for a sum of Rs. 10,000/- from the High Court Legal Services Committee.

(2023) 5 ILRA 857

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED:LUCKNOW 10.05.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 203 of 2023

Waseem Khan

...Appellant

Versus

State of U.P. & Anr.

...Respondents

Counsel for the Appellant:

Sushil Kumar Misra, Vishal Nigam

Counsel for the Respondents:

G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - U.P. Gangster and Anti-Social (Prevention of Activities) Act, 1986 - Section 18 - The appellant has been falsely implicated due to enmity and the case under the Gangster Act was imposed upon and the property of the appellant was attached by the District Magistrate u/s 14(1) of the Act-Only on the basis of the police report, the District Magistrate has attached the property-the prosecution has failed to establish that the provisions of Sections 2 and 3 of the Act are attracted in the case of appellant, the prosecution has also failed to establish that the property acquired and owned by the appellant has been earned from the income indulging in anti-social activities-the enquiry u/s 16 was not done in accordance with the Act, the provisions of Sections 14, 15, 17 were also not followed in accordance with the Act-thus, the entire proceeding initiated in pursuance thereof is vitiated-Order of attachment was passed in mechanical manner without application of mind and is arbitrary.(Para 1 to 25)

B. In order to proceed u/s 14 there must be materials for objective determination of the District Magistrate that the person is either a member, leader or organizer of a gang and has acquired any property in commission of any offence under the Act. There must be nexus between his criminal act and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. Initial burden was upon the State to satisfy the District Magistrate with necessary materials-The Act does not provide that aggrieved person seeking release of the properties from attachment must prove the source of income for acquisition thereof. (Para 18)

The appeal is allowed. (E-6)

List of Cases cited:

1. Smt. Maina Devi Vs St. of U.P. (2013) 83 ACC 902
2. Smt. Shanti Devi w/o Sri Ram Vs St. of U.P. (2007) 2 ALJ 483 All
3. Rajbir Singh Tyagi Vs St. of U.P. & ors. (2018) SCC Online All 5986

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

1. Pleadings in the case have been exchanged between the parties.

2. Heard Shri Sushil Kumar Misra, learned counsel for the appellant, Mrs. Kiran Singh, learned Additional Government Advocate-1 for the State and perused the material available on record.

3. The present appeal under Section 18 of U.P. Gangster and Anti Social (Prevention of Activities) Act, 1986 (hereinafter referred to as the '**Gangster Act**') has been preferred by the appellant, namely, Waseem Khan with a prayer to quash the judgment and order dated 13.4.2022 passed by the District Magistrate, Lucknow/opposite party no.2 in Case No. 2850 of 2021 Computerized Case No. D202110460002850 (State Vs. Waseem Khan) under section 14(1) of the Gangster Act , whereby the District Magistrate, Lucknow attached the following property of the appellant including a new house situated in village Tirgawan, Tehsil Malihabad, District Lucknow with the finding that the appellant has purchased the house in question and land (immovable property) between 2012 to 2021 from the income earned by involving in anti social activities and the appellant has purchased the following properties without taking loan whereas the

appellant has purchased the Scorpio and Pulsar Motor Cycle by taking loan.

क्र मां क	राजस्व ग्राम का नाम	खतौनी खाता संख्या	गाटा संख्या	गाटे का कुल रकबा हेक्टेयर में	अन्य गाटे में अंश	विवर ण अंश का क्षेत्र फल हे० में	विवर ण
1.	2.	3.	4.	5.	6.	7.	8.
1.	तिरगवां	61	152	0.27 8	½	0.1 39	
2.	तिरगवां	105	87	0.40 2	½	0.2 01	
3.	अहमदा बाद	30	438	1.04 4	1/18	0.0 58	
4.	अहमदा बाद	43	623	0.26 2	1/18	0.0 15	
5.	अहमदा बाद	44	625	0.43 5	1/18	0.0 24	
6.	अहमदा बाद	45	623	0.26 2	1/18	0.0 15	
	योग	6 खाता	6 किता	2.68 2		0.4 52	

4. The appellant has also prayed for quashing of the impugned judgment and order dated 5.1.2023 passed by the Additional District and Sessions Judge, Court No. 08/Special Judge, Gangster Act, Lucknow in Criminal Appeal No. 84 of 2022, Waseem Khan Vs. State of Uttar Pradesh and another, whereby the appellate court dismissed the appeal and decided the Criminal Misc. Case No. 735 of 2022 finally and confirmed the impugned order dated 13.04.2022 passed by the District Magistrate, Lucknow.

5. In short, the facts of the case are that initially, more than ten years ago, a

First Information Report dated 15.08.2012 was lodged by one Shri Suleman Beg son of Sikandar Beg, resident of village Daulatpur Malihabad, District Lucknow, which was registered as case crime no. 342 of 2012 under sections 147,307,325,504,506 IPC against six persons including the appellant alleging therein that a construction work was being done by the appellant on government land and being Village Pradhan, Suleman Beg restrained the appellant from constructing him the same. Thereafter First Information Reports were lodged against the appellant bearing case crime no. 535 of 2017 under sections 147,148,452,504,506 IPC and case crime no. 81 of 2019, under sections 406,323,506 IPC and case crime no. 551 of 2019 under sections 420,468,471,506,120-B IPC and case crime no. 24 of 2019 under sections 419,420,467,468,471 IPC and case crime no. 173 of 2021 under section 2/3 U.P. Gangster Act.

6. Learned counsel for the appellant submits that the appellant has been implicated in the aforesaid cases due to enmity and the case under the Gangster Act was imposed upon the appellant in the year 2021 whereas the property of the appellant which was attached vide order dated 13.4.2022 passed by the District Magistrate, Lucknow under section 14 (1) of U.P. Gangster Act, was acquired by the appellant much earlier to the imposition of Gangster Act upon him being ancestral property.

7. Elaborating the submissions, learned counsel for the appellant has submitted that the attached property, the reference of which is given above, was in fact ancestral property of the appellant.

8. Learned Counsel of the appellant further submitted that in furtherance of the

FIR bearing Case Crime No. 173/2021 under section 2/3 U.P. Gangster Act, the District Magistrate, Lucknow-opposite party no.2 proceeded to exercise its power under Section 14(1) of the Gangster Act and passed an order for attaching the properties of the appellant on 13.4.2022.

9. Being aggrieved by the aforesaid attachment order dated 13.04.2022 passed by District Magistrate, Lucknow-opposite party no.2, representation dated 14.9.2021 was preferred by the appellant before opposite party no.2 under Section 15 (1) of the Gangster Act seeking release of the appellant's properties from attachment. However, the aforesaid representation was dismissed in a cursory manner by the District Magistrate, Lucknow/opposite party no.2 vide order dated 13.04.2022. While passing the impugned order dated 13.4.2022 the District Magistrate, Lucknow/opposite party no.2 referred the case to the learned Gangsters Court under Section 16 (1) of the Gangster Act in respect of properties which were not released by him; and, the learned Gangsters Court, thereafter, proceeded to pass the impugned order dated 05.01.2023 in exercise of its powers under Section 17 of the Gangster Act.

10. Learned counsel for the appellant further submitted that the District Magistrate, Lucknow/opposite party no. 2 has wrongly and incorrectly attached the immovable property and the house of the appellant on the wrong presumption that the said properties have been acquired from the income earned by the appellant by involving in anti social activities, whereas the appellant is neither Gangster nor he has earned these properties from involving in anti social activities.

11. Clarifying the position, it has been urged by the learned counsel for the appellant that as a matter of fact the appellant was doing business at Mumbai from 1997 to 2008 and used to send the money to his parents and from that money as well as the income of his father, a house was constructed of which electrical energy connection was taken in the year 1998. In the year 2008, he came back from Mumbai and apart from looking after the agriculture and groves farms he started selling building material shop in the name and style "M/s Hira Traders" from where he was selling Morang, Sariya, Sand and Cement and for running this business, he had obtained Tin Number and used to give income tax. It has also been submitted that a tax raid was also conducted at his business establishment. It has also been indicated that land of Khata No. 447, Gata No. 95 area 0.062 acres situated in village Moazzamnagar is recorded in the name of his father which even today is recorded in his name. The land of other gatas is his ancestral property and are recorded in the name of his father and not in his name. It has also been submitted by the learned counsel for the appellant that the house in question was constructed in village Tirgawan by the appellant in the year 1999 on the abadi land from the income earned by the business run by himself before imposition of Gangster Act upon him. In this regard, the appellant has submitted voter list of the year 1999 before court below and also the copies of receipts of electricity connection of the House taken on 31.7.1999 issued by Uttar Pradesh State Electricity Corporation bearing no. 551075/97/GSPL, Receipt No. 43 of Rs. 600/-, electricity bill of Rs. 10244/- of the house of November, 2002 issued by the Uttar Pradesh Corporation Limited and telephone bills of the house of dated 11.7.2003 of Rs. 442/-, 11.5.2003 of

Rs. 115/-, 11.3.2003 of Rs. 153/-, 11.01.2003 of Rs. 115/-, 11.09.2002 of Rs. 290/-, 11.07.2002 of Rs. 230/-, 11.5.2002 of Rs. 155/- and Annual Tax Statement under section 203AA of the Income Tax Act, 1961 of the Assessment Year 2009-10 of his House. The copies of receipts of the same are annexed as Annexure no.3 to this appeal. The aforesaid receipts fortify the fact that the appellant had purchased/constructed his house much earlier even when no criminal case was registered against him and even before imposing the Gangster Act upon him. However, the concerned authorities without considering all these relevant facts and documentary evidence, passed the impugned orders on wrong premise with oblique motive.

12. Learned counsel for the appellant further submitted that the learned trial court while passing the impugned order dated 13.04.2022, without properly perusing the contents of application and documents annexed with the release application has wrongly and incorrectly rejected the same by presuming that the property in question has been acquired by the appellant from the income earned by indulging in anti social activities without going through documentary evidence filed on behalf of appellant and wrongly interpreting that appellant has not filed any document to prove that the property in question has not been acquired from the income earned by indulging in anti social activities. Thus the trial court erred in law while rejecting the application of appellant for release of property in question. The learned counsel submits that the appellant had given the complete detail of the immovable property including the house which has been attached vide order dated 13.4.2022 by the District Magistrate, Lucknow.

13. Learned counsel for the appellant further submits that the impugned order dated 13.4.2022 passed by the District Magistrate, Lucknow does not reveal that the District Magistrate, Lucknow had “reason of believe” that the property in question was acquired by the appellant as a commission of an offence under the Gangster Act rather the aforesaid order is passed on mere suspicion, surmises and conjectures and the appellate court has also passed the order dated 5.1.2023 in cursory manner without analysing the documents of the appellant. Thus both the impugned orders are not sustainable in the eye of law.

14. Per contra, Mrs. Kiran Singh, learned AGA-1, has argued that the learned appellate court has correctly appreciated the material on record before passing the impugned order. The District Magistrate, Lucknow has passed the impugned order dated 13.04.2022 after being fully satisfied that appellant has acquired the property in question by illegal means involving himself in anti social activities as defined under the Gangster Act, as such there is no illegality, infirmity or perversity in the impugned orders. Moreover, the competent authority has passed the order after considering the report of the Superintendent of Police (Rural Area) as also the report of Station House Officer, Mall and as such it is wrong to say that the impugned order of attachment passed by the competent authority suffers from infirmities.

15. Learned AGA-1 has further submitted that the learned trial court pointed out that the appellant was also not able to show the source of income from which the appellant has acquired the properties attached by the learned District Magistrate, Lucknow. The learned trial court also pointed out that when the vehicle

of the appellant i.e., Scorpio Car and Pulsar Motorcycle were purchased by the appellant on loan then from what source of income has the appellant purchased the land without loan, which was seized by the District Magistrate. Thus the learned courts below after considering the entire material including the documentary evidence available on record have passed the impugned orders in correct perspectives and they need no interference.

16. I have heard learned counsel for the appellant, learned AGA-1 for the opposite parties and gone through the impugned orders passed by the courts below.

17. It seems to be just and expedient to refer to the relevant provisions of the Gangster Act which are as under :-

"2. Definitions- In this Act,- (a) "Code" means the Code of Criminal Procedure, 1973;

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code, or (ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 or the Narcotic Drugs and Psychotropic Substances Act,

1985 or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims, for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956, or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867, or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code, or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on

false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or (xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

*(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities; (xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966;

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and The Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xvv) indulging in crimes that impact security of State, public order and even tempo of life,"

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause

(b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;

(d) "public servant" means a public servant as defined in Section 21 of the Indian Penal Code or any other law for the time being in force, and includes any person who lawfully assists the police or other authorities of the State, in investigation or prosecution or punishment of an offence punishable under this Act, whether by giving information or evidence relating to such offence or offender or in any other manner;

(e) "member of the family of a public servant" means his parents or spouse and brother, sister, son, daughter, grandson, granddaughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a person in whose welfare the public servant is interested;

(f) words and phrases used but not defined in this Act and defined in the Code of Criminal Procedure, 1973, or the Indian Penal Code shall have the meanings respectively assigned to them in such Codes.

3. Penalty-(1) A gangster, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:

Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.

(2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or

after the commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine”.

18. The issue involved in the present case may be resolved with the help of the consideration of provisions of sections 14, 15 and 17 of the Gangsters Act, which read as under:

“14. Attachment of property.”-(1) If the District Magistrate has reason to believe that any property, whether movable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

(2) The provisions of the Code shall mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under sub-section (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property .- (1) Where any property is attached under Section 14, the claimant thereof may, within three months from the date of knowledge of such attachment, make a representation to the

District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by court .-

(1) Where no representation is made within the period specified in sub-section

(1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3) (a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub-section (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or on any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3), the Court shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No. V of 1908), in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath ;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office ;

(e) issuing commission for examination of witnesses or documents;

(f) dismissing a reference for default or deciding it ex parte;

(g) setting aside an order of dismissal for default or ex parte decision.

(5) In any proceedings under this section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence Act, 1872 (Act No. 1 of 1872), notwithstanding.

17. Order after inquiry.- If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable

under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise."

19. It is now well settled that property being made subject matter of an attachment under Section 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act. The District Magistrate has to record its satisfaction on this point. The satisfaction of the District Magistrate is not open to challenge in any appeal. Only a representation is provided for before the District Magistrate himself under Section 15 of the Act and in case he refuses to release the property on such representation, in that case the person aggrieved has to make a reference to the Court having jurisdiction to try an offence under the Act. The Court, while dealing with the reference made under sub-section (2) of Section 15 of the Act has to see whether the property was acquired by a gangster as a result of commission of an offence triable under the Act and has to enter into the question and record his own finding on the basis of the inquiry held by him under Section 16 of the Act. If the Court comes to the conclusion that the property was not acquired by the gangster as a result of commission of an offence triable under the Act, the Court shall order for release of the property in favour of the person from whose possession it was attached.

The object behind providing the power of judicial scrutiny under Section 16 of the Code is to check arbitrary exercise of power by the District

Magistrate in depriving a person of his property and to restore the rule of law, therefore a heavy duty lies upon the Court to hold a formal enquiry to find out the truth with regard to the question, whether the property was acquired by or as a result of the commission of an offence triable under the Act. The order to be passed under Section 17 of the Act must disclose reasons and the evidence in support of finding of the Court. The Court is not empowered to act as a post office or mouthpiece of the State or the District Magistrate. If a person has no criminal history during the period the property was acquired by him, how the property can be held to be a property acquired by or as a result of commission of an offence triable under the Act is a pivotal question which has to be answered by the Court. Besides, the aforesaid question, the other important question to be considered by the Court is whether the property which was acquired prior to the registration of the case against the accused under the Act or prior to the registration of the first case of the Gangster chart can be attached by District Magistrate under Section 14 of the Act.

The provisions of Section 14 of the Act, referred to above, empowers the District Magistrate to attach the property acquired by the Gangster as a result of commission of an offence triable under this Act. The District Magistrate may appoint an Administrator of any property attached, to administer such property in the best interest thereof but there must be reason to believe that any property whether moveable or immovable in possession of any person, has been acquired by a Gangster as a result of commission of an offence, triable under this Act but the District Magistrate in its order has not recorded his satisfaction

having reason to believe with regard to the property attached that it was acquired by appellant as a result of commission of an offence triable under Gangster Act, even though while deciding the reference under Section 16 of the Act, the court below does not appreciate the evidence and in a mechanical manner passed the impugned order relying upon the observations made by the District Magistrate which is illegal and an unjustified approach.

20. A Coordinate Bench of this Court in the case of **Smt. Maina Devi versus State of U.P. 2013(83) ACC 902** in paras-8, 9 and 10 has been pleased to held as under:-

“8. Considering the facts, circumstances of the case, submissions made by the learned Counsel for the appellant and the learned A.G.A. and from the perusal of the record it appears that the issue involved in the present case may be resolved with the help of the consideration of the provisions of section 14, 15 and 17 of the Gangsters Act, which read as under:

15. Release of property.—(1) Where any property is attached under section 14, the claimant thereof may within three months from the date of knowledge of such attachment make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

17. Order after inquiry—*If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable*

under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.

9. In light of above mentioned provisions of the Gangster Act the District Magistrate is empowered to attach movable or immovable properties in possession of any person acquired by a gangster as a result of the commission of an offence triable under this Act. But for exercising such powers there must be the reason to believe to the District Magistrate that such property was acquired by a gangster as a result of the commission of an offence triable under this Act. The words reason to believe are stronger than the word "satisfied", it must be passed on reasons which are relevant and material. In the present case, from the perusal of the lower Court record it appears that only on the basis of the police report submitted by the officer incharge of P.S. Sarai Lak-hansi, District Mau, the District Magistrate, Mau has attached two houses of the appellant, no material was supplied to the District Magistrate to have a reason to believe that the property in question was acquired by the gangster Raj Bahadur Singh as a result of commission of an offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also. The learned District Magistrate was having no material in support of the police report that both the houses of the appellant were acquired by his son Raj Bahadur Singh. The learned District Magistrate rejected the application under section 15 of the Gangsters Act moved by the appellant for releasing the attached houses. The application was moved well within the time, the application

was a representation to the District Magistrate, Mau, it was having all the details disclosing the sources by which both the houses were acquired by the appellant. But learned District Magistrate did not consider the sources disclosed by the appellant and rejected the application vide order dated 29.12.2008. The explanation of all the sources by which the appellant acquired the houses has not been properly considered. Therefore, impugned order dated 29.12.2008 has become illegal. The learned Special Judge (Gangsters Act), Azamgarh rejected the application moved by the appellant under section 17 of the Gangsters Act without considering the provisions of the section 14 of the Gangsters Act and the 'relevancy of the reasons' recorded by the District Magistrate to believe that both the attached houses were acquired by a gangster Raj Bahadur Singh son of the appellant as a result of commission of an offence triable under this Act. The order dated 17.3.2009 passed by learned Special Judge (Gangsters Act)/Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 is also illegal.

10. In view of the above discussion, the order passed by District Magistrate, Mau under section 14(1) of the Gangsters Act attaching two houses of the appellant the order dated 29.12.2008 passed by District Magistrate, Mau by which the application under section 15(1)(2) of the Gangster Act has been rejected and the order dated 17.3.2009 passed by learned Special Judge (Gangster Act), Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 are illegal, the same are hereby set aside and the District Magistrate, Mau is hereby directed to release both the houses No. 204-D/8 and 205-D/9 situated in Mohalla Chandmari,

Imiliyan, P.S. Sarai Lak-hansi, District Mau in favour of the appellant forthwith.”

21. Further, another Coordinate Bench of this Court in the case of **Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483 (All)** in paras-9, 10 and 11 has been pleased to held as under:-

“9. The conjoint reading of these sections shows that first it has to be proved that gangster or any person on his behalf is or has been in possession of the property, and such property has been acquired by the commission of any offence triable under this Act, only then the District Magistrate acquires jurisdiction to proceed in the matter and to attach the property. Only when the initial burden is discharged, the onus shifts to the gangster or such person, to account for the same satisfactorily. But if it is found that the concerned person was not a gangster and did not acquire the property in commission of any offence triable under this Act, it has to be released as provided in Section 17. In other words the initial burden is on the prosecution to show that the concerned person is a gangster and has acquired property on account of his criminal activity as triable under the Act.

10. Therefore, in order to proceed under section 14 there must be materials for objective determination of the District Magistrate that the person is either a member, leader or organiser of a gang and has acquired any property in commission of any offence under the Act. There must be a nexus between his criminal acts as enumerated therein and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words what is necessary to find is whether, his acquisition of

property was a result of commission of any offence enumerated in the Act being a member, leader or organiser of a gang. One might have committed several offences but if the property acquired by him was with the aid of his earning from legal resources no action under Section 14 of the Act can be taken against him.

11. In the case of *Badan Singh alias Baddo v. State of U.P.*, 2002 Cri LJ 1392 : 2001 All LJ 2852 it has been held by this Court that Section 14 of the Act is a harsh provision that affects one's right to property, which is a fundamental right under the Constitution. Therefore, initial burden was upon the State to satisfy the District Magistrate with necessary materials that a gangster acquired the properties as a result of commission of any offence. It has also been held in this case that the Act does not provide that the aggrieved person seeking release of the properties from attachment must prove the source of income for acquisition thereof.”

22. Further, another Coordinate Bench of this Court in the case of **Rajbir Singh Tyagi Vs State of U.P. and Others 2018 SCC Online AII 5986** in paras 16 and 18 has been pleased to held as under:-

“ 16. A conjoint reading of the aforesaid two definitions what appears is that for taking action under Section 14 against a person, there must be materials for objective determination of the District Magistrate that he either as a member, leader or organizer of a gang acquired any property as a result of commission of any offence under the Act. There must be nexus between his criminal act and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words, what is necessary to find is whether his acquisition of

property was as a result of commission of any offence enumerated in the Act being a member, leader or organizer of a gang. One might have committed several offences, but if the property acquired by him was with the aid of his earning from legal source, no action under Section 14 of the Act can be taken against him.

18. Section 14 of the Act is a harsh provision that affects one's right to property which is a constitutional right under the Constitution. Therefore, initial burden was upon the State to satisfy the District Magistrate with necessary materials that petitioner Rajbir Singh Tyagi being a gangster acquired the properties as a result of commission of any offence. That was however, not done. So, complaining the attachment order to be illegal, a move was made by the petitioners by filing a representation for release of the properties. The said prayer was rejected with the observation that the petitioners could not establish the source of income to build the house and acquire the movables. This approach of the District Magistrate, in my opinion, has no sanction under law. The Act does not provide that aggrieved person seeking release of the properties from attachment must prove the source of income for acquisition thereof. So, on a conspectus of the relevant provisions of the Act, I am of the considered opinion that the order of attachment passed by the District Magistrate, Muzaffar Nagar is illegal, arbitrary and against the weight of the materials on record."

23. Keeping in view the aforesaid settled proposition of law and the judgments rendered by this Court in the case of **Smt. Maina Devi versus State of U.P. 2013(83) ACC 902** and **Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483 (All), and Rajbir Singh**

Tyagi Vs State of U.P. and Others 2018 SCC Online AII 5986, this Court is of the view that the properties, which were attached, were acquired by the appellant with the aid of his earning from legal resources and not by commission of any offence triable under the Act as it is settled law that the properties being made subject matter of attachment under Section 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act and also the impugned orders were not passed on reasons which are relevant and material. In the present case from the perusal of the impugned order dated 13.4.2022 and record it appears that only on the basis of the police report, the District Magistrate has attached the property in question, no material was supplied to the District Magistrate to have reasons to believe that the property in question was acquired by the gangster the present appellant as a result of commission of any offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also from the record. It appears that the District Magistrate has no material in support of the police report that the property in question was acquired by the present appellant being gangster even though the proceedings were not followed as per the provisions of the Act. It appears that the appellant was having enough source of income from his business at Mumbai as well as at his native place, from which the appellant had acquired the properties and even the properties were acquired by the appellant much prior to the registration of criminal cases and imposition of Gangster Act, which was invoked in the year 2021 and the impugned order of attachment was passed in mechanical manner without application of mind and is arbitrary. Thus the impugned order dated 13.04.2022

passed by the District Magistrate, Lucknow and the impugned order dated 5.1.2023 passed by the Additional Session Judge, Court No.8/Special Judge, Gangsters Act, Lucknow are illegal and the same are liable to be quashed.

24. In view of above facts and circumstances of the case, the impugned orders passed by the courts below cannot be said to be passed in correct perspectives as they are not sustainable in the eye of law and require interference by this Court, the prosecution has failed to establish that the provisions of Sections 2 and 3 of the Gangster Act are attracted in the case of appellant, and further the appellant's property is also not attached in accordance with law, as the prosecution has failed to establish that the property in question acquired and owned by the appellant has been earned from the income indulging in anti social activities. The enquiry under Section 16 was not done in accordance with the Act, the provisions of Sections 14, 15 & 17 were also not followed in accordance with the Act, thus the entire proceeding initiated in pursuance thereof is vitiated.

25. Accordingly, the present appeal is **allowed**. The impugned order dated 13.04.2022 passed by the District Magistrate, Lucknow in Case No. 2850 of 2021 Computerized Case No. D202110460002850 (State Vs. Waseem Khan) under section 14(1) of Gangster Act and the impugned order dated 5.1.2023 passed by the Additional District and Sessions Judge/Special Judge, Court No. 8/Special Judge, Gangster Act, Lucknow in Criminal Appeal No. 84 of 2022 (Waseem Khan Vs. State of Uttar Pradesh and another) and Criminal Misc. Case No. 735 of 2022 (State of U.P. Vs. Waseem Khan) are hereby quashed.

The District Magistrate, Lucknow/opposite party no.2 is directed to release all the properties of the appellant attached vide order dated 13.04.2022 in favour of appellant, forthwith.

No order as to costs.

(2023) 5 ILRA 870
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED:LUCKNOW 27.04.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Criminal Appeal No. 842 of 2023

Indramani Yadav & Ors. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:

Sameer Singh, Pawan Kumar Pandey, Shashank Singh

Counsel for the Respondents:

G.A., Vikas Verma

A. Criminal Law - The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 14A(1) - Indian Penal Code, 1860 - Sections 147, 323, 326-A, 504 and 3(1)X SC/ST Act-Challenge to –summoning order u/s 3(1)X SC/ST Act-Apex Court held in very clear words that hurling abuses naming the caste in the public place or at the place of public view, would only constitute an offence under SC/ST Act unless it is established, the trial court has to judicially scrutinize the factum that whether the words spoken are in the public view or public place-In the instant case, on cry of the family members of the complainant , the village persons reached inside the house and they saw that the accused persons are beating and hurling abuses to the family members inside the house which is admittedly not a public place-

Thus, the learned trial court did not apply its judicial mind while issuing the summons against the applicants u/s 3(1)X of SC/ST Act-Resultantly, summoning order is set aside to the extent of issuance of summons u/s 3(1)X of the SC/ST Act.(Para 1 to 18)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Hitesh Verma Vs St. of U.K. & Anr (2020) 10 SCC 710

2. Ashwani Kumar Vs State & anr. WP (Crl.) No. 1593 of 2006 & Crl M.A. No 6859 of 2006

(Delivered by Hon'ble Shree Prakash Singh, J.)

(1.) Heard Shri Sameer Singh, Advocate assisted by Shri Shashank Singh, learned Counsel for the appellants, Shri Anirudh Kumar Singh, learned A.G.A.-I for the State.

(2.) This criminal appeal under Section 14A(1) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been filed with a prayer to quash the summoning order dated 04.02.2023 under Section 147, 323, 326-A, 504 of IPC and 3(1)X SC/ST Act, 1989 arising out of Complaint Case No. 118 of 2019 (Jagannath Vs. Sitaram & Ors.) pending before the learned Special Judge, SC/ST Act, Ambedkar Nagar and the entire criminal proceedings arising out of the aforementioned complaint case.

(3.) Learned Counsel appearing for the appellants submit that the appellants are innocent and have falsely been implicated in the instant matter. He submits that the First Information Report was lodged on 09.01.2017 and thereafter, the Investigating

Officer conducted investigation and found no material against the appellant so far as the allegations leveled in the First Information Report is concerned and thus the final report was submitted on 05.07.2017. On such final report, the complainant filed the protest application on 06.06.2018 and the same was treated as a complaint case and the Magistrate and learned trial Court has recorded the statement of the complainant as well as the witnesses under Section 200 & 202 of the Cr.P.C. He has drawn attention of this Court towards the protest application, which reveals that the allegation is regarding the fact that the accused persons attacked over the injured as well as other family members and thereafter, they entered into the house of the complainant and have beaten and poured certain inflammable substance over the son of the complainant and as a result, he got burnt.

(4.) The contention of the Counsel for the complainant is that along with other sections of the IPC, the Magistrate has summoned the appellants under Section 3(1)X of the SC/ST Act. He has further drawn attention of this Court towards the statement of the complainant, which has been annexed on Page - 100 and has referred that the complainant himself has stated before the trial Court that the incident took place inside of the house and after hue and cry of the complainant, the village people came over there and the appellants were rescued. He further submits that the learned trial Court has ignored the fact that the incident did not take place in public view and therefore, the summons under Section 3(1)X of the SC/ST Act could not have been issued against the appellants.

(5.) In support of his contention, he has placed reliance on a judgment reported in **(2020) 10 SCC 710; Hitesh Verma Vs. State of Uttarakhand & Anr.**; and has referred Paragraphs 14, 17 & 18 of the said case. Paragraphs 14, 17 & 18 of the judgment are quoted hereunder:-

"14. Another key ingredient of the provision is insult or intimidation in 'any place within public view'. What is to be regarded as 'place in public view' had come up for consideration before this Court in the judgment reported as Swaran Singh V. State. The Court had drawn distinction between the expression 'public place' and 'in any place within public view'. It was held that if an offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, then the lawn would certainly be a place within the public view. On the contrary, if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then it would not be an offence since it is not in the public view. The Court held as under:

"28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by Appellants 2 and 3 (by calling him a 'chamar') when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn

would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression 'place within public view' with the expression 'public place'. A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies."

17. In another judgment reported as Khuman Singh V. State of M.P., this Court held that in a case for applicability of Section 3(2)(v) of the Act, the fact that the deceased belonged to Scheduled Caste would not be enough to inflict enhanced punishment. This Court held that there was nothing to suggest that the offence was committed by the appellant only because the deceased belonged to Scheduled Caste. The Court held as under:-

"15. As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to 'Khangar' Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable." 18. Therefore, offence under the Act is not established

merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling abuses is against a person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out.

(6.) Relying upon the aforesaid judgment, he submits that the Apex Court has drawn distinction between the expression "public place" "and in any place within public view" and it has been held that if an offence is committed outside the building etc. or in the lawn, outside a house and the lawn can be seen by someone from the road or a lane outside the boundary wall, then the lawn would certainly be a place within public view and thus it is borne out from the aforesaid ratio that so far as the offences under SC/ST Act is concerned, that is to be scrutinized on the aforesaid test.

(7.) He has also placed reliance on the judgment rendered in **Writ Petition (Crl.) No. 1593 of 2006 & Criminal M.A. No. 6859 of 2006; Ashwani Kumar Vs. State & Anr.**; and has referred paragraph 9 & 17 of the judgment. Paragraph 9 & 17 of the said judgment is quoted herein below:-

" 9. Proposition of law thus is clear. Simply because Section 3(1)X of SC/ST Act finds mention in the FIR by itself cannot be a ground to conclude that prima facie an offence under the along said Section of SC/ST Act has been made out. Judicial scrutiny of the documents in suchlike cases is permissible to evaluate whether the

material relied upon by the prosecution revealed the existence of basic ingredients of the offence or not. For that limited purpose, the Court can sift and weigh the material placed before it, before examining the question whether on the allegations made in the FIR, prima facie any offence under Section 3(1)X of SC/ST Act is made out.

....17. Expression "public" is a polymorphous word which has different meanings, which is used as noun or as an adjective. As noun, "public" means a body of people at large; the community at large, without reference to the geographical limits of any corporation like a city, town or country, the people; the whole body politics, or all the citizens of the state. In other words, the word public does not mean all the people or most of the people nor very many of the people of a place, but so many of them as contradistinguishes them from a few. Therefore, public means inhabitants of a particular place, may be all or few or the people of the neighbourhood. As an adjective, 'public' would have meaning upon the subjects to which it is applied. SC/ST Act has been enacted with a view to protect a weaker section of the society from various kinds of atrocities that might be perpetrated against SC/STs which find enumeration in Section 3 of the SC/ST Act as constituting an offence. Court has to keep in mind that offence under the SC/ST Act are quite grave and provide stringent punishment and therefore, stronger proof is required. Court has to adopt an interpretation which suppresses or evades the mischief which might have been played and advances the object of the Act. Therefore, 'public view' appearing in Section 3(1)X of SC/ST Act has to be interpreted to mean the presence of the public persons, however small may be, and those persons are independent and

impartial and not interested in any of the parties. In other words, persons having any kind of close relationship or association with the complainant have to be excluded from the definition of 'public view'."

(8.) Referring the aforesaid judgment, he added that simply because Section of SC/ST Act finds mention in the FIR, it cannot be a ground to reach at conclusion that, prima facie, an offence is made out but the judicial scrutiny of the documents in such like cases is required to evaluate, whether the material relied upon by the prosecution reveals the existence of the basic ingredients of the offence or not?

(9.) He also contends that bare reading of the order passed by the trial Court, which is impugned with this appeal, is evident that merely on the basis of the assertion and without scrutinizing the evidence, the same has been passed. The complainant himself has stated that certain people attacked over the house and after cry of the family members, the village persons came there and thus, the ingredients of Section 3(1)X do not attract. Concluding his arguments, he added that even the statement of the complainant is also evident that the incident has taken place inside of the house which is neither public place nor place with public view, and, therefore, the order dated 04.02.2023 is without the application of judicial mind and considering the law enunciated by the Apex Court, the same may be set aside.

(10.) On the other hand, learned Counsel appearing for the complainant has vehemently opposed the contentions aforesaid and submits that the statement has been recorded by the trial Court under Sections 200 & 202 of Cr.P.C. which clearly shows that the offence has been

committed by the appellants and whereby, the trial Court considering the same has issued the summon under Section 3(1)X of SC/ST Act along with Sections 147, 323, 326A & 504 of IPC. He has drawn attention of this Court towards the impugned order and submits that the trial Court has considered the statement of the complainant as well as the witnesses under Sections 200 & 202 of Cr.P.C. respectively and also given its finding and thus, the summoning order, issued against the appellants, do not assail any infirmity and erroneous and, therefore, the instant appeal has no merit and is liable to be dismissed.

(11.) Per Contra, learned A.G.A. appearing for the State has also controverted the contention of Counsel for the appellants and added that after recording the statement of the complainant and the witnesses, the order has been passed thereby giving the reasonings and, thus, no interference is warranted.

(12.) Having heard learned Counsel for the parties and after perusal of the material placed on record, it transpires that initially the FIR was lodged on 09.01.2017 against the appellants and after investigation, when it was found by the investigating officer that there is no substantive material or evidence against the appellants, the final report was submitted and when the protest application was filed on 06.06.2018, the Magistrate, treating the same as a complaint case, has recorded the statements of the complainant as well as the witnesses and issued summons under Section 3(1)X of SC/ST Act including other sections of IPC.

(13.) When this Court examines the statement of the complainant, it reveals that

the complainant himself had admitted that the incident had taken place inside of the house and it has been further stated that the accused persons came and attacked over the house and entered into the same and started beating and on the cry of family members, the village persons came over there and thus, prima facie, there seems to be no evidence with respect to the fact that certain other persons were there than the family members who have seen or heard the incident and thus, prima facie the alleged occurrence cannot said to be happened in public place or place within public view?

(14.) This Court has also considered the ratio of the judgment of Apex Court rendered in the case of **Hitesh Verma (Supra)**, which clearly says that if the incident took place outside the area of the house or in the lawn but unless that access is within of the public, the same cannot be said to be happened at public view or public place. The reliance has also been placed on a judgment rendered in the case of **Ashwani Kumar (Supra)** wherein it has been held that only mentioning the sections of SC/ST Act cannot be a ground to conclude committal of an offence under the aforesaid Act, unless the judicial scrutiny is done.

(15.) After the aforesaid submissions and discussions, it emerges that Hon'ble the Apex Court has held in very clear words that hurling abuses naming the caste in the public place or at the place of public view, would only constitute an offence under SC/ST Act and unless it is established, no criminal proceeding can go on in such cases and for reaching on the conclusion, the trial Court has to judicially scrutinize the factum that whether the words spoken are in the public view or public place. So

far as the present case is concerned, on cry of the family members of the complainant, the village persons reached and they saw that the accused persons are beating the family members though the abuses were hurled inside of the house, which is admittedly not a public place.

(16.) Considering the aforesaid submissions and discussions, it is decipherable that the learned trial Court did not apply its judicial mind while issuing the summons against the applicants under Section 3(1)X of the SC/ST Act. Resultantly, the summoning order dated 04.02.2023 is set aside to the extent of issuance of summons under Section 3(1)X of the SC/ST Act.

(17.) It is directed that the trial Court shall proceed accordingly.

(18.) The appeal is hereby **partly allowed** with the aforesaid observations.

(2023) 5 ILRA 875
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 1159 of 2017
 with
 Crl. Appeals No. 1160 of 2017 & 1162 of 2017

Gaurav Sharma @ Sonu & Anr....Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

Sri Rakesh Kumar Singh, Sri Amit Kumar, Sri Brijesh Sahai, Sri Dileep Kumar, Sri Raj Singh Parihar, Sri Rajrshi Gupta, Sri Saurabh Yadav, Sri Vimlendu Tripathi

Counsel for the Respondent:

G.A., Sri Ambar Khanna, Sri Raj Kumar Khanna,
Sri M.J. Akhtar, Sri V.M. Zaidi (Sr. Advocate)

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Sections 147, 148 & 302/149 - Arms Act, 1878 - Section 25 - Challenge to-Conviction-testimony of PW-1 is not reliable as he is an interested witness and his conduct is not found natural on many counts-More so, he has criminal antecedents as he had been to jail-Delay of 15 days in recording his statement, despite him being the sole eye witness is troubling-he neither lodged FIR nor is the witness of inquest-PW-2 wife of the deceased lodged the FIR-testimony of PW-2 of last seen evidence is not convincing-The two firearms and iron rod recovered from the accused are from open place and there are no independent witnesses to establish the recovery itself, the witnesses of recovery of firearm are only the police personnel and iron rod had no bloodstains on it-deceased body was brought to mortuary as unknown and later this entry was scored off-no explanation by the prosecution as to why such entry was scored off-In his cross-examination PW-10 admitted that dead body was handed over to him at night one day before but the dead body was brought to mortuary at 7.30 in the next day morning-Since the available evidence on record has not been subjected to a careful scrutiny by the court below, therefore accused appellants are clearly entitled to benefit of doubt.(Para 1 to 61)

The appeals are allowed. (E-6)

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.)

1. These three appeals are directed against the judgment and order dated 20.01.2017, passed by the learned Additional Sessions Judge Court No. 01, Bijnor in Sessions Trial No. 85 of 2014 (State Vs. Gaurav Sharma @ Sonu and

others), arising out of Case Crime No. 22 of 2013, under Sections 147, 148, 302/149 IPC, Police Station – Kotwali Nagar, District – Bijnor; in Sessions Trial No. 86 of 2014 (State Vs. Gaurav Sharma @ Sonu), arising out of Case Crime No. 25 of 2013, under Section 25 of the Arms Act, Police Station – Kotwali Nagar, District – Bijnor; in Sessions Trial No. 87 of 2014 (State Vs. Gautam), arising out of Case Crime No. 142 of 2013, under Section 25 Arms Act, Police Station – Kotwali Nagar, District – Bijnor; and in Sessions Trial No. 88 of 2014, arising out of Case Crime No. 22 of 2013, under Sections 147, 148, 302/149 IPC, Police Station – Kotwali Nagar, District – Bijnor; whereby the appellants Gaurav Sharma @ Sonu, Gautam Sharma, Uttam Kumar Sharma, Sandeep Bhardwaj and Ankit Bhardwaj have been convicted under section 302 read with 149 IPC and sentenced to life imprisonment along with fine of Rs.25,000/-, each, and in default of payment of fine to undergo one year's additional imprisonment; rigorous imprisonment for three years alongwith fine of Rs.3,000/- each, coupled with a default sentence of three months, under Section 148 I.P.C; and rigorous imprisonment for two years alongwith fine of Rs.2,000/- each, coupled with a default sentence of two months, under Section 147 I.P.C. Accused Gaurav Sharma @ Sonu and Gautam Sharma have also been sentenced to rigorous imprisonment for seven years alongwith fine of Rs.5,000/- each, coupled with a default sentence of six months, under Section 25 Arms Act. All the sentences are directed to run concurrently.

2. The prosecution case is based upon a written report (Ex.Ka.1) of the informant (PW-2), who happens to be the wife of the deceased, as per which, the maternal

brother of her husband ,namely Gautam and Gaurav, sons of Parasuram Sharma, came to her house and talked to her husband for taking him to Surendra Nagar, near Awas Vikas, whereafter her husband informed that he is going with Gaurav and Gautam and would return soon. Amount running into lacs were due and payable to informant's husband by these two persons (Gaurav and Gautam). When the husband of PW-2 did not return, the informant got anxious and asked her brother-in-law (PW-1) to go to Surendra Nagar and look for him. PW-1, accordingly, left for Surendra Nagar where the accused Gautam, Gaurav and Uttam sons of Parasuram Sharma and Sandeep Bhardwaj and Ankit Bhardwaj, brother-in-law of Gaurav, were assaulting her husband with iron-rods. PW-1 raised an alarm, whereafter the aforesaid accused fired on her husband and fled. PW-1 had seen the assailants who killed her husband and, therefore, a report be lodged. On the basis of this information a first information report came to be lodged under Sections 147/148/149/302 as Case Crime No. 22 of 2013.

3. Investigating Officer proceeded to the spot and collected plain and bloodstained sand, grits, etc. which were kept in separate boxes and sealed vide recovery memo marked as Ex.Ka-4. The Investigating Officer also recovered a 315 bore empty and bloodstained flat bullet which were sealed vide recovery memo marked as Ex.Ka.5. The police also recovered from the spot the Scooty belonging to deceased bearing Registration No. UP-20 J-3492 and Glasses with golden frame, mobile, a receipt of water tax and silver anklet which were sealed vide recovery memo marked as Ex.Ka-6.

4. On the date of incident itself the accused Gautam was arrested. He

confessed his guilt and took the police to the place where he had hidden the weapon of assault. He took out a 315 bore tamancha from the bushes on the Bairaj Road, nearly 40 steps from the bridge. The recovered firearm was opened and a 315 bore live cartridge was found in the barrel. A memo of recovery of tamancha was consequently prepared vide Ex.Ka.9. On the basis of such recovery of firearm another first information report (Ex.Ka.17) came to be lodged as Case Crime No. 142 of 2013, under Section 25 of the Arms Act at 15.30 pm on the date of incident.

5. Yet another FIR was lodged at Kotwali Sadar, Bijnor on 13.1.2013 at 18.05 PM in respect of the alleged incident of the same day at 4.15 PM, wherein on the pointing out of the accused Gaurav Sharma a firearm with empty stuck in the barrel was recovered from the shrubbery in a dry canal. Recovery memo has also been prepared of this 315 bore tamancha (Ex.Ka.7) which allegedly was used by the accused for firing on the deceased. Smell of gun powder in the barrel was found.

6. Inquest was conducted on 12.1.2013 (Ex.Ka-10), wherein the time for commencement of inquest proceeding contains an overwriting to make it 19.30. There is also a clear overwriting on the time of completion of panchayatnama to make it look 20.30 hours on 12.1.2013. The inquest witnesses were Dr. Mitu Kant Sharma, Shivam Awasthi, Rajat Awasthi, Manikant Sharma and Lavi Sharma. The dead body on the Activa Scooter was found in front of an under construction house of M.P. Singh. Houses were under construction in Surendra Nagar Colony. Blood was oozing out from his head and 315 bore empty was also found near the place of incident. The deceased had worn a sando

vest, a white woolen vest, white jersey, gray shirt and other clothes on the lower part of the body. Inquest witnesses found bloodstained wound on the head and the back as well as his wrist was fractured. In order to ascertain the cause of death the witnesses opined that the postmortem be conducted on the body of the deceased. The dead body was sealed and given in the custody of Constables 1516 Amit Kumar and 702 Parmendra Singh.

7. Postmortem was conducted on the dead body of the deceased on the next day i.e. 13.1.2013. Following examinations have been reported in the postmortem, which has been proved by Dr. Bhojraj Singh (PW-5):-

“Age- 54 years.

External examination

Eyes, mouth closed

Ante-mortem Injuries

1. Gunshot wound of entry 2.0 x 1.0 cm on skull 10.0 cm above left eyebrow and margins are inverted, cavity deep.

2. Gunshot wound of exit 6.0 x 2.0 cm bone deep on left side of skull 12 cm below left ear.

3. Lacerated wound 6.0 x 1.0 cm bone deep on skull 12 cm on right eyebrow.

4. Lacerated wound 4.0 x 1.0 cm, bone deep, 3 cm behind to injury no. 3.

5. T.S. 6.0. x 3 cm on left elbow with fracture of both bone.

6. T.S. 10.0 x 6.0 cm with fracture of middle phalynx of left index finger with fracture of metacarpal.

7. M. AS with TS in area of 4.0 x 2.0 cm on right forearm with fracture of both bone.

8. Gunshot wound of entry 5.0 x 2.0 cm on left side of back just below scapula.

Cause of Death

Shock and haemorrhage due to ante-mortem injuries.”

8. The investigating officer after recording statement of the witnesses under Section 161 Cr.P.C. and preparation of site plan on the information received from the wife of the deceased (PW-2) and another witnesses proceeded to file four separate charge-sheets on 15.1.2013 (Ex.Ka.24), 18.2.2013 (Ex.Ka.27), 9.4.2013 (Ex.Ka.30) and 17.4.2013 (Ex.Ka.31). The prosecution has also brought on record the FSL report dated 16.12.2014 (Ex.Ka.35/1, 35/2) as well as FSL Report dated 4.8.2014 (Ex.Ka.35/3, 35/4). Permission was also obtained from the District Magistrate Bijnor to launch prosecution under Section 25 of the Arms Act against the accused Gaurav Sharma and Gautam Sharma.

9. On taking cognizance of the charge-sheets, the Magistrate committed the case to the Court of Sessions where it got registered as Sessions Trial No. 85 of 2014 against Gaurav Sharma @ Sonu, Gautam Sharma, Uttam Kumar Sharma, Sandeep Bhardwaj and Ankit Bhardwaj, arising out of Case Crime No. 22 of 2013, under Sections 147, 148, 302/149 IPC; Sessions Trial No. 86 of 2014 against Gaurav Sharma @ Sonu, arising out of Case Crime No. 25 of 2013, under Section 25 Arms Act; Sessions Trial No. 87 of 2014 against Gautam Sharma, arising out of Case Crime No. 142 of 2013, under Section 25 Arms Act, Police Station – Kotwali Nagar, District – Bijnor.

10. The prosecution in order to establish the guilt of the accused adduced documentary evidence in the form of FIR dated 12.01.2013 (Ex.Ka-19), FIR dated 13.01.2013 (Ex.Ka-21), FIR dated 12.02.2013 (Ex.Ka-17), written report

(Ex.Ka-1), recovery memo of 'Tamancha' & empty cartridge (Ex.Ka-7), recovery memo of country made pistol 315 bore & live cartridge 315 bore (Ex.Ka-9), recovery memo of iron rod (Ex.Ka-32), recovery memo of blood stained and plain sand and concrete (Ex.Ka-4), recovery memo of empty cartridge & blood stained bullet (Ex.Ka-5), recovery memo of scooty, glass, mobile phone & Payal (Ex.Ka-6), postmortem report (Ex.Ka-2), report of forensic science laboratory dated 16.12.2014 (Ex.Ka-35/1, 35/2), report of forensic science laboratory dated 04.08.2014 (Ex.Ka-35/3, 35/4), Panchayatnama (Ex.Ka-10), charge-sheet dated 17.04.2013 (Ex.Ka-31), charge-sheet dated 09.04.2013 (Ex.Ka-30), charge-sheet dated 15.01.2013 (Ex.Ka-24), charge-sheet dated 18.02.2013 (Ex.Ka-27), order of District Magistrate dated 29.01.2013 (Ex.Ka-25), order of District Magistrate dated 04.03.2013 (Ex.Ka-28), Site plan with Index dated 17.03.2013 (Ex.Ka.29), Site plan with Index dated 17.01.2013 (Ex.Ka.8), Site plan with Index dated 15.01.2013 (Ex.Ka.23), Site plan with Index dated 15.03.2013 (Ex.Ka.33), Site plan with Index dated 18.02.2013 (Ex.Ka.26), Site plan with Index dated 12.01.2013 (Ex.Ka.3).

11. Prosecution has also adduced oral evidence of Shrikant Atrey (PW-1), eye witness of the incident (brother of the deceased); Meera Atrey (PW-2), complainant, wife of deceased and witness of last seen; Yuvraj Singh (PW-3), witness, who saw the accused persons having the weapon in their hands near the flour mill of Awas Vikas; Bramha Dutt (PW-4), who has proved the confession made by Gautam Sharma, Uttam Kumar Sharma, Sandeep Bhardwaj and Ankit Bhardwaj before him; Dr. Bhojraj Singh (PW-5), who had

conducted the autopsy. S.I. Abdul Salam (PW-6), Ist I.O. of Crime No. 22/2013 (since 12.1.2013 to 17.1.2013) proved the chick, spot inspection and Fard of recovery memo recovered from the place of incident and proved Blood Stained earth and empties; S.I. Brijpal Singh Tomar (PW-7), proved the recovery of Tamancha 315 Bore, Challan Lash, Photo Lash, Letter of C.M.O., Letter of R.I.; Constable Ramdhan Singh (PW-8), proved the chik FIR on record and carbon copy of G.D. under Section 25 of Arms Act; Head Constable Indradev (PW-9), proved chik and carbon copy of G.D. of Section 25 of Arms Act; Constable Parvendra Singh (PW-10), proved the fact that he brought the dead body from the place of incident to Police Headquarter and from Police Headquarter to Mortuary along with the police paper and letter to C.M.O.; Head Constable Santosh Vishnoi (PW-11), I.O. of Case under Section 25 of Arms Act proved the chik and recovery memo; Incharge Inspector Sunil Kumar Singh (PW-12), Iind I.O. in Crime No. 22/2013, took investigation on 25.1.2013; S.I. Surya Nath Singh Yadav (PW-13), IIIrd I.O. proved the arrest of Gautam and recovery of Tamancha 315 Bore and too kover the investigation on 8.2.2013 in Crime No. 22/2013; and Retired S.I. V.K. Baliyan (PW-14), took over investigation on 29.4.2013, proved the recovery of Iron Rod on the pointing out of Sandeep Bhardwaj and Ankit Bhardwaj.

12. PW-1 is the sole eye-witness in this case, who happens to be the brother of the deceased. He knows all the accused out of whom Gaurav, Gautam and Uttam are his maternal brothers and accused Sandeep and Ankit are the brother-in-law of accused Gaurav. This witness claims that he had come to the shop of his brother at around 4.45 pm on the date of incident. The shop

and the residence of the deceased is one and the same. While he was at the shop (situated on the ground floor) PW-2 came down stairs and informed him that the deceased had left alongwith accused Gaurav and Gautam at about 4.00 to Patel Nagar and have not returned so far. She asked him (PW-1) to go and see for him. PW-1 stated that he immediately came to Surendra Nagar and saw that his brother (deceased-Chandra Kant Atrey) was being assaulted by accused Uttam, Sandeep, Ankit, Gaurav and Gautam with iron-rod. The assault was in newly constructed house situated in Surendra Nagar. Sand, Grit, etc., were lying on the floor. PW-1 claims to have raised an alarm on which the accused Gautam and Gaurav fired on Chandra Kant Atrey due to which he fell and died instantly. The accused fled from Surendra Nagar towards Awas Vikas. PW-1 returned and informed of the incident to his sister-in-law, who lodged the report at the police station. As per PW-1 his brother had given money on loan. Huge amount was taken as loan. A house at Awas Vikas was given to live on which accused had their possession. For this reason PW-2 was fearful of going with the accused. The incident of murder has also been committed for this reason. This witness claims to have gone to the place of incident alongwith Investigating Officer from where he took bloodstained and plain sand and grits. Empty and a bloodstained flat bullet had been recovered from the place of occurrence. Signatures of PW-1 were obtained on the memos of recovery. Memo of recovery has also been prepared in respect of the recovered Activa, Glasses, etc. Accused Sandeep and Ankit claims to have absconded for long and had also extended threats to settle the matter or they too would be sent to the place of the deceased, in respect of which an NCR No. 71/2013 was got registered on 12.3.2013.

In the cross examination PW-1 has stated that his brother indulged in work of giving and taking loan. Business of the deceased included giving loans to public. 10-20 people were given loan and the witness did not know whether any security in the form of land or gold etc. were kept by the deceased for disbursing loans. He is not aware whether deceased had any fight with Dr. Prashant in respect of the shop situated in Civil Lines. PW-1 claims that he is not aware of litigation pending between the deceased with others. Deceased had a mobile but he does not remember his phone number. PW-2 also had a mobile on which PW-1 used to talk. Before leaving for Surendra Nagar, PW-1 did not inquire about the location of deceased on his phone number. He had also not asked PW-2 to contact him on phone. PW-1 was also not informed by PW-2 whether she had tried to contact her husband on phone. He has denied the suggestion that he was called later by PW-2 by calling on his mobile. The witness also claimed ignorance about the fact that the deceased had bought a house from accused Gaurav and the details of payments were maintained or not. PW-1 lives at a distance of 2 and half kilometer from the house of the deceased. The incident occurred at a distance of 2 kilometers. There is a police beat near the place of incident namely Bega Kala. There is also a police beat on the way from his house to the place of occurrence. He claims to have come straight to the police station but later said that he went via his home. He narrated the entire incident to PW-2. Statement of PW-1 was recorded by the Investigating Officer after fifteen days of the incident. It is stated that he saw all five accused assaulting the deceased with iron-rod (sariya). The entire incident occurred within 1-2 minutes and he neither tried to intervene nor tried to apprehend the

accused. He had also not thrown grits at the accused. He also did not take his brother to the doctor since his skull had opened and he died on the spot. He also did not take the dead body with him. He did not touch the dead body and, therefore, question of blood clots appearing on his clothes did not arise. As per this witness two fires were shot. The road near the place of occurrence goes from the north to south. Towards the west which was the place of occurrence. Construction was going on in a house and mason and labours were working inside but none of them came out. He later stated that the house of incident was 5-7 steps away from the road. He further stated that the place of incident is the road which is nearby the house. This witness has been confronted with his previous statement under Section 161 Cr.P.C. wherein he had disclosed that the accused were assaulting the deceased with iron-rod in a new house and that if such facts have been written by the Investigating Officer then they are wrong. He also claims to have gone to the place of occurrence with the Investigating Officer. He had shown the place of occurrence on the west side of the road going north to south. He cannot explain if any other place is shown as the place of occurrence. His brother's scooter had fallen and he left the dead body in the contact of the persons who were present at the spot but he does not remember the name of any of those persons nor was he known to them. There is no independent witness of the incident from nearby the place of occurrence. He stated that the accused had placed the tamancha on the temple of deceased and fired from close range. Similarly the other fire was shot near the back of the deceased by placing the tamancha on the body of the deceased. This witness has admitted that there had been complaints but he is not aware of criminal case launched against his

brother. However, he knew that he had remained in Jail for two months. There are various cases relating to landed property. The deceased had a shop of submersible pump which he used to open at 10.00 and then closed 3-4 pm. The witness later stated that he used to close the shop at 6.00 pm. There were servants in the shop but none of them had been sent to locate the deceased. His brother had left at about 4.00 whereas he had gone to locate him at quarter to 5.00. This witness has denied the suggestion that he had not seen the incident and that the dead body of the deceased was found later and a false case has been set up to implicate the accused.

13. PW-2 is the wife of the deceased. She has stated her husband called her that at 4.00 pm. House and shop of deceased is at one place. Shop is on the ground floor whereas the house is on the first floor. On hearing the call of the deceased she came on the balcony and saw that accused Gaurav and Gautam were standing with her husband. Husband of PW-2 (deceased) informed that he is going with Gaurav and Gautam to Awasthi Vikas Surendra Nagar. These persons are taking him to Surendra Nagar and that he is going with them. The deceased left alongwith the accused Gaurav and Gautam. PW-2 claims that she got engaged with domestic work. She was concerned and was loitering around in the balcony. She saw that her brother-in-law PW-1 was at the shop. PW-2 then came down the stairs to the shop and informed PW-1 that the deceased had gone with Gaurav and Gautam to Surendra Nagar and has not returned and, therefore, he may go in search of him. PW-1 left and later informed that her husband was shot dead by the accused. Written report of the incident was got scribed by her Nandoi Dhananjay Awasthi on which she signed.

The written report has accordingly been proved and she has explained the relationship. She has stated that there was outstanding loan of lacs of rupees of deceased on the accused Gaurav and Gautam and that is why they have killed her husband. Whenever her husband used to go with accused Gaurav and Gautam she used to fear of any fight and as the deceased has left with them, therefore, she was disturbed and had asked PW-1 to search him out. After the death of her husband she received a cheque dated 16.1.2013 of Rs. 5,60,000/- signed by Gaurav Bhardwaj payable at Axis Bank which has been produced during her cross examination and marked as Exhibit 1.

PW-2 has been cross examined. She has explained the location of her house and the shop. On the date of incident her husband had called her and when she came out her husband told that Gaurav and Gautam are with him and are taking him to Surendra Nagar. After saying this the deceased left with them. The deceased had not stated anything else. She denied the suggestion that there is no house above the shop. Behind the shop there is a godown above which is her house where she used to reside. There is a small balcony on the east. She has denied the suggestion that the shop is not visible from the balcony. Her husband had told her that he is going with the accused to Awas Vikas Surendra Nagar. In the report is mentioned as Awas Vikas near Surendra Nagar. The witness is not aware whether Awas Vikas and Surendra Nagar are two separate and distinct localities and there are residential houses between the two colonies. She has denied having bought any house from Gaurav in Shalini Enclave. She does not know anyone with the name Archana. Anita Sharma is her Nanad (husband's sister) and that she

has not purchased any house with Anita from Gaurav, rather house was purchased from Abhijit. This house is in Shalini Enclave. She is not aware whether Shalini Enclave falls between Surendra Nagar and Awas Vikas. This witness has denied the suggestion that she had to pay some money to Gaurav and he has been implicated so as to avoid payment of balance amount.

There is no enmity between accused and her husband. Her husband was not involved in property business but from time to time used to purchase plots and in case of need used to sell them. Her husband was not involved in money lending business. On the date of incident her husband had gone at 4.00. She had not started his search till quarter to 5.00. She informed PW-1 that her husband has been taken by the accused and she fears of some fight between them and, therefore, he may visit him while going back home.

PW-2 in his further cross-examination has stated that on hearing news of murder she came first to police station and thereafter came to Surendra Nagar. PW-1 had informed at about 05.15 – 05.30 that her husband has been done to death. She had not asked PW-1 to scribe the report as he had seen the incident and that she may go to her husband. She also does not remember as to who brought Dhananjay. She had not gone near the dead body with police but came to stay with PW-1 by when the police already arrived. She has denied the suggestion that she had no gone to Surendra Nagar as the dead body was not there. She has also denied the suggestion that the first information to her was that of her husband's body was lying in the mortuary.

PW-2 has admitted that there were several litigations going on between her

husband and other persons. These cases were in respect of agricultural land. She has agricultural land in village Rasoolpur. She has further not aware about cases pending with Kadwa son of Kisan. She was also not aware that there are 8-10 cases of deceased with Ramesh son of Buddha. She knew doctor Prashant who is neighbour and with whom case was pending for vacating the shop. He husband also had litigation for the last 27 years in respect of a house with a boy of Annapurna Hotel. She denied the suggestion that her husband had relations with other ladies and that the police visited her house in this connection. She denied that at the time of occurrence there was no PNT Landline number in her house and shop. PW-2 has further stated that she has no written proof of the fact that loan of lacs of rupees was due from the accused Gaurav and Gautam. She was also not aware of any witness of this transaction. She also denied the suggestion that the story of loan is narrated on legal advise. Cheque (paper no.37ka) was not filled in her presence. He husband died on 12.01.2013 and the date on the cheque is of 16.01.2013. She had not informed the police after receiving of cheque. She is not aware as to who had filled the cheque or who had signed it. This witness has denied the suggestion that on legal advise she has produced cheque with forged signatures. She was not aware about bank passbook and cheque book of Gaurav got lost in respect of which newspaper item was published on 20.06.2012. This witness has further admitted that there is a SRS Mall near his house. She has three daughters and a son. She has denied that she had gone to SRS Mall to watch a movie between 3 PM to 6 PM. She also denied the fact that the incident of murder of deceased was intimated to her while she was seeing the movie.

14. PW-3 is friend of the deceased. He has stated that while he was returning through Avas Vikas he met the five accused who were armed with country made pistol (tamancha) and iron rod and were in perplexed state and were running away by saying that they have finished the person. This witness enquired from them as to what happened on which the accused asked him to be concern with his own work. In the cross-examination PW-3 has admitted that he has no document to show that he is a contractor or that his version going to office was incorrect since 12.01.2013 was a second Saturday. PW-1 is his closest friend. He informed PW-1 of what he saw 15-16 days after the incident and that he had not disclosed him about it earlier. His statement was recorded after 18 days. This witness is an accused of a case under section 302 IPC. He has denied the suggestion that he had not seen anything but giving a false statement.

15. PW-4 has stated that on 21.01.2013 he was at Moradabad in the house of his brother-in-law (Sadu) where the accused came and confessed their offence. The accused also stated that he would vacate the house and would honestly return the amount.

16. PW-5 to PW-14 are the formal witnesses and, therefore, their statements shall be referred as and when require.

17. The prosecution relies upon following evidence to implicate the accused appellants:-

(i) The oral testimony of PW-1 as eye witness to the incident of assault and murder of the deceased;

(ii) Testimony of PW-2 who has lastly seen the deceased in the company of

accused Gaurav and Gautam with whom the deceased left and later the news arrived of his brutal murder;

(iii) The recovery of two firearms and iron rod on the pointing out of the accused as well as the FSL report on the strength on which the prosecution alleges that implication of accused appellants in the matter is clearly established;

(iv) The testimony of PW-3 and PW-4 who have seen the accused in perplexed state soon after the incident and the alleged admission of the accused of their committed the offence so that the matter be amicably resolved.

18. The evidence on the above counts have been taken note of by the court below in order to return a finding of guilt against the accused appellants. The existence of motive; ocular testimony of PW-1; ocular testimony of last seen of first informant and the recovery of weapon of assault are primarily the circumstances which have been factored in by the court below in order to return a finding of guilt beyond reasonable doubt.

19. The judgment of conviction and sentence is challenged by the accused appellants, who contend that they are innocent and have been falsely implicated in the matter. The defence contends that in fact an unknown dead body was found and was deposited in the mortuary by Constable 1516 Amit Kumar, in respect of which relevant entries were made in the relevant registers and such information was also sent to concerned police station. It is alleged that these entries have subsequently been scored off and no other incident was reported around the same time. It is thus alleged that police papers were manipulated to give different colour to the incident in connivance with the prosecution witnesses

so as to falsely implicate the accused appellants and that none has seen the incident and the unknown body found was that of the deceased. The defence has further setup a case that in fact PW-2 had gone with her children to see a movie and it was at the theater that information about murder of the deceased was received by her. Newspaper report dated 13.01.2013 has been brought on record in order to substantiate it. The defence has, therefore, questioned all facets of prosecution story in order to contend that the accused appellants have been falsely implicated.

20. Sri Vimlendu Tripathi, learned counsel for the accused appellants submits that PW-1 was neither present at the spot nor has he seen the incident. This contention relies upon the following circumstances: (a) statement of PW-1 was recorded after 15 days of the incident; (b) PW-1 has not lodged the report nor is he witness to the inquest and, therefore, his presence at the place of occurrence is highly doubtful; (c) the conduct of PW-1 in not making any attempts to save the deceased or to rush in hospital or even lodging a report are the circumstances which creates a doubt on his presence and; (d) there are numerous cuttings in the police papers as also the register to show that police papers were manipulated and the signatures on the recovery of empties from spot are fabricated. It is also pointed out that the FIR has been sent to magistrate after a week.

21. The second limb of argument essentially questions the testimony of PW-2, who is alleged to have lastly seen the two accused taking the deceased. It is urged that the shop of deceased was on the ground floor and was not visible from first floor of the house, which was situated after

the open field behind the shop. It is urged that in fact PW-2 was at the SRS Mall seeing a movie and her presence in the house is not proved. The testimony of PW-2 is impeached on various other factual aspects also.

22. Countering the evidence relating to recovery of firearms and empties, it is urged that the flat bullet found at the place of occurrence has not matched with the recovered tamancha. It is also urged that there is no independent witness of recovery and the report of FSL cannot be read as a corroborative piece of evidence to implicate the accused appellants.

23. It is lastly urged on behalf of the accused appellants that the testimony of PW-3 and PW-4 are wholly unreliable and cannot constitute any basis for implication of the accused appellants in the matter. It is argued that the testimonies produced by the prosecution are of interested witnesses and though existence of independent persons at the place of occurrence is admitted, yet none of them is produced, which questions the prosecution story.

24. On behalf of the prosecution and the informant the contentions are strongly opposed and it urged by Sri V. M. Zaidi, learned Senior Counsel for the informant alongwith Sri Ambar Khanna and learned A.G.A. for the State that the prosecution evidence is trustworthy and reliable and, therefore, the court below has rightly convicted and sentenced the accused appellants. It is further argued that there is no reason to falsely implicate the maternal brother in the offence and, therefore, the appeal lacks merit.

25. We have heard learned counsel for the parties and perused the record of

appeals as well as original records of court below.

26. Prosecution on the strength of testimonies of witnesses as also documentary evidences has attempted to establish that the deceased has been assaulted and shot dead by the accused appellants, in prosecution of their common object as members of unlawful assembly, since they owed huge amount of money to him which they wanted to avoid repaying. The court below has analysed the evidence on record to come to the conclusion that prosecution has established its case beyond reasonable doubt. We, therefore, are required to examine as to whether the prosecution has succeeded in proving its case beyond reasonable doubt and the conclusion of court below is sustainable or not? We are also required to examine as to whether sentence awarded by the court below to the accused appellants commensurates with the guilt established on their part?

27. The evidence on record goes to show that the deceased was assaulted and shot dead. The postmortem report dated 31.01.2013 has been proved by the Autopsy Surgeon Dr. Bhojraj Singh (PW-5). There is a gunshot wound of entry of 2cm x 2cm on the left side of skull with corners inverted with corresponding gunshot wound of exit of 6cm x 2cm, 12cm below the ear. The second gunshot wound of entry is on the left side of the waist of size 5cm x 2cm. In addition to the above two gunshot injury the injury nos.3 and 4 are lacerated wound and injury nos.5 and 6 are traumatic swelling. A flat bullet is recovered from the stomach of the deceased and his seventh and eighth ribs were found fractured. The left lung was also lacerated. The inquest report (panchayatnama- Ex.Ka.10) also

shows that the body of deceased Chandra Kant Attrey was found on his activa scooty in front of an under-construction house. Gunshot injury was noticed on the head of the deceased as also on his back and his ribs were found fractured. The inquest witnesses opined that the deceased died on account of ante-mortem injuries sustained by him. The evidence on record, therefore, conclusively proves that the deceased died a homicidal death.

28. The prosecution evidence to implicate the accused appellants is primarily three fold. (i) Ocular testimony of PW-1, who allegedly has seen the incident; (ii) ocular testimony of the first informant (PW-2) who lastly saw the deceased going alongwith accused Gaurav and Gautam and soon thereafter the dead body was found and; (iii) the recovery of firearm on the pointing out of the accused Gaurav and Gautam as well as FSL report connecting empty cartridge found at the place of occurrence with the recovered firearm. We shall now take up the abovenoted prosecution evidence, one by one.

29. PW-1 is the sole eye witness of the occurrence. He is the real brother of the deceased and is thus a related witness. He claims to have come to the shop of deceased at about 04.45 PM on the date of occurrence and his sister-in-law (PW-2) came downstairs after seeing him at the shop and informed him that the accused Gaurav and Gautam had taken his brother to Patel Nagar at about 04.00 PM and has not returned. Informant, therefore, asked PW-1 to go and look for his brother. PW-1 claims that he immediately came to Surendra Nagar and saw the accused assaulting his brother with iron rods. In the examination-in-chief PW-1 has stated that his brother was being assaulted in an under-

construction new house at Surendra Nagar. Grit, sand etc. were lying nearby. He claims that when he raised alarm the accused shot at his brother and he died. The accused then fled from Surendra Nagar to Avas Vikas Colony.

30. The testimony of PW-1 has been carefully examined by us and we find following aspects intriguing in it i.e. (a) PW-1 is the brother of deceased and although he was present at the place of occurrence but neither he tried to save his brother nor made any attempt to rush him to a hospital or a doctor. Though it is settled that there is no fixed norm of the manner in which the witness may react and people may react differently, in such circumstance, but some resistance is expected on part of PW-1 on seeing his brother being assaulted. Attempt to take the injured to the hospital or to a doctor is ordinarily expected even if chances of survival of injured are bleak; (b) PW-1 neither touched the body of his brother lying on his scooty nor called anyone for help and left the body on the spot in care of others present on the spot without even knowing their identity so as to ensure the safety of corpse; (c) interestingly, PW-1 admits that he crossed the police station and allegedly halted there but did not lodge any police report. Being the real brother of the deceased the least that was expected of PW-1 was that he would lodge a report with the police of the incident and not doing so renders his conduct open to suspicion; (d) PW-1 is not even a witness of inquest though he claims to have seen the incident and was available at the spot. The defence argument questioning the presence itself of PW-1, at the place of occurrence, finds some support from such omission of PW-1 in important events; (e) the presence of PW-1 at the place of occurrence is seriously questioned

on the ground that though he is the solitary eye witness of the incident yet his statement was not recorded on the date of incident by the police or on the next day but was recorded by the Investigating Officer after 15 days of the occurrence. There is absolutely no justification put forth by the Investigator for such inordinate delay in recording of statement of PW-1 under section 161 Cr.P.C.; (f) PW-1 in his examination in chief has specified the place of occurrence as the under-construction house whereas in his cross-examination PW-1 has stated that the place of occurrence is towards the end of road on the western side. He has been specifically confronted on this aspect during cross and his explanation that he had not made such disclosure in the examination in chief is not convincing; (g) the place of occurrence disclosed to Investigating Officer as per PW-1 is on the west of north-south road whereas the site plan shows the incident on north side of east-west road. This also is a ground to generate suspicion on the veracity of the witness; (h) PW-1 has denied having stated in his examination-in-chief that he saw the accused assaulting his brother with iron rod inside the under-construction house. He has also denied knowing name of any of the person who arrived at the place of occurrence though he was familiar with them and; (i) PW-1 has categorically stated that the accused fired on the deceased by placing the firearm on his head and the other accused placed the firearm on his back. However, the postmortem report does not show any blackening or charring on the deceased, which is expected when one is shot from such close distance. The argument of Sri Zaidi and Sri Khanna that blackening did not occur as the deceased was wearing several layers of clothes does not appeal to us, as the clothes worn by the deceased

were not on the head but even there also the blackening and charring was missing. We have our doubts whether blackening and charring could otherwise be extinguished on account of wearing of clothes. This aspect also raises a doubt on the presence of PW-1 at the place of occurrence or his having seen the incident.

Learned counsel for the parties have addressed us at length on the above aspects with reference to various case laws on the point. We have given our thoughtful consideration to the above aspects and we find substance in the argument of appellants' counsel Sri Vimlendu Tripathi that it would not be safe to place reliance upon the testimony of PW-1, particularly as he is an interested witness and his conduct is not found natural on many counts. This witness otherwise does not have clean antecedents as he had been to jail. He is facing various cases also. His testimony therefore requires a careful scrutiny. Viewed in the above background the delay of 15 days in recording of his statement, despite him being the sole eye witness is troubling. The fact that he neither lodged the FIR though being the closest male relative of the deceased nor is the witness of inquest and his statement that gunshots were fired by placing the firearm on the deceased without any blackening and charring shown in the postmortem report remains unexplained by the prosecution even before us. His conduct otherwise is not found natural on several counts, as noticed above. We are thus not persuaded to accept the testimony of PW-1 as being a credible and reliable evidence to implicate the accused appellants.

31. PW-2 is the first informant and is the wife of deceased. Her testimony shows that she was informed by the deceased that he is

going with accused Gaurav and Gautam. It was in her presence that her husband left with the accused Gaurav and Gautam. She got concerned after her husband did not return for long and she was moving in the balcony awaiting arrival of her husband. She saw that PW-1 had come to the shop and she came downstairs and asked him to go and look for his brother. Her testimony is primarily challenged on two counts; (a) that she was not present as she had gone to see a movie in SRS Mall and; (b) her house is away from the shop and is not in line of sight such that it is not possible for anyone to see the front of shop or the persons standing or coming to the shop.

32. So far as the defence argument of PW-2 having gone to see a movie is concerned, reliance is placed upon a local newspaper which has been produced by the defence and is marked as paper no.Kha-107 This newspaper report does refer to the incident in question and records that information of the incident was given to PW-2 while she was in the movie theater. Law is settled that newspaper report cannot be used as a piece of primary evidence and the fact mentioned therein will have to be independently proved on the strength of evidence led by the parties. We have examined the evidence and except for some suggestions given to the PW-2 or hearsay information of Investigating Officer there is no evidence on record to show that either PW-1 was seen in the movie theater by anyone or any ticket etc. has been produced to prove that she was watching 3 pm to 6 pm show. We are, therefore, not impressed by the defence argument that PW-2 was not present at her house at around 4 pm and hence could not have seen the arrival of accused Gaurav and Gautam on her shop or the fact that her husband left with them to

Surendra Nagar. The defence argument, in that regard, is thus rejected.

33. PW-2 has stated that there is an open area of 2-3 meter between her shop and the road. She claims that her husband called her and when she came out her husband told her that Gaurav and Gautam are standing with him and are taking him to Surendra Nagar. Her version is challenged on the ground that there is no house above the shop and that the front of shop is not visible from the balcony on the house situated on the first floor. PW-2 has been specifically confronted during her cross examination on this aspect and her testimony, in this regard, is reproduced hereinafter:-

“मेरी दुकान 21 फिट लम्बी व 8 फुट चौड़ी है। इस दुकान में मेरे पति समरसेबिल पम्प का काम करते थे इस दुकान के अन्दर भी बैठते थे और कभी धूप में बाहर बैठते थे।

दुकान के अन्दर का एक दरवाजा है। दुकान के पीछे खाली मैदान है। जहाँ सामान पड़ा रहता है। उसके पीछे गोदाम है उसमें एक तहखाना है। इस गोदाम के ऊपर मेरा रिहायशी मकान है जिसमें मैं उस समय रहती थी। इस मकान में एक छोटा सा छज्जा पूर्व की तरफ है और कोई छज्जा नहीं है।

यह कहना गलत है कि उस छज्जे से दुकान के बाहर न दिखायी देता हो और दुकान का मैन गेट दिखायी न देता हो।”

34. The above statement clearly goes to show that ,as per PW-2, the submersible pump shop of deceased was narrow i.e. 8 ft. wide and long i.e. 21 ft. This shop had a door inside after which there was an open field where goods were kept. There exists a godown thereafter, having a basement, above which is the residence of PW-2. There is a small balcony on the east of the house. As per PW-2 she saw the two accused with the deceased in front of the shop from her balcony and it from there only that her husband informed her that he is going with the two accused. It is from

here that she also saw the arrival of PW-1 at the shop.

35. The question for our consideration is as to whether it was possible for PW-2 to have seen the deceased leaving with the two accused, from her balcony or the arrival of PW-1 at the shop etc.

36. PW-2 has admitted that her shop is 21 ft. long whereafter there exists open field to be followed with a godown above which exists her residence. There is no site plan prepared by the Investigating Officer of the shop or the godown or residence of PW-2. We are, therefore, required to visualize from the evidence on record as to whether PW-2 could have seen her husband standing with the two accused or leaving with them.

37. The residence of PW-2 is not above the shop. After the 21 ft. long shop there exists an open field. Size of this field is not specified but the use of expression 'open field' in normal parlance does suggest that it is not a very small area. It is after this open field that there exists a godown above which is the house of PW-2. The locality appears to be urbanized and structures around the shop are expected. It is not shown that the shop is not surrounded by any structures on either sides. The house on the first floor of godown situates after the open field after which situates the 21 ft. long shop. We find it difficult to accept that someone from the balcony of the house could see the front of the shop despite the obstructions in the form of constructed shop etc.

38. 4 PM in the month of January, in a market area, is generally a busy place. We do not find it convincing to believe that someone would shout from the front of his

shop to inform his wife that he is standing with Gaurav and Gautam or that they are taking him to Surendra Nagar, particularly as we are not convinced that the balcony is in the straight line of sight from the front of shop.

39. PW-2 claims that her husband left at around 4 PM and did not return till 4.45 PM. This delay of 45 minutes is not unusually long. The deceased and PW-2 both had mobile phones on which PW-2 could have talked to her husband to ascertain his well being. However, PW-2 admits that she did not call her husband on the mobile. There were servants in the shop who are not produced and were also not sent to look for the deceased.

40. PW-2 similarly states that she saw PW-1 standing in front of the shop from the balcony. As we have already observed that balcony in the house on the first floor is not in straight line of sight from the front of shop as such the statement of PW-2 that she saw PW-1 arriving at the shop and so she came downstairs also does not appear to be convincing.

41. PW-2 although has claimed that the accused Gaurav and Gautam owed lacs of rupees to her husband but no details in that regard have been furnished during trial. PW-2 has also admitted that there is no witness to such monetary transactions. The only material to show the financial transaction is a cheque allegedly found in the shop, date 16.01.2013, of Rs.5,60,000/- signed by accused Gaurav Bhardwaj. It is not shown as to why and how a cheque of subsequent date would be issued by the accused or could reach the shop of the deceased. The ink used on the cheque is different and the cheque has also not been given to the police nor the Investigating

Officer was informed about it. It is only at the stage of trial that this cheque has been produced for the first time. The manner in which this cheque has been produced raises more questions than what it answers.

42. PW-2 has also admitted that her husband was facing multiple litigation with regard to property disputes. Following passage from her statement is relevant and is extracted hereinafter:-

“मेरे पति व कुछ लोगों के बीच दीवानी के मुकदमें चल रहे हैं। यह मुकदमे मेरी खेती की जमीन की बावत चल रहे हैं। रसूलपुर गाँव में भी हमारी खेती की जमीन है। मुझे नहीं मालूम है कि कड़वा एस/ओ किशन से मुकदमा है या नहीं। मुझे जानकारी नहीं है कि रमेश एस/ओ बुद्ध से 8-10 मुकदमे हैं डा० प्रशान्त को जानती हूँ पड़ोस में रहते हैं। काफी समय प्रशान्त दुकान खाली कराने का मुकदमा चला था। अन्नापूर्ण होटल वाले के लडके से मेरे पति की मुकदमे बाजी 27 सालों की पुरानी है जो एक मकान को लेकर है। यह कहना बिल्कुल गलत है कि मेरे पति का औरतों से सम्बन्ध हो। यह कहना भी बिल्कुल गलत है कि पुलिस इस सम्बन्ध में मेरे घर आई हो।”

43. The testimony of PW-2 otherwise goes to show that the deceased had bought and sold various properties and disputes with different persons were pending at various forums. PW-2 has specifically stated that there is no enmity between the accused with the deceased. She although has stated that her husband was not in the business of selling or buying properties but from time to time he used to buy plots or sell them in case of need. The place of incident is also an under-construction colony where various houses were being constructed. It appears that the deceased had multiple disputes with various persons and apparently some of the properties had changed hands in recent past. PW-2 has admitted that her husband's sister Anita Sharma had bought a house in Shalini Enclave which situates between Surendra

Nagar and Avas Vikas Colony. A suggestion has also been given that some money was paid to Gaurav on account of which he has been falsely implicated after the deceased was shot dead due to some property dispute.

44. The close scrutiny of statement of PW-2 clearly reveals that she is not an eye witness of incident and is at best a witness of last seen. Her statement in that regard is not found reliable, particularly as we find it difficult to believe her statement that she could see the front of her shop from her balcony, which is at a distance behind the shop. We, therefore, do not find the testimony of PW-2 to be convincing and the evidence of last seen thus is also not worthy of acceptance.

45. We now come to the last limb of prosecution case i.e. the recovery of firearm as also the FSL report. The FSL report is on record as Ex.Ka.35/1 & Ex.Ka.35/2, which relates to the bloodstained and plain earth as well as clothes worn by the deceased. The report in respect of such recovery is contained in Ex.Ka.35/2 as per which human blood has been found on bloodstained earth as well as clothes worn by the deceased. However, the bloodstains were not capable of any classification and, therefore, this part of the FSL report is not of much relevance. It is the second part of FSL report contained in paper marked as Ex.Ka.35/3 and 35/4 which is relevant. A flat bullet has been taken out from the body of deceased which is marked as EB-1 and EB-2. This bullet has been compared with the two firearms recovered from the accused appellants Gaurav and Gautam, which are marked as item 1/14 and 2/14. The two firearms have been matched with the recovered bullet and as per the FSL report the recovered bullet

lacks individual characteristics for being compared with the two recovered firearms. The bullet which has thus been recovered from the body of deceased has not matched with the firearm allegedly recovered from the accused appellants.

46. The two firearms recovered from the accused appellants are from open place and there are no independent witnesses to establish the recovery itself. The witnesses of recovery of firearm are only the police personnel.

47. The 315 bore firearms recovered from the accused appellants Gaurav had a cartridge stuck in its barrel. This has been marked as EC-1 and as per FSL report it has been fired from the tamancha marked as 1/14. Since the recovery of firearm itself is not reliable, we are not inclined to attach much importance to the FSL report as it is but natural that the cartridge in the barrel would be shown to be fired from such firearm.

48. The police has also recovered empty cartridge from the place of occurrence which is marked as EC-2 which has matched from the recovered firearm marked as 2/14 from the accused Gautam.

49. The fact that empty cartridge EC-2 has matched with the recovered firearm as 2/14 from the accused Gautam is prima facie a material produced by the prosecution to implicate the accused Gautam in this case. On behalf of the informant much reliance has been placed upon this aspect of the matter. On behalf of the defence, however, detailed argument has been advanced to discredit the recovery of EC-2 from the place of occurrence and the submissions in that regard needs to be noticed, at this stage.

50. There is also a recovery of iron rod vide Ex. Ka-32. As per the statement of accused Ankit Bhardwaj this iron rod was hidden next to a Bael tree and little below the soil. So far as this recovered iron rod is concerned, it is admitted to the prosecution that it neither had any bloodstains on it, nor there is any independent witness to this recovery. The recovery otherwise is from an open place.

51. The fairness of investigation is seriously questioned by the defence in this case on the ground that the dead body of the deceased was actually brought to mortuary as unknown and such receiving of unknown body was also proved from the records. As per such records an unknown dead body was brought by Constable 1516 Amit Kumar. The register maintained in the mortuary has been produced as per which such a dead body was received at 6.10 PM about which intimation was also sent to Station House Officer, Kotwali City. Later on this entry was deleted. There was no reference to this dead body anywhere else in the records. According to defence it was the deceased, whose dead body was initially brought as unknown person in the mortuary by Constable 1516 Amit Kumar and later, by interpolating the records the informant has come out with a new story only to settle the score with accused as the deceased had secured certain amount from the accused. Our attention has been invited to the testimony of Head Constable Indradev (PW-9), who has stated that Amit Kumar was posted in police beat at Awas Vikas and he had not returned to the police station prior to registration of this case. Following passage from the statement of PW-9 is relevant and is reproduced hereinafter:-

“दिनांक 12.1.13 को का० 1516 अमित कुमार की तैनाती चौकी आवास विकास पर थी आवास विकास क्षेत्र की ही

यह घटना है। इस मुकदमे के कायम होने से पहले कां० 1516 अमित कुमार की थाने में वापसी नहीं है। चिकित्सा अधिकारी जिला की रिपोर्ट के अनुसार कां० 1516 अमित कुमार ने दि० 12.1.13 को 6.10 पी०एम० पर अज्ञात शव अस्पताल में दाखिल किया जिसकी सूचना थानाध्यक्ष को०शहर को भेजी गई।

दि० 12.1.13 के रोजनामचे में सिर्फ एक ही पंचायतनाम भरणे का तस्करा है। यह कहना गलत है कि एफ०आई०अ०र० एन्टीटार्गम करके बाद में लिखी गई हो”

52. The original register of mortuary has been produced during trial, which clearly contains an endorsement, as per which an unknown dead body was brought to the mortuary by Constable 1516 Amit Kumar. The statement of Dr. Bhojraj Singh (PW-5) in that regard is reproduced hereinafter:-

“दिनांक 12.1.13 को 6.10 पी०एम० पर सी०पी० 1516 अमित कुमार एक अज्ञात व्यक्ति को लेकर आया जिसे अस्पताल में देखने के बाद (sic) डैथ कहा गया उसके शरीर को मोरचरी में रखकर पुलिस को सूचना की गई थी। असल रजिस्टर मेरे सामने है जिस पर दि० 12.1.13 की सम्बन्धित एन्ट्री श्री गजेन्द्र कुमार शर्मा की फोरमेसिस्ट की लिखी हुई है। दाखिल करता हूँ। फोरमेसिस्ट गजेन्द्र को मैने लिखते पढ़ते देखा है। मै गजेन्द्र कुमार शर्मा का लेख पहचानता हूँ फोटो काफी पर प्रदर्श ख-1 डाला गया।

उसी दिन इस अज्ञात शव की सूचना थाना को०शहर को दी गई अस्पताल की पुलिस इन्फोरमेशन बुक मेरे सामने है। जिस पर डाक्टर प्रेम प्रकाश के द्वारा सूचना भेजी गई जो थाने पर प्राप्त हुई जिस पर थाने की मोहर लगी है। डा० प्रेम प्रकाश को मैने लिखते पढ़ते देखा है इसकी फोटो प्रति दाखिल करता हूँ। इस पर प्रदर्श ख-2 डाला गया।”

PW-5, on his re-examination, has stated as under:-

“रजिस्टर ख-1 फार्मेसिस्ट भरता है जो अभी जीवित है। प्रदर्श ख-1 के मूल रजिस्टर में क्रम सं० 188 के पश्चात क्रम सं० 189 पर ब्रोड डेड अननोन लिखा गया तथा बाद में एन्ट्री नं० 189 को काट दिया गया यह मेरे सामने नहीं काटा गया किसने काटा मुझे पता नहीं न मै बता सकता। उसके बाद 189 पर दूसरी प्रवृष्टी है। प्रदर्श ख-2 में पेपर सं० ख-55/5 भी मेरे द्वारा जारी नहीं किया

गया है यह भी फोरमेसिस्ट के हस्ताक्षर में है जो नौकरी में है सूचना के पश्चात डेड बॉडी मोरचरी में रखने का प्रावधान है थाने को सूचना तभी दी जाती है जब डेड बॉडी को अस्पताल स्टाफ अपने कब्जे में ले लेता है।

X X X

प्रदर्श ख-2 के भाग 55/2 पर चिकित्सा अधिकारी के कालम में डा० प्रेम प्रकाश के हस्ताक्षर है। ख-55/5 पर भी डा० प्रेम प्रकाश के हस्ताक्षर है जो इसी अज्ञात से मुत्तिलक है”

53. The Investigating Officer Abdul Salam (PW-6) has admitted that no disclosure statement was made in this case, nor any separate recovery memo was prepared. Both the firearms had been recovered from open place. The statement of PW-6 in that regard is reproduced hereinafter:-

“प्रकृति कारण (Disclose statement) इस केस में नहीं लिखा गया न ही उसका कोई अलग से मेमो बना।

दोनों बरामदगिया खुले स्थान से हुई दोनों में कोई पब्लिक का गवाह नहीं था बरामदगी स्थल पर कोई भी आ जा सकता था दिल्ली पौडी रोड हाईवे है हर समय हर तरह की सवारी दिन भर चलती है रावली रोड पर भी आसपास गांव है उस पर भी सवारी चलती है रावली रोड पर भी आसपास गांव है उस पर भी सवारी चलती है किसी कर्मचारी को गवाह मुरतब करने हेतु नहीं भेजा। यह कहना गलत है कि दोनों तमंचे की बरामदगी फर्जी दिखाई हो। यह सही है कि तमंचे की बरामदगी होना महत्वपूर्ण साक्ष्य था।”

54. It is, therefore, apparent from the evidence on record that a dead body was brought in the mortuary at 6.10 PM as unknown, and later this entry was scored off. There is no corresponding explanation by the prosecution as to why such entry was scored off and what happened to this unknown dead body. Just beneath this entry is the entry relating to the body of the deceased having been brought to the mortuary. Absence of any explanation with regard to the dead body brought in the mortuary as unknown, and just thereafter the entry occurring in respect of dead body of deceased having been brought to the

mortuary, does create a doubt in the prosecution case and the argument of defence that in fact it was the deceased's body which was brought as unknown, and later after his identity was established that the entire story has been developed cannot be lightly brushed aside. It is in this context that we find that there is a clear interpolation in the timing of holding the inquest in panchayatnama on which there is neither any initial nor the prosecution has explained as to why such interpolation became necessary. The FIR has also been sent to the Magistrate almost after a week. We also find from the statement of first Investigating Officer (PW-6) that while investigation remained with him (investigation of PW-6 was about 15 and odd days), none came forward to depose as an eye-witness of the incident. The statement of PW-6 in that regard assumes significance and is reproduced hereinafter:-

“जब तक तफतीश मेरे पास रही तब तक कोई चश्मदीद साक्षी मेरे सामने यह कहने नहीं आया कि मैंने घटना देखी। मैंने चश्मदीद साक्षी के बयान लेने चाहे पर किसी ने नहीं दिये यह कहना गलत है कि मेरे तफतीश रहने के दौरान तक कोई चश्मदीद साक्षी तैयार ही न हो”

55. What is also important to note that after the inquest was concluded the dead body of the deceased was handed over to Constable 1516 Amit Kumar and Constable Parvendra Singh (PW-10). In his cross-examination PW-10 has admitted that the dead body was handed over to him at 8.30 pm on 12.1.2013 but the dead body was brought to the mortuary at 7.30 in the morning. There is no clarity as to what happened to the body from 8.30 pm on 12.1.2013 to 7.30 am on 13.1.2013. The statement of PW-10 in that regard is reproduced hereinafter:-

“मैं सिर्फ लाश लाया हूँ मुझे लाश 12.1.13 को शाम 8.30 बजे मिली थी। लाश लाने वाले स्थान से पी०एम० हाऊस

करीब 1-1/4 KM दूर है। लाश लाने वाला स्थान शहर में है इस प्रकार की सवारी उपलब्ध है। लाश हमने 13.1.13 को सुबह 7.30 बजे लाकर दाखिल की। यह कहना गलत है कि लाश हमें 13.1.13 को मिली हो लाश सुबह 7.30 बजे दाखिल की थी तथा रपट आदि की नकल 11.30 बजे दिन लाकर दाखिल की थी मोटर साईकिल से अस्पताल थाने से आने व जाने में लगभग 10 मिनट का समय लगेगा। यह कहना गलत है कि मैं गलत ब्यानी कर रहा हूँ”

56. It is in the above background that when we examine the recovery of two firearms recovered from the accused without any disclosure statement; without any public witness and from the open place, we do not find it safe to rely upon the recovery of firearms or the recovered cartridge from the place of occurrence, so as to implicate the accused appellants in the offence.

57. The testimony of PW-3 and PW-4 also needs to be noticed hereinafter. PW-3 is a Contractor alongwith PW-1 and has studied with him from Class 6th to 10th. His statement that accused stated before him that they have finished the deceased while rushing towards Awas Vikas does not appear to be credible. His statement has been recorded 18 days after the incident. He states that this fact was disclosed by him to PW-1 after about 15-16 days at Bijnor. We do not find such statement to be credible, as it is unnatural to expect such important fact not to be informed to the family members or the Investigating Officer. The testimony of PW-3, therefore, is not of much help to the prosecution case.

58. So far as PW-4 is concerned, he too is a related witness and has stated that all the accused came and confessed having eliminated the deceased and assured that they will vacate the house of deceased, so that the matter may be settled between

them. The statement of PW-4 has also been recorded after several days and there are material contradictions in his version, which remains unexplained. We are not inclined to give much weightage to the testimony of PW-4 nor can it constitute any material to implicate the accused appellants.

59. The court below has erred in accepting the prosecution case without subjecting the evidence on record to a careful scrutiny as there are anomalies found in the testimonies of witnesses and the evidence regarding recovery of firearms has also not been carefully examined. The judgment of the court below on material aspects is, therefore, found wanting. Since the available evidence on record has not been subjected to a careful scrutiny by the court below, therefore, the finding of guilt returned in the judgment cannot be sustained and is liable to be reversed.

60. For the discussions and deliberations held above, we find that the accused appellants are clearly entitled to benefit of doubt as the prosecution has not been able to prove their guilt beyond reasonable doubt.

61. Consequently, the present appeals succeed and are allowed. The impugned judgment and order dated dated 20.01.2017, passed by the learned Additional Sessions Judge Court No. 01, Bijnor is hereby set aside. The appellants, who are reported to be in jail for more than ten years, shall be released, forthwith and set free, if they are not wanted in any other case, subject to compliance of Section 437-A Cr.P.C.

(2023) 5 ILRA 894
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 08.05.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 1268 of 2007
 with

CrI. Appeals No. 1321 of 2007, 1386 of 2007,
 1623 of 2007, 1757 of 2007 & 2213 of 2007

Rama Kant Dixit **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Sri Krishna Ji Khare, Sri Arun Kumar, Sri Arvendra Singh, Sri Lav Srivastava, Sri Rajeev Nayan Singh, Sri Rajiv Lochan Shukla, Sri V.P. Srivastava(Sr. Advocate)

Counsel for the Respondent:

G.A., Sri J.S. Sengar

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860-Sections 147, 148, 302/149 & 307/149 -Challenge to Conviction-The prosecution on the commencement of trial has set out to prove the incident of shoot-out in question as per which it was the accused-appellants who indiscriminately fired on the jeep in which the deceased, three prosecution witnesses and one else were travelling and led to the brutal murder of six passengers travelling therein- According to the prosecution the incident is seen by three prosecution witnesses of fact i.e. P.W.-1, P.W.-2 and P.W.-3 who are said to have jumped out of the running jeep alongwith another from the back door and have further witnessed the occurrence-The evidence on record reveals that these witnesses of fact are highly interested witnesses and their credibility and reliability as well as their presence at the place of occurrence becomes doubtful on account of the facts and also their criminal antecedents-their

presence at the time and place of occurrence being seriously doubtful, the medical evidence not corroborating the ocular version, the long pre-existing enmity in between the accused-appellants and the first informant PW-1-it seems doubtful that the four passengers of the jeep (including the three witnesses of fact, namely, P.W.-1, P.W.-2 and P.W.-3) could jump out of a running jeep and escape unhurt when ten armed men are indiscriminately firing at the jeep and hide themselves at a distance of 40 to 50 paces in a pigeon pea field (arahar) and witnessed the occurrence from there-it is unnatural that having spotted these four passengers, the assailants would allow them to leave and would not walk a few paces further to eliminate them, particularly when P.W.-1 was their prime suspect on account of their pre-existing enmity-therefore, the testimonies of the prosecution witnesses of fact are not trustworthy and reliable, particularly as they are highly interested witnesses and their very presence at the place of occurrence is doubtful and hence their testimonies are not worthy of trust-the very presence of the three prosecution witnesses of fact at the time and place of occurrence being not fully established- the ocular version of the occurrence not being corroborated by the medical evidence- Hence, the findings returned by the trial court for recording the guilt of accused-appellants are not only illegal but also perverse. (Para 1 to 191)

B. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. (Para 113)

The appeal is allowed. (E-6)

List of Cases cited:

1. Md. Jabbar Ali & ors, Vs St. of Assam (2022) SCC OnLine SC 1440

2. Murli & anr. Vs St. of Raj. (2009) 9 SCC 417

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This bunch of criminal appeals is by the accused-appellants assailing a common judgment and order dated 1st February, 2007 passed by the Sessions Judge, Mainpuri in Sessions Trial No. 97 of 2005 (State Vs. Jagannath and 5 Others) and Sessions Trial No. 104 of 2005 (State Vs. Hariom), arising out of Case Crime No. 286 of 1996, under Sections 147, 148, 302/149, 307/149 I.P.C., Police Station-Bhogaon, District-Mainpuri, whereby all the accused-appellants have been convicted and sentenced to two years rigorous imprisonment each under Section 148 I.P.C.; seven years rigorous imprisonment each under Section 307/149 I.P.C. with fine of Rs. 30,000/- each and in default thereof, to further undergo one year additional simple imprisonment; life imprisonment each under Section 302/149 I.P.C. with fine of Rs. 70,000/- and in default thereof, to further undergo one year additional simple imprisonment each. All the sentences are to run concurrently.

2. As these appeals arise out of the same judgment and order. As such they were clubbed together and are now being decided by this common judgment.

3. We have heard Mr. V.P. Srivastava, the learned Senior Counsel assisted by Mr. Rajiv Lochan Shukla, Mr. Rajeev Nayan Singh and Mr. Arun Sharma, learned counsel appearing for the accused-appellant Rama Kant Dixit, Mr. Brijesh Sahai,

learned Senior Advocate assisted by Mr. Bhavya Sahai, Mr. Sarvesh Kumar Dubey, Mr. Waquar Ahmad and Abhay Singh Yadav, learned counsels appearing for the accused-appellants Vipin Dixit, Chandra Kant and Hari Om, Mr. Rajiv Lochan Shukla and Mr. Sarvesh Kumar Dubey, learned counsel appearing for the accused-appellant Devendra and Mr. Arun Kumar Shukla, learned counsel appearing for the accused-appellant Kaushlendra and Mr. Arunendra Singh and Mr. Amit Sinha, learned A.G.As. for the State.

INCIDENT

4. On 6th September, 1996 an incident occurred at around 04:30 p.m. on Mainpuri-Bhogaon road near Raja ka Bagh at a distance of nearly 3 kilometres from Bhogaon Police Station, where six persons travelling in a Commander Jeep from Mainpuri to Bewer were shot dead in broad day light in a brutal shoot-out. Those killed in the incident were Hem Singh, Gajendra Singh alias Tillu, Ram Kishan Singh, Naresh Dixit, Ashok Parihar and Mahesh Yadav.

PROSECUTION CASE

5. The first informant Surendra Singh (P.W.-1) submitted a written report on 6th September, 1996 at Police Station-Kotwali, District Mainpuri on the basis of which a first information report (Exhibit-ka/8) came to be registered as case crime no. Nill of 1996 at 17.35 p.m. No case crime number was assigned to this FIR, since the offence was committed within the territorial limits of Police Station-Bhogaon. Constable Udai Ram of Police Station-Kotwali brought the FIR and the written report submitted by the first informant to Police Station-Bhogaon on the basis of which case crime no. 286 of

1997 was allotted to the FIR and its contents were recorded in the General Diary maintained at Police Station-Bhogaon.

6. The written report of first informant/P.W.-1 has been proved by him in which it is alleged that he, his son Gajendra Singh alias Tillu, driver Hem Singh Yadav, Mahesh Singh Yadav, Ashok Parihar, Naresh Dixit, Ex-Pradhan Devendra Singh, Santosh Gupta and his younger brother Santosh were going to Bewar from Mainpuri by his jeep. While on their way ahead of railway crossing, a Gypsy and Maruti Van overtook his Jeep at around 4.30 pm and positioned them in front of the jeep. Accused Ramanand, Hariom, Hukam Chand, Anand, Jagannath, Devendra, Vipin, Kaushlendrapal Singh, Raj Bhushan, Billu, all residents of Bewer armed with rifles and guns, got down from these two vehicles and exhorted to finish them all and thereby take revenge. The informant along with Santosh Gupta, Santosh Singh and Devendra Singh ran out of their jeep and from the nearby field saw that all the above named accused persons fired indiscriminately with their rifles and guns, in which except the four who ran out of the jeep all other passengers of the jeep were killed on account of firearm injuries. Previous enmity was stated as the cause behind the occurrence. The informant is said to have come walking by concealing himself all the way to lodge the report.

INVESTIGATION

7. It transpires that someone informed about the firing/shootout at Rooi Tiraha to Police Station-Bhogaon at 04:50 p.m. The Station House Officer, Police Station-Bhogaon noted such fact vide Entry-26 in G.D. maintained at Police Station Bhogaon

and left for the place of occurrence along with other Police personnel and commenced investigation at 04:50 p.m. The Station House Officer found that Jeep No. 84A-0340 had hit a Eucalyptus tree and its bumper was stuck in the tree. A dead body was lying on the steering wheel while another dead body was partly on bonnet of Jeep. Another dead body was on the seat behind the driver. Two bodies were on the ground on left and right side of the Jeep. Another dead body was at a distance about 15 paces from the Jeep towards north west. Information was transmitted on wireless to the higher authorities about the incident.

8. Constable Sumit Narain along with the copy of check FIR, G.D. entry etc. of Police Station-Bhogaon came on the spot along with first informant/P.W.-1. Statement of first informant/P.W.1 under Section 161 Cr.P.C. was recorded on the spot and on the date of incident.

9. After completing necessary formalities, the inquest proceedings of the bodies of all the six deceased were undertaken on 6th September, 1996. As per the inquest reports/panchayatnama (Exhibit-ka/13, 21, 29, 36, 44 and 54), proceedings of inquest in respect of deceased Hem Singh commenced at 18:20 p.m. and concluded at 19:20 p.m.; 19:30 p.m. to 20:30 p.m. in respect of the deceased Gajendra @ Tillu; 20: 35 p.m. to 21:40 p.m. in respect of deceased Ram Kishan; 21.50 p.m. to 23:00 p.m. in respect of deceased Naresh Dixit; 23:10 p.m. to 00:15 a.m. on 7th September, 1996 in respect of deceased Ashok Parihar; 00:25 a.m. to 01:30 a.m. on 7th September, 1996 in respect of deceased Mahesh. The Inquest witnesses have opined that the death of all the six deceased appear to have been caused due to firearm injuries. However,

for ascertaining the exact cause of death, post-mortem be got conducted. Prima facie in the opinion of witnesses of inquest (panch witnesses) the death of the deceased was characterized as homicidal. Thereafter the bodies of the deceased were sealed and dispatched for post-mortem.

10. The post-mortem of the bodies of the deceased, namely, Hem Singh, Gajendra Singh alias Tillu, Ram Kishan Singh, Naresh Dixit, Ashok Parihar and Mahesh Yadav were conducted on 7th September, 1996 by a team of doctors headed by Dr. R.P.S. Chauhan (P.W.-4).

The post-mortem of body of deceased Ashok Parihar was conducted at 10.15 a.m. on 7th September, 1996. In the opinion of team of doctors which conducted the autopsy of aforesaid deceased, the cause of death is shock and hemorrhage as a result of following ante-mortem injuries:

“1. Lacerated wound 18 cm x 9 cm x lower part of buccal cavity (lower jaw which is missing) over lower part of the face and neck. Margins are blackened and tongue is blackened. Trachea upper part ruptured.

2. Firearm wound of entry 3 cm × 2.5 cm x thigh on medial side of right leg 15 cm below the knee joint. Margins are inverted. Both the bones of leg are fractured.

3. Firearm wound of exit 5 cm X 3.5 cm on back right leg 13 cm above ankle.

4. The firearm wound of entry 3 cm x 2.5 cm x bone deep a medial side of left leg 13 cm above left knee joint. Margins are inverted. Both bones of the leg are fractured. (five pieces of metallic are found in the bone) .”

The autopsy of the body of deceased Ramkishan Singh was held at 12:05 p.m on 7th September, 1996. As per the team of

doctors which conducted the post-mortem the cause of death was opined as shock and hemorrhage as a result of following ante-mortem injuries:

"1. Lacerated wound 6 cm x 5 cm x through and through injury no.2 on right side of face 4 cm away from right ear. Margins are blackened and inverted.

2. Lacerated wound (bone of exit) 18 cm x 18 cm on left side of deaf, forehead and head. Brain matter is coming out.

3. Firearm wound of entry 0.5 cm 0.5 cm x through and through injury no.4 on medial aspect of right thigh

4. Firearm wound of exit 2 cm x 1.5 cm on anterior aspect of right thigh 3 cm above from injury no.3

5. Traumatic swelling 18 cm x 10 cm on middle of left thigh, bone fractured.

6. Traumatic swelling 10 cm x 6 cm on left leg lower side. Both bones are fractured."

The autopsy of the body of deceased Naresh Dixit was conducted at 02:00 p.m on 7th September, 1996. As per the opinion of the autopsy team the cause of death was concluded to be shock and hemorrhage as a result of following ante-mortem injuries:

"1. Firearm wound of entry 1.5 cm x 1 cm x through and through injury no.2 left side of forehead 2 cm above eye brow. Margins are inverted and blackened.

2. Firearm wound of exit 4 cm x 2.5 cm. above right eyebrow and forehead. Right eye bulging.

3. Lacerated wound 7 cm x 1 cm x bone deep on left side of forehead and just above eye brow. Margins are blackened.

4. Lacerated wound 8 cm x 2 cm x muscle deep on left side of chest. Upper part 1 cm below clavicle. Margins are blackened and wound gutter like. "

The autopsy of the body of deceased Hem Singh was conducted at 11 a.m. on 7th September, 1996. As per the opinion of the autopsy team the cause of death of deceased was delineated as shock and hemorrhage as a result of following ante-mortem injuries:

"1. Lacerated wound 6 cm x 2 cm x scalp deep on front of forehead and right side of head. 4 cm above root of nose.

2. Firearm wound of entry 3 cm x 1.5 cm x cavity deep on back of right side of chest 7 cm below inferior angle of scapula. Surrounded by two small wound of size 0.3 cm x 0.3 cm x skin deep in area 12 cm x 8 cm. No blackening found.

3. Firearm wound of entry 3 cm x 3.5 cm x through and through injury no.4 on back of abdomen right side. No blackening found.

4. Firearm wound of exit 4 cm x 3 cm on right side of back of abdomen in axillary line 8 cm above iliac crest."

On the same day at 1:15 p.m. the autopsy of the body of the deceased Gajendra alias Tillu was conducted. As per the post-mortem report the cause of death of aforesaid deceased is shock and hemorrhage as a result of following ante-mortem injuries:

"1. Firearm wound of entry over left side of jaw and neck 2 cm away from mid line of chin. Size 5 cm x 3 cm x through and through injury no.2. Margins are blackened and inverted.

2. Firearm wound of exit 18 cm x 6 cm on right side of head and forehead just near right ear. Brain matter coming out of wound. Bone of skull are fractured.

3. Traumatic swelling 10 cm x 8 cm on right upper arm 6 cm above elbow joint. Bone of upper arm fractured.

4. *Firearm wound entry 3 cm x 2.5 cm x cavity deep on right side of abdomen 6 cm away from umbilicus at 7 o'clock position. Margins are inverted and blackened.*

5. *Firearm wound entry 1.5 cm x 1.5 cm x through and through injury no.6 on back of left right 5 cm above knee joint. Margins are inverted and blackened.*

6. *Firearm wound of exit 18 cm x 7 cm on medial aspect of left thigh 7 cm above knee joint.*

7. *Lacerated wound 3 cm x 1 cm x skull bone deep on forehead 5 cm above of root of nose."*

At 12:35 p.m. the autopsy of the body of deceased Mahesh was performed. The cause of death has been opined by the autopsy team as shock and hemorrhage as a result of following ante-mortem injuries:

"1. Lacerated firearm wound 18 cm x 5 cm x brain deep on left side of forehead and head. Margins are blackened. Bone of left side skull are fractured. Brain matter coming out of bone.

2. Firearm wound entry 3 cm x 2.5 cm x through and through injury no.3 on right side of chest. 5 cm below clavicle. Margin blackened and inverted.

3. Firearm wound of exit 5 cm x 3.5 cm on right side of nipple. Margins inverted.

4. Firearm lacerated wound 5 cm x 3 cm x bone deep on base of right thumb of right hand. Bones are fractured.

5. Firearm lacerated wound over front of right knee joint 12 cm x 8 cm. Bones are fractured. Margins blackened.

6. Firearm lacerated wound 11 cm x 4 cm x bone deep over left scapula of back.

7. Traumatic swelling 10 m x 8 cm on left upper arm. 6 cm above elbow joint. Bone fractured."

11. On 7th September, 1996 itself the Police collected four portions of blood soaked rexine from the Jeep vide Exhibit-ka/63. Blood soaked earth and plain earth were also collected by the Police from near the dead body of the deceased Naresh Dixit vide Exhibit-ka/64. Blood soaked earth and plain earth were also collected by the Police from near the dead body of the deceased Mahesh Fauzi vide Exhibit-ka/65. Blood soaked earth and plain earth were also collected by the Police from near the dead body of the deceased Ashok Parihar vide Exhibit-ka/66. The shoes and slippers of the deceased found in the Jeep along with tiffin and spectacles were recovered vide Exhibit-ka/67. The Jeep bearing Registration No. U.P.84 A-0340 was also recovered vide Exhibit-ka/68.

12. The Police on 7th September, 1996 also recovered following empties from the spot vide Exhibit-ka/69:

"1. 6 empty cartridges of 12 bore of red colour cardboard, "Astram Magnum" was mentioned in English on three empty cartridges, whereas on the other three, "Shaktiman" was mentioned.

2. 3 empty cartridges of 12 bore of red colour cardboard, "Indian Ordinance Factory" was mentioned on each cartridges.

3. 5 empty cartridges of 12 bore of red plastic, "Clay ground prix" was mentioned on each cartridges.

4. 5 empty cartridges of 12 bore of brass metal out of which on base of one cartridge, " 8 M.M./315" was mentioned, whereas on two, "8 M.M.K.F. 92" was mentioned.

5. 4 empty cartridges of 12 bore of brass metal which seem to be semi-automatic, "P.K.B.30" was mentioned on base of each cartridge.

6. 2 empty cartridges of 12 bore of brass metal, "43 E.C." was mentioned on the base of each cartridge.

7. 1 live cartridge of brass metal on which base "P.K.B.30" was mentioned.

8. 1 live bullet of brass metal in which colour was filled."

13. A Maruti car bearing Registration No. M.P. 14/D-2312 was found on 9th September, 1996 at about 12:00 in the afternoon in an open plot at new Baghwan Colony which was having blood stains on the back of its seat cover. Upon examination certain empties were also found therein. Accordingly, a recovery memo of same was prepared which is Exhibit- ka/10. The details of the same are as under:-

"(i) one missed live cartridge, 30 PKB was written on its base,

(ii) one empty cartridge, 8 MM KF 92 was written on its base,

(both the cartridges were found below the driving seat of the car)

(iii) two empty cartridges, PKB 30 and 67 respectively were written on them

(both the cartridges were found below the seat adjacent to the driving seat."

14. The recovered items, noticed above, were sent to Forensic Science Laboratory, Agra for their scientific examination. A report of the Joint Director of Forensic Science Laboratory, Agra dated 16th December, 1996 is on record as per which blood stains have been found on all the recovered items sent for forensic examination.

"(1) On the recovered items mentioned at serial nos.4 (rexine seat/cover), 5 (small piece of rexine seat/cover, 8 (a pair of brown slippers), 13

(a painted black belt), 14 (shirt), 15 (sando vest), 18 (gray pant/trouser), 19 (navy blue shirt), 20 (underwear), 26 (brown underwear), 28 (pajama), 29 (Kurta/shirt), 30 (vest), 31 (underwear), 32 (pajama), 33 (Kurta/shirt), 34 (vest), 36 (cotton towel/aungauchha), 37 (Janeoo), 40 (shirt) 41 (vest), 42 (underwear), 44 (a pair of shocks), 46 (black door), 47 (Kalava) and 49 (a piece of green cloth), human bloods were found.

(2) On the recovered items mentioned at serial nos. 1, (earth), 2 (earth etc.), 3 (earth etc.) (which have been kept in a tin can), 6 (a pair of white slippers), 7 (a pair of slippers), 9 (tiffin), 10 (plastic shoe), 11 (spectacles), 12 (a frame of spectacles), 16 (yellow underwear), 17 (black handkerchief), 21 (brown handkerchief), 22 (a pair of brown shoe), 23 (belt), 24 (shirt), 25 (brown underwear), 35 (underwear), 38 (a plastic slipper of left leg), 39 (pant/trouser), 43 (handkerchief), 45 (a Tabeez of red cloth) and 48 (a pair of shoe), blood stains were found to be disintegrated.

(3) No definite result could be ascertained from the forensic examination of the blood stains found on the recovered items mentioned at serial no. 4 (rexine seat of jeep), 5, (small piece of rexine seat), and 49 (piece of green cloth).

(4). Blood stains on the recovered items mentioned at serial nos. 8 (a pair of brown slippers), 13 (a painted black belt), 14 (shirt), 15 (sando vest), 18 (brown pant/trouser), 19 (navy blue shirt), 20 (underwear), 26 (brown underwear), 28 (pajama), 29 (Kurta), 30 (vest), 31 (underwear), 32 (pajama), 33 (Kurta), 34 (vest), 36 (Aungauchha/cloth towel), 37 (Janeoo), 40 (shirt), 41 (vest), 42 (underwear), 44 (a pair of shocks), 46 (black door) and 47 (Kalava), were found unsuitable for classification."

15. After completion of statutory investigation under Chapter XII Cr.P.C., a charge-sheet came to be submitted on 23rd May, 1998 against all the named accused. The Magistrate took cognizance on the charge-sheet and committed the case to the Court of Sessions, where it got registered as Sessions Trial No. 197 of 2005 (State Vs. Jagannath & Others).

The concerned Sessions Judge charged the accused-appellants of having committed offences under Sections 147, 148, 302/149 and 307/149 I.P.C. on 19th July, 2005. The accused-appellants denied the charges so framed and pleaded innocence. Resultantly, the trial procedure commenced.

THE TRIAL

16. The prosecution in order to establish its case has adduced following documentary evidence:

“i). Written report dated 6th September, 1996 submitted by Surendra Singh/informant-P.W.-1 has been marked as Exhibit-Ka/1;

ii). The first information report dated 6th September, 1996 at Police Station Bhogaon has been marked as Exhibit-Ka/34;

(iii) The first information report dated 6th September, 1996 at Police Station Kotwali Mainpuri has been marked as Exhibit-Ka/8

iv. The inquest reports (Panchayatnamas) of all the six deceased dated 6th September, 1996 have been marked as as Exhibits-ka/113, 21, 29, 36, 44 and 54;

v). Recovery memo of blood stained and plain rexine of seat of jeep dated 7th September, 1996 has been marked as Exhibit-ka/63;

vi). Recovery memos of blood stained and plain earths dated 7th September, 1996 have been marked as Exhibits-ka/64,65 & 66;

vii). Recovery memo of shoes, slippers, tiffin & spectacles dated 7th September, 1996 has been marked as Exhibit-ka/67;

viii). Recovery memo of jeep dated 7th September, 1996 has been marked as Exhibit-ka/68;

ix Recovery memo of empty cartridge and bullets dated 7th September, 1996 has been marked as Exhibit-ka/69;

x). Site plans with index dated 7th September, 1996 and 15th September, 1996 have been marked as Exhibits-ka/62 & 70;

xi). Post-mortem reports of all the six deceased dated 7th September, 1996 have been marked as Exhibits-ka/2, 3, 4, 5, 6 & 7; and

xii). Recovery memo of Maruti Car & Empty Cartridge dated 9th September, 1996 has been marked as Exhibit-ka/10 .”

17. In addition to above, the prosecution has adduced three witnesses of fact, namely, Surendra Singh (P.W.-1/first informant), who happens to be the father of the deceased Gajendra Singh, Devendra Singh (P.W.-2), who happens to be the brother of the deceased Gajendra Singh and son of P.W.-1 and Santosh Gupta, who happens to be an associate of the informant/P.W.1. Apart from the above, Dr. R.P.S. Chauhan (P.W.-4) who conducted the autopsy of the bodies of all the deceased was also produced and he proved the post-mortem reports dated 7th September, 1996 (Exhibits-ka/2, 3, 4, 5, 6 & 7), Babulal Gautam, Head Constable (P.W.-5) who had prepared the check first information report dated 6th September, 1996 (Exhibit-ka/8) at Police Station Kotwali Mainpuri and also proved the same. Mubin Ahmad (P.W.-6), the then

Station House Officer, Kotwali Mainpuri, who had prepared the recovery memo (Exhibit-ka/10) of Maruti Car, seat cover of the car, one live cartridge and three empties were also produced and he proved the same. The then Head Moharir Mangal Singh (P.W.-7) who had prepared the check first information report dated 6th September, 1996 at Police Station-Bhogaon was also produced. The then Station House Officer of Police Station Bhogaon, District-Mainpuri, namely, Rampal Singh (P.W.-8) who had conducted the investigation in the case was also produced. Sub-Inspector Jaichandra Singh (P.W.-9) who has recovered the Gypsy on 10th September, 1996 from Mughal Road, in front of Raju Hotel was also produced.

After the prosecution evidence was over all the incriminating material which emerged during the course of trial was put to the accused-appellants for recording their statements under Section 313 Cr.P.C. for having their version of occurrence in which they have denied the questions put to them.

18. Defence also adduced six witnesses in support of its case. D.W.-1 is Ramesh Chandra Sharma, Senior Assistant, Commercial Tax Officer at Shikohabad, District Firozabad. Head Constable-179 Surya Pal Singh is D.W.-2. Rajesh Kumar Singh (D.W.-3), Officer In-charge of Police Station Hari Parwat, District Agra, who from July, 1997 to July, 1999 was Inspector in the Crime Branch, Crime Investigation Department (for short "C.B.C.I.D."). S.C. Pal (D.W.-4), who was posted as Inspector in C.B.C.I.D. Agra from 30th November, 1996 to 28th January, 1998. D.W.-5 is Kamlesh Kumar, Revenue Inspector, District Panchayat Mainpuri, District Mainpuri. D.W.-6 is Mahak Singh, who

was posted as Inspector, C.B.C.I.D., Agra from 18th February, 2000 to 14th March, 2000.

FINDINGS AND CONCLUSION OF THE TRIAL COURT

19. Court below on the basis of the evidence on record came to the conclusion that the prosecution has succeeded in establishing that the shootout was committed by the accused-appellants on account of previous enmity, they resorted to indiscriminate firing resulting in the death of six persons. Court below has come to the said conclusion on the basis of oral evidence to the effect that the incident was witnessed by the three prosecution witnesses of fact, namely, P.W.-1, P.W.-2 and P.W.-3 and their testimonies are natural and reliable. The ocular version of the occurrence as disclosed in the statements of aforesaid witnesses stands corroborated by the medical evidence as well as the forensic evidence. It has, thus, been held by court below that the prosecution has succeeded in establishing the guilt of the accused-appellants beyond doubt. On the plea of delay in the lodging of the FIR, trial court has recorded the finding that the charge against the accused-appellants under Section-147 I.P.C. does not require conviction as the accused-appellants were equipped with deadly firearms and they have committed 6 murders being members of an unlawful assembly, as such the accused-appellants are liable to be convicted under Sections 148, 307/149, 302/149 I.P.C. Accordingly, the trial court vide impugned judgment and order has convicted the accused-appellants and sentenced them to life imprisonment with fine.

APPELLANTS' CONTENTIONS

20. The broad spectrum of the arguments advanced on behalf of the accused-appellants can be summed up on following three counts:-

(i) the accused-appellants have been falsely implicated on account of previous enmity between the parties. Specific instances of enmity have been highlighted vis-a-vis the accused-appellants and the informant/ P.W.-1;

(ii) the prosecution witnesses were actually not present at the place of occurrence nor have they seen the incident and their depositions are neither credible nor reliable. Arguments at length have been advanced highlighting the evidence on record to doubt their presence at the place of occurrence as well as inherent improbability in their versions/ stands;

(iii) On behalf of the accused-appellants it has also been strenuously urged that the incident of shoot-out was carried out by Subhash Gang and evidence in that regard was also collected during the course of investigation. However, the investigation was not taken to its logical end. The same was deliberately left un-concluded on account of the influence of the informant's side to falsely implicate the accused-appellants due to previous enmity.

The individual submissions of the learned counsels for the accused-appellants shall be referred to, in detail, in the later part of this judgment.

21. Having examined the broad contentions urged in these appeals and upon perusal of record, the question that primarily arises for determination in these appeals is:- as to whether the conclusion of guilt of the accused-appellants, arrived at by the trial court, as also the sentence awarded to them is legal and sustainable in

law. Vice versa the same does not suffer from any infirmity and perversity.

22. Before considering the merits of the submissions raised by the learned counsel for accused-appellants and the learned A.G.A., qua the impugned judgment and order of conviction and sentence passed by the court below, it is desirable to refer to the statements of the prosecution witnesses in detail in view of the question which arises for determination in the present appeals as formulated in paragraph no.21 of this judgment.

BRIEF STATEMENTS OF PROSECUTION WITNESSES

P.W.-1/First Informant (Surendra Singh son of Babu Singh)

23. This witness has stated that he was coming back to Bower in his commander jeep after seeing his ailing maternal aunt (Mausi) and was accompanied by his sons Devendra Singh and Gajendra Singh, his younger brother Santosh Singh, Santosh Gupta, Ashok resident of Bankati, Mahesh Fauji resident of Pakaria and Ramkishan, driver Hem Singh and two others, namely, Naresh Dixit and Ex-Pradhan of Humayunpur, namely, Kishan Pal Singh. At around 4.30 p.m., a Maruti car and a van overtook his vehicle from behind. Ramanand, Jagannath, Hariom and Anand all four persons were in the car and in the second Gypsy Chandrakant alias Billu son of Vishwanath Singh, Devendra, Vipin, Kaushalendra and Rajbhushan, total six persons were sitting with guns and riffles in their hands. All these persons got out of the vehicles and shouted to finish all the passengers in the said vehicle with intention to take revenge.

Seeing them, first informant/P.W.1, Santosh Singh, Devendra Singh (P.W.-2) and Santosh Gupta (P.W.3) jumped towards the west and fled into pigeon pea (Arhar) field. All the accused persons started firing from their respective firearms due to which his son Gajendra, Ashok Parihar, Mahesh Yadav, Naresh Dixit, Ramkishan and Hem Singh driver died on the spot. Driver Hem Singh drifted on being hit by gun shot and the vehicle came to a halt after colliding with an eucalyptus tree. Leaving behind the three others, who were with him, on the spot, the first informant came to Police Station-Kotwali and met Satendra Singh, Ramesh Singh and Dinesh Singh at the petrol pump in front of Kotwali, to whom he narrated the entire incident. He then scribed the written report of the incident, signed it and submitted it at the Police Station. On seeing paper No. 5A/2, this witness has proved the same on which Exhibit Ka-1 was marked. This witness has further stated that an old enmity is going on between the accused and his family. In the murder of his younger brother Shivraj Singh, various persons from the side of accused, namely, Chhote, father of Chhote, named accused Jagannath, accused Hariom and his brother and accused Anand were implicated and the case is pending. Accused Ramanand has died whereas accused Rajbhushan Singh and Anand are absconding.

24. In the cross examination first informant/P.W.-1 has stated that the name of the former Pradhan of Humayunpur was not known to him at the time of incident, so he indicated him as the Ex-Pradhan (Purva Pradhan). Devendra Singh is not the former pradhan but was his son. P.W. 1 in reply to a question as to why he has not written the name of his son Devendra Singh, only the name of his other son Gajendra alias Tillu

has been written, has submitted that he has written the names of both sons in the written report. Name of Devendra Singh has not been mentioned as his son but he is his son. He has further stated that he reached the place of crime for the first time at 4.00 in the evening, later he said that he had reached at 4.30. He was sitting on the left side of the back seat in the jeep. He, his son Devendra, Santosh Gupta and his younger brother Santosh were sitting on the back side of the jeep, whereas the Driver Hem Singh, Gajendra Singh, Mahesh Fauji were sitting on the front seat and Ashok Parihar, Pradhan of Humayunpur i.e. Kishanpal Singh and Naresh Dixit were sitting on the middle seat of the vehicle. Krishna Pal Singh's name has not been mentioned in the written report but he has been indicated as former Pradhan of Humayunpur.

25. P.W.1 has further stated that in the incident all the three persons sitting on the front seat were killed. Two persons had died in the vehicle itself while the third died after falling near the foot of the vehicle. All the three persons, who were sitting on the middle seat also died of whom one died inside the vehicle and two outside the vehicle. Both the vehicles of the accused were positioned in front of his jeep. Surrounding the jeep from the front the accused exhorted and started firing in which four passengers sitting at the back side of the jeep, including the informant (P.W.-1), ran towards the west. They fled to a distance of 50-55 paces into a pigeon pea (Arhar) field, from where they saw the incident. Accused also fired on those who escaped but he cannot remember the number of shots fired on them. He had disclosed to the inspector that many shots fired at all the four but none of them actually hit them. By taking the cover of

trees all four, including himself, fled to the pigeon pea (Arhar) field. He could not disclose whether the bullets hit the trees or not.

26. P.W.-1 further stated that all the accused fled towards Mainpuri from the place of occurrence. P.W.-1 came towards the railway crossing and from there he took a tempo and came to Mainpuri. He has further stated that the fact qua his coming by the tempo to Mainpuri was not mentioned in the written report and that it was neither asked from him nor did he disclose about the same. In the written report, the fact that he came secretly has been written but the fact that he came by the tempo has not been written. He has further stated that accused Kaushalendra had filed a case against his brother Shivraj Singh and Upadesh Singh for theft of spare tire of vehicle (stepney) before this incident.

27. This witness has further stated that on the date of incident he along with 7 others left for Audanya Padaria after 1.30 p.m. from his house, where his maternal aunt (Mausi) was living but he did not know her name. However he has stated that his maternal aunt must have been around 60 to 70 years of age. His maternal uncle (Mausa) was not alive at that time. Mausau had died about 15-20 years before the incident. Maternal aunt's (mausi) original place of residence was Badapur Pinjri, which falls within the territorial limits of Police Station, Jakra and he went directly to Audanya Padaria and that he did not stop in between. Audanya Padaria is about ten and a half kilometres away from Bewer. Those who accompanied him were from different communities/caste. Ashok Parihar is son of his maternal uncle, Santosh Gupta was his friend, Mahesh Fauji was of his

close acquaintance, Ramkishan was Pradhan and because of the same he had good relations with him. He has denied that the aforesaid persons lived in his house. His maternal aunt (Mausi) used to live at his house. His maternal aunt was sick for many days and was suffering from fever and what other disease she was suffering from was known to the doctor and that he had not taken his aunt (mausi) anywhere for treatment. He stayed at aunt's (mausi) place for about one and a half hours and at about 3:30 in the evening he left for Bewer. Satendra Singh, Ramesh and Dinesh were not his relatives but he knew them for the last 2 to 4 years before the incident.

28. P.W. 1 has also disclosed that his two brothers were Members of Legislative Assembly (for short "MLAs") and Satendra Singh, Ramesh and Dinesh were known to him since then and they visited his place. On coming back from his maternal aunt's place, Ramkrishna @ Krishnapal Pradhan and Naresh Dixit met him at Jail intersection. There were total 8 persons in the jeep and the other two met at the Jail intersection. He has admitted in his examination-in-chief that the nickname of Ramkishan is Kishanpal has not been disclosed by him. He has denied that Ram Kishan and Kishanpal are two different persons. He has also denied that two persons had not met him at the Jail intersection and that is why he has not disclosed about them to the Police.

29. P.W.-1 has also stated that the place of occurrence is at a distance of one and a half kilometer from the railway crossing towards Bhogaon. Both the vehicles of the accused were at a distance of 7 to 8 paces from the place of incident towards the east. His jeep was at a distance of 7 to 8 paces from both the vehicles.

There was maize field on the west of pigeon pea (Arhar) field. From black top road, the place of incident is about 8 to 10 paces. Distance between the place of occurrence and Kotwali, Mainpuri is 8 to 9 kms. Kotwali Bhogaon is about 3 kms. from the place of occurrence. He has further stated that knowing the fact that the accused went to Mainpuri, he also went to Mainpuri because there were fields, fences and shed etc. whereas there was an open space on the side of Bhogaon. The witness along with three others feared for their life at the hands of accused. Ten minutes after the departure of the accused, he went to Mainpuri from the pigeon pea (Arhar) field and that his brother Santosh (not produced in evidence) asked him to go and lodge a report while they (remaining three) stayed back.

30. From the spot till the railway crossing he went hiding towards the field. He reached Kotwali Mainpuri at 5.30 in the evening and at that time Satyendra, Dinesh and Ramesh were at the petrol pump. It would have taken 20 to 25 minutes to write the report. Those three persons went to the police station with him. The written report was given to Dewan ji. This witness has denied that due to the fact that his two brothers were M.L.A's and one of them contested the election for Member of Parliament, the policemen went to the spot and inspected the spot and later wrote the FIR at the police station. When he reached the spot with the police, the Bhogaon police with the sub-inspector was present and his three companions who had stayed back also met at the spot. He did not know whether any of his three companions had given any written report regarding the incident to the Bhogaon police at the place of incident as the same was not given in front of him nor did they disclose about any

written report. He has denied that he was not present at the spot at the time of the incident but was in Mainpuri and he had lodged a first information report at police station Kotwali Mainpuri under political influence after consulting Dinesh, Ramesh and Satyendra. He had disclosed to the Inspector that the accused had semi automatic and automatic weapons in their hands. He did not disclose as to which accused had which weapon in his hand and neither did the Inspector ask him about it.

31 P.W.-1 has further stated that he knew the accused Jagannath Prasad who is a retired teacher. He did not know whether Jagannath Prasad was currently handicapped with one hand and one leg and that he was not handicapped at the time of incident. He didn't know that Jagannath Prasad had poor vision at that time. He has denied that Jagannath Prasad already had a disability since prior to 6.9.96 and his vision was low. Whether Jagannath Prasad was a patient of heart disease or not he didn't know. Ramesh Chandra Dixit alias Pahalwan had been murdered and that he knew him. Accused Vipin Dixit is the son of the same Ramesh Chandra Dixit. In the murder case of Ramesh Chandra Dixit the son of P.W.-1, namely, Devendra, his brother Shivraj Singh, Upadesh Singh, Santosh Singh were implicated as the accused.

32. P.W.-1 also knew Hukam Chandra Dixit, who was murdered wherein his son Munesh and brother Upadesh Singh were implicated as the accused. Sons of Hukam Chandra Dixit, namely, Hariom and Ramanand are the accused in this case and Ramanand has died. He knew the accused Jagannath's son Chhote alias Rajveer in whose murder case his brothers, namely, Upadesh Singh, Shivraj Singh and his son

Mallu were accused. Santosh Gupta, who is a witness in this case, is also an accused therein. He himself said that the name of Santosh Gupta was added in the case later on. Rajveer alias Chhote's cousins were Ramakant Dixit, Chandrakant and Billu.

33. This witness has further stated that as soon as the accused overtook his vehicle, all four of them who were sitting in the back seat jumped out of the jeep and ran away and that is why he cannot say whether the shots were fired to puncture the wheels or to stop his vehicle. There were four to six bullet marks on his jeep which were noted by the police. As soon as they jumped out of the jeep, the firing started. The incident lasted for 5 to 7 minutes. He could not disclose as to which accused fired how many shots. On account of indiscriminate firing it was difficult to pinpoint as to whose bullet hit whom. There must have been 30 to 35 gun shots fired in all. All the accused were firing from the front side of jeep. The accused fired from a distance of 2 to 8 paces. The accused surrounded his vehicle from the front and started firing from the east. The accused had also fired at all four of them while they were running away, but they escaped unhurt. At the time of inquest proceedings all four of them were not near the dead bodies, rather his three colleagues were near the dead bodies and he was being interrogated by the Inspector, separately.

34. P.W.-1 has denied the suggestion that all four of them were not present on the spot, and that is why they are not seen in the photographs produced by the prosecution. None of them had signed on the inquest reports as witness. This witness has denied that he was not present at the spot and that he did not see the occurrence and that is why he did not tell the names of

the accused to the police personnel who completed the inquest (Panchayatnama). This witness has admitted that on the date of incident his brothers Updesh Singh, Shivraj Singh and his son Mallu were in jail in connection with the murder of Rajveer alias Chhote. He has denied that on the date of incident they had gone to jail to meet them. He has also denied that after getting information from the jail, he went to Mainpuri police station and gave a written report. He has also denied that due to old enmity, he had falsely implicated the accused in the case.

35. This witness has further stated that his enmity was going on for the last ten years with Jagannath and that he was not aware of any case lodged by Jagannath against him or other accused of his family before the incident. This witness has also stated that the vehicles of the accused were facing towards Bhogaon when both the vehicles stopped. The driver of his jeep tried to move forward by crossing both those vehicles, but in the meantime he was hit by a bullet and could not move forward. This fact has not been written by him in the written report. He has stated that he had told the Investigating Officer about the jeep getting disbalanced and hitting the Eucalyptus tree, but he has not disclosed the Investigation Officer about the driver being shot or the jeep getting disbalanced due to the driver being shot.

36. This witness has further stated that one of the assailants followed them while they ran for safety and hid in pigeon pea (Arhar) field. They must have stayed in the field for about 15 minutes but the standing crop did not get damaged due to them. He got the spot inspected by the Investigating Officer at around 6.30 p.m. on the date of incident. He stayed at the

spot till 2:30 in the night whereafter he left home leaving other three persons on the spot. His house is about six miles away from the place of incident. Various persons of his village later came to the spot with whom he left. When he left the place of incident the dead bodies had already been sent for post mortem at around 2:30 in the night. The dead bodies were sent by hand trolley. Next day morning he came to the Mortuary at Mainpuri and his other three companions met him there.

37. This witness has further stated that the branch of the tree with which his jeep collided was broken. On returning from the pigeon pea (Arhar) field, he had seen his vehicle, of which, the front windshield was broken. Before coming to lodge the report, he had seen his son's dead body but he did not cry, hugged him or inspected his son's dead body by turning it upside down. He did not touch his son's dead body. This witness has further stated that none of those sitting in the jeep had any weapons. Mahesh Fauji had a licensed gun which was deposited at that time. However, he was not aware as to how many days before the incident the firearm was deposited. None of the passengers had any weapons like Kanta, lance/spear (Ballam), Axe with them in the jeep.

38. This witness in his further cross-examination has stated that the officers/officials of CBCID had also recorded his statement regarding the incident. He did not remember as to after how many days his statement was recorded by the CBCID. He had not disclosed the officers/officials of CBCID that all four of them had witnessed the entire incident hiding in the pigeon pea (Arhar) field. He cannot say as to how they wrote in his statement about mustard crop which is not

cultivated in the month of September. Ashok Parihar is his cousin's son and he always had good relations with him. He knew Mahesh Fauji for 20 years before the incident and had good relations with him. He had known Santosh Gupta for 20 years and had good relations with him also. This witness has also stated that he did have the business of farming, running a cinema hall, renting out a hotel. Earlier he used to work as transporter but now it is closed.

39. P.W.-1 has denied that he indulged in trade of liquor, narcotics (smack) and illegal weapons from his place. His son Dinesh Singh had the contract of country-made liquor. The policemen had picked up some liquor from his son's liquor shop and he could not disclose its quantity. The shop of his son was a government liquor shop and in connection with it the police had taken him and his son Bantu alias Manoj from the house. He has also denied that smack worth one crore rupees had been seized from the possession of son of his brother Shivraj Singh, namely, Titu alias Satyendra, who was absconding and his house had been attached.

40. P.W.-1 has also stated that Police has shown recovery of motorcycle, SBBL gun, 80 grams of opium from his hotel which belonged to the customers and that 80 grams of opium was planted by the police. Police has taken away 386 quarter bottles of country-made liquor from his son's liquor shop. The Police brought half a truck of liquor from somewhere, mixed it with a half drum of water and showed that a total of four drums of liquor were recovered from him along with his two sons Mallu and Bantu and implicated them falsely in the said case.

41. P.W.-1 has stated that he did not know as to why these three persons,

namely, Satyendra, Ramesh and Dinesh who accompanied him to Police Station Kotwali had come to the petrol pump. He did not know whether twenty cases are pending against Santosh Gupta. Santosh Gupta has come to the court on the said date. He has denied that he had not seen the incident and was giving false testimony due to enmity. P.W.-1 has further stated that accused Vipin has land and farm in his village. Vipin's land and farm would be about one and a half furlongs away from his house. He has denied that he wanted to buy Vipin's land and farm and when he refused to sell the same, he harboured enmity with him. He has admitted that in the year 1985, his brother Shivraj Singh was fatally attacked in Bevar. In the year 1986 he was fatally attacked in Lucknow and in 1996 his brother Shivraj Singh and Upadesh Singh etc. were attacked in which his friend Jaigovind Dixit was murdered. The said fact has been disclosed by him to the Investigating Officer to explain the enmity. He could tell the difference between a gypsy, a van and a car by looking at these vehicles. At the time of the incident, he had seen the Gypsy and the car, the Gypsy was of blue colour and the car was of cream colour. He has stated in his examination-in-chief that it was a Gypsy and a van, but in fact the accused used a gypsy and a car at the time of the incident and he could not disclose the reason as to how such statement was recorded. He has denied that he was not present on the spot and hence he created a confusion about Gypsy and van. No person with weapon was present on the date of the incident and therefore, he could not have any weapon with him. When the accused overtook his vehicle, they had weapons in their hands. Their windows were open but he did not remember whether he had told this to the Inspector or not. The rear curtain

was fixed in his jeep. After coming out from the jeep, they saw the accused with weapons.

42. P.W. -1 has then stated that they had left the house after having their meal. On the date of incident they went to place of his maternal aunt (Mausi) and name of her husband was Lal Singh. The pradhan of the village where he went to see his maternal aunt was Salendra Singh or not he did not know. P.W.-1 has further disclosed that Tukman Singh was the real brother of his brother's (Shiv Raj Singh) father-in-law (Munshi Singh). He did not know whether Tukman Singh had enmity with Subhash gang or not. Tukman Singh's friend Jagdish Mishra, a resident of Rampur, lived in Bevar as well as in the village. He did not know whether Subhash Gang had killed four to five persons of Jagdish Mishra's family after robbing them. At the time of the incident, no member of his family had been provided Police protection. With regard to the present incident, both the Police as well as CBCID have recorded his statements separately. He had not seen Devendra's house so could not tell as to in which direction the door of his house was situated.

43. P.W.-1 has denied that he had a house in Bewer and Rakshapal lived there and he was murdered there. He did not know Rakshpal was accused in the murder of brother of Subedar Pandey. He also did not know Subhash Pandey at all, so he could not say how many cases of murder and dacoity were pending against him and his gang. P.W.-1 has denied that the vehicle which was taken into custody by the Police from the spot had no window in it. At the time of firing, Ashok Parihar was sitting in jeep and got out of the vehicle and ran 10 to 12 steps towards Bhogaon, when he was

shot and fell down. Naresh Dixit also tried to come out of the vehicle but was shot and fell near the foot step of the vehicle. He has however denied that Mahesh Fauji got out of the jeep and ran four-five steps towards east.

44. P.W.-1 has stated that the bonnet of his jeep was towards Bhogaon, He cannot specify the size of bonnet of the jeep. The jeep did not have a rear window but a curtain. He has denied that there were bushes in which Subhash Pandey Gang had hidden themselves and fired indiscriminately due to which the incident took place. He has further denied that all the persons who were sitting in his jeep were killed in the incident. He has also denied that he was not a co-passenger of the jeep. He has also denied that he had came to lodge the report due to enmity and that he had not seen the incident.

P.W.-2 (Devendra Singh son of Surendra Singh)

45. P.W.-2 is the son of P.W.-1 and has lost his brother in the incident. He has stated that the incident took place on 6.9.96 at 4.30 p.m. They were going towards Bewer by jeep after seeing his father's maternal aunt (Mausi) were returning from Audenya. There were eight persons in the jeep, namely, PW-2 himself, his father (first informant/P.W.-1), his uncle Santosh Singh, his brother Gajendra Singh alias Tillu (deceased), Mahesh Fauji, Ashok Parihar, driver Hem Singh and Santosh Gupta (P.W.-3). When they came to Jail intersection (Chauraha) at Mainpuri they met Naresh Dixit and former Pradhan Ramkrishna who accompanied them in the jeep. Before the railway crossing Naresh Pandit Ji asked the driver to stop the vehicle to ease himself and the driver

stopped the vehicle. Naresh Dixit and other persons got down from the vehicle and after easing themselves all the persons again sat in the jeep and then crossed the railway crossing. The place of incident was about 1.5 km from Bhogaon and about 1.25 furlong before Rui Sinaura Tiraha. At that time it was around 4.30 p.m. A blue Gypsy and a cream colour Maruti car of which the gypsy was in front overtook his vehicle. His driver Hem Singh tried to overtake both the vehicles which were positioned in front of the jeep. While the jeep was in motion the accused Ramanand, Jagannath, Hariom, Anand, Devendra, Rajbhushan, Kaushalendra, Vipin, Billu @ Chandrakant and Ramakant, total ten persons got down from those vehicles and exhorted to finish them with an intention to take revenge. Immediately he, his father (first informant/P.W.-1), Santosh Gupta (P.W.-3) and his uncle Santosh, all of them jumped from the back of their vehicle and ran towards pigeon pea (Arhar) field.

46. He has further stated that In the indiscriminate firing by the accused all six persons who were sitting in the vehicle, namely, Hem Singh, Gajendra @ Tillu, Mahesh Fauzi, Ashok Parihar, former Pradhan Ram Kishan Singh and Naresh Dixit died on the spot. Since the driver Hem Singh died in the said firing, their jeep got dis-balanced and collided with the Eucalyptus tree. After the accused fled towards Mainpuri by their vehicles they came out of the pigeon pea (Arhar) field to the spot and saw that six persons had died. They came towards the railway crossing hiding themselves. They had later hidden themselves in the fields. In the cross-examination P.W.-2 has stated that former Pradhan Ramkishan and Naresh Dixit had met them at the jail intersection and the said fact has been disclosed by him to the

Inspector. If the same has not been incorporated in his statement then he does not know the reason. C.B.C.I.D. had taken his statement after three to four months of the incident. He has further stated that on the date of incident his uncles Shivraj Singh @ P.T.I., Updesh Singh, his brother Vijender @ Mallu were in jail in connection with the murder case of Chhote alias Rajveer and on the date of incident they had not gone to meet them in jail. His father always sits at the back of the jeep, so even on the date of the incident, he was on the back seat. At the time of the incident his father was the eldest among all the persons who were sitting in the jeep. This witness has further stated that before the incident he had come from Bower to Mainpuri about ten times. At the time they jumped from their jeep it was moving. In a rush to save their lives they jumped and ran to the field. When they were running, no one followed them. They were looking back while running. While they were running the accused fired towards the jeep and also towards them but none of them were hit by the bullets as the jeep was between them and the person firing. After the four of them jumped out of the car, their jeep must have moved about 10 to 12 steps.

47. This witness has further stated that due to panic on the spot they forgot that one or two of them should have stayed near the dead bodies. They had not touched the dead bodies. When they found that no person was coming, they left the place of occurrence towards railway crossing. He admitted saying for the first time that his father had gone to lodge the report by a tempo. The curtain of the jeep was dropped. At the time when jeep got disbalanced and the driver was shot dead, they jumped out of the jeep and ran

towards the field as they had no other option. When the accused exhorted, they all jumped off the jeep. At the time all four of them jumped from behind the jeep, which was moving at a slow speed. He has further stated that in the murder case of Jagannath's son Chhotey, Gajendra @ Tillu and Mahesh Fauji were accused. He has also stated that he had not lodged any first information report. He could not disclose whether any of the dead was an accused or not. He has further stated that the police of Bhogaon Police Station reached the spot fifteen minutes after they reached the spot and before his father returned from Mainpuri.

P.W.-2 has stated that none of them who jumped from the back of the jeep had sustained any scratch or any other injury. The four of them remained in hiding for 15 minutes in the pigeon pea (Arhar) field. None of the accused came near the field to kill or surround them. He has denied that there was no land in his father's name in Kishunpur Gadiya. The tempo was found standing at the railway crossing towards Mainpuri and that he could not tell the reason why the tempo was standing at the crossing and that no person of village was seen nearby.

48. P.W.-2 has denied that it would be difficult to jump out from the jeep if the rear end of the jeep was close to the Stepney. The jeep has been sold by his uncle. He has also denied that his family had no enmity with accused Vipin and that is why accused Vipin has been falsely implicated in order to pressurize him to sell the land, which he was not selling. In the written report he has not been mentioned as son of informant. He has further denied that he was not on the spot and that is why the person who wrote the written report did not

write his name as son of first informant (PW-1), Surendra Singh. He has also stated that he did not know whether Rakshpal Singh's enmity was going on with Subhash Pandey or not and whether Rakshpal Singh and Tukman Singh were accused in the murder of Subhash Pandey's brother Subedar. He also did not know whether there was an encounter between Subhash Pandey's gang and the police and the empties found in the encounter and the empties found in the present incident were sent for examination or not. He has denied that Subhash gang had enmity with his family and because of this enmity Subhash gang could have caused the incident in question. He has also denied that the accused present in the Court could not have caused the incident. He has also denied that the two constables who were posted with accused Devendra by the I.G. Zone Kanpur for his protection, accompanied him for his security on the date and time of incident and that the accused Devendra was not involved in the incident in question. He has further denied that the gunners, who were posted with his uncle used to go for their personal work after asking him and they used to keep their weapons at his uncle's place. He has stated that accused Kaushalendra had lodged a robbery case against his family members before the incident in question and that was the cause of enmity. They did not take any female member of their family to see his father's maternal aunt. He has further stated that at that time his uncle Shivraj Singh was the manager of Amar Shaheed Inter College but he was not aware since when he was holding the said post. He has denied that the accused Koshlendra Pal Singh was falsely implicated due to enmity arising out of school for the post of manager. He has also denied that the family members who died in the incident in question had gone to

meet his uncle who was in jail. He has also denied that at that time he, his father, his uncle Santosh Kumar, and Santosh Kumar Gupta were not present in the jeep.

49. P.W.-2 has further stated that on the date of incident they went to see his father's maternal aunt from their village. Total eight persons went to see her. Naresh Dixit and Ram Kishan (former Pradhan), met them at the Mainpuri Jail crossing while they were returning after seeing his father's maternal aunt. It was not correct that ten of them had left the village and did not meet the above two persons on the way. He has also denied that both the above persons did not met at Jail intersection and that is why the same was not disclosed to Inspector and C.I.D. He has further stated that at the time of incident driver Hem Singh was sitting on the front seat of the Jeep along with Gajendra @ Tillu and Mahesh Fauzi. Naresh Dixit, Ramkishan Former Pradhan and Ashok Parihar were sitting in the middle seat of the Jeep and remaining four persons were sitting on the back side of the jeep.

50. This witness has further stated that all the accused had fired at the moving vehicle. When all four of them jumped out of the vehicle, the accused were eight to ten paces away. While all four of them were jumping from behind the jeep, the accused also fired towards the jeep. The statement related to survival of four of them and the death of other 6 persons was given to the inspector. He has further stated that at the time when all four of them were running to hide, the accused fired at them but they did not get hurt as there was a jeep between them and the assailants. Accused started firing from the side of black top road. At the time of firing, the accused did not came from all sides of the jeep but they were

firing from the eastern side of the jeep. He has denied that the place of incident was a dense forest comprising of Eucalyptus trees. He has also denied that there was a dense forest of Eucalyptus trees from Sarwa village to the drain at the time of the incident. The field where all four of them were hiding was about one and a half feet depressed from the place of incident. There was no ditch around the eucalyptus trees at the time of the incident. His height is five feet eight inches. All four of them had seen the incident from the agricultural field. He has also denied that the place of the incident was not visible because of trees, pigeon pea (Arhar) plants and the ditch where they were hiding. He also denied that they have seen the incident by hiding in the mustard field and not by hiding in the pigeon pea (Arhar) field. He has stated that all three of them came back to the place of incident after his father got seated in the tempo. There were more than 25 shots fired in total. He would not be able to tell which accused's bullet hit which deceased. He would also not be able to tell how many shots were fired by which accused. He would not even be able to tell which deceased was hit by how many shots. They saw the dead persons after coming out of the pigeon pea (Arhar) field. All the injuries of the deceased could not be seen. Nearly all the deceased had injuries above the neck. Even on that day, he could tell how many injuries the deceased sustained. After the Bhogaon police arrived they inquired and were told about the incident. At the time when the police was inspecting the place of occurrence no questions were asked from them nor they disclosed anything to the Police, as all three were sitting separately.

P.W.-3 (Santosh Gupta son of Shri Ramnath)

51. The incident took place nine years ago. They were going from Garhiya Kishanpur to Audenya in a commander jeep. In that jeep driver Hem Singh, Gajendra @ Tillu, Mahesh Fauji, Ashok Parihar, Santosh Singh and P.W.-1 Surendra Singh, Devendra (P.W.-2) and P.W.-3 were sitting. When they were coming back to Bewer from village Aurenja, Naresh Pandit and Ram Kishan Pradhan met at the jail intersection and both of them also sat in the jeep. When they reached 1.25 furlong east from Rui Sinaura, a Gypsy and Maruti car overtook his jeep and they were positioned in front of the jeep in which this witness alongwith others were travelling. Immediately, Devendra, Rajbhushan, Kaushalendra, Vipin, Ramakant, Villu, Jagannath, Ramnand, Hariom, Anand came out of the two vehicles, out of them Rajbhushan, Vipin, Jagannath, Ramanand had guns in their hands and the remaining six accused had rifles in their hands. At that time it was around half past four in the evening. All these accused exhorted that they would not spare any of them and take revenge. Seeing the accused persons, first informant/P.W.-1 Surendra Singh, Devendra (P.W.-2), and Santosh Singh along with him jumped from the jeep and ran towards the pigeon pea (Arhar) field in the west. As the driver was shot, the jeep got dis-balanced and collided with the tree. Due to the firing, Hem Singh driver, Gajendra @ Tillu, Mahesh Fauji, Ashok Parihar, Naresh Pandit, Ram Kishan Pradhan of Himayupur died on the spot. The incident was seen by them from pigeon pea (Arhar) field. After the incident, the accused left towards Mainpuri by their vehicles. After that all four of them came towards the railway crossing, where a tempo was standing by which first informant/P.W.-1 Surendra Singh went to Mainpuri to lodge report. After that all

three of them returned to the spot. They had gone to see Surendra Singh's maternal aunt who was sick in Audenya. He has further stated that he had been living in Kishanpur Gadhiya for the last 4 to 5 years before the incident. He had a room in Kishanpur Garhiyan. His house would be one furlong away from the house of informant/P.W.-1 Surendra Singh. He knew first informant-Surendra Singh and his family for the last 14 to 15 years. In times of trouble, they visited the places of each other and also helped each other. He has further stated that he was an accused in one or two cases along with the family of the informant. He was an accused in the cases under Section 302 I.P.C. and 307 I.P.C. and was also an accused in one robbery and one kidnapping case. He has then stated that he was accused in two kidnapping cases and a total of four to five criminal cases were pending against him. When he was in Chilousa, no case was filed against him. He was also prosecuted under the Goondas Act and the Gangsters Act. It is not correct that there were twenty criminal cases against him from 1990 to 2004. Cases against him were in Police Station Kotwali and Police Station Bhogaon. There was no case registered against him at Police Station Kotwali Mainpuri.

52. P.W.-2 has further stated that he saw and identified the weapons that the accused had at the time of the incident. He informed the Inspector that four of the accused had guns and remaining six had rifles in their hands. If the inspector had not written the said fact in his statement, then he could tell the reason for the same. There was no other weapon in the hands of the accused except rifles and guns. He did not have information about automatic and semi automatic weapons. He did not inform the inspector that some of the accused had

automatic and semi-automatic weapons in their hands. If the inspector had written the same in his statement, then he could not give any reason for it. He has further stated that after the incident, all four of them had gone to the railway crossing along with the informant Surendra Singh to drop him to a tempo. He informed the said fact to the Inspector and if he had not written it in his statement, he could not tell the reason for it. He did not inform the Inspector that after the departure of the accused, all four of them secretly went to Mainpuri. He has further stated that C.B.C.I.D recorded his statement after 7-8 months of the incident. At the time when his statement was recorded by C.B.C.I.D, he was in jail in a case under the Goondas Act. He did not give any statement to the C.B.C.I.D that ten people had gone with him in the jeep on the day of the incident. Naresh Dixit and Ram Kishan had not come with him. If the names of these people were not written in his statement among those going to Audenya, then the same is wrong. He did not give statement to the C.B.C.I.D. that at around 4:30 p.m. their jeep was trying to overtake the accused's vehicles after which it got disbalanaced and hit the tree. He gave the statement to C.B.C.I.D. that Jagannath Dixit had filed a case of murder of his son Rajever @ Chhote Dixit against Surendra Singh's brother Upadesh Singh in Bhogaon Kotwali and because of the said enmity, the accused have committed the incident in question. He did not give statement to C.B.C.I.D. that the first informant Surendra Singh had left them on the spot and went to Mainpuri

53. P.W.-2 has further stated that in the case relating to the murder of Chhote Dixit, he was not named in the F.I.R. Later he was made an accused. He has further stated that after the accused left, they came

to the spot looking for the dead bodies. After 10 minutes, the police of Bhogaon Police Station came and only then they came out of the field. The police of Bhogaon Police Station had come on the spot at half past five. On looking at the photographs of the dead bodies, he could identify two of them as photographs had been ruined. On looking at the photograph paper no. 10 a/1, the witness identified it as the body of Gajendra @ Tillu. He has also stated that the spot from where they jumped from the jeep and the pigeon pea (Arhar) field was 10-12 paces. About 15-16 minutes after the accused had left the spot, fist informant Surendra Singh was made to sit in the tempo at about 5 o'clock.

P. W. 4 (Dr. R.P.S. Chauhan), who conducted the autopsy of the deceased

54. P.W. 4 has stated that all the dead bodies were sealed and he had opened these dead bodies by matching them with the sample seal. He has further stated that injury No. 1 of Ashok Parihar was an injury caused by an Explosive, Injury No. 2 was in the form of Entry Wound fired from the left side of the deceased. Injury no. 4 must have been inflicted from the right side. Injury No. 1 on the dead body of Ramkishan was inflicted from the right side. Injury No. 3 is possible to have been inflicted from the left side. Injury number 5 and 6 could be caused by a blunt hard object. Injury No. 1 on the dead body of deceased Naresh Dixit is possible to have been inflicted from left side. Injury No. 3 and 4 may have come from the friction of the bullet fired from the firearm. It is possible to inflict this injury from the left side. Injury No. 1 on the dead body of deceased Hem Singh is possible to be inflicted from the right side and this injury is possible to be caused by firearm bullet,

Injury No. 2 can be said to have been inflicted from the back side. Injury No. 3 is possible to have been inflicted from the right side from the back. Injury No. 1 on the dead body of deceased Gajendra Singh is possible to have been inflicted from left side. Injury No. 3 is likely to be caused by a blunt object from the right side. Injury No. 4 is likely to be caused by a firearm bullet from the right side, Injury No. 5 is likely to be caused by a firearm bullet from the front right side. Injury No. 1 on the dead body of deceased Mahesh is possible to have been caused by bullet from front left side. Injury No. 2 is likely to have been caused from the front right side. Injury No. 5 is likely to be from a firearm shot from the front right side. Injury No. 6 was caused by a bullet from firearm from rear left side.

55. P.W.-4 has further stated that the injuries on the body of the deceased Ashok Parihar is possible to have been inflicted from left, right and from behind. The injuries on the body of the deceased Ramkrishna is possible to have been inflicted from left and right. The injuries on the body of the deceased Naresh Dixit is possible to have been inflicted from left side. The injuries on the body of the deceased Hem Singh is possible to have been inflicted from right and from behind. The injuries on the body of the deceased Gajendra Singh is possible to have been inflicted from left and right. The injuries on the body of the deceased Mahesh Singh is possible to have been inflicted from left and right. None of the injuries on the body of the deceased were inflicted from pellets and were bullets fired from the firearm. The metal pieces that have been removed from the dead bodies can also be such pieces which can enter the body after the blast of hand grenade etc. Ashok Parihar's

injury number 06 is possible due to lathi blows.

P.W.- 5 (Mr. Babulal Gautam), the then Head Moharir of Police Station-Kotwali, Mainpuri

56. P.W.-5 has stated that after making an entry in G.D. at Police Station-Kotwali, District Mainpuri, the copy of the F.I.R. and the written report were sent by Constable 196 Udayaram to Police Station-Bhogaon. The original G.D. got weeded out as it was old. The original and carbon copy of GD is not available in front of him. He has further stated that when first informant/P.W. -1 Surendra Singh came to lodge the report, there were many persons, but three persons came with him inside the police station. At that time Kotwal Sahab, the inspector, was not present in Kotwali and he did not know as to after how long Kotwal Sahab had returned. He came to know on the basis of written report that the place of incident was not within the territorial limits of Kotwali Mainpuri. He has further stated that Bhogaon Police Station would be 13 to 14 kms away from Mainpuri Police Station. That road is connected to Mainpuri Police Station. As soon as written report was received, the other Head Muharrir informed other officers, S.H.O. Mainpuri and Kotwali of Bhogaon about the incident through wireless. Head Muhrrir was not questioned and at the time of incident Ashok Chauhan was BJP's worker and not MLA. P.W.-5 has denied that due to the pressure of the politicians, they have lodged an ante-timed F.I.R.

57. P.W.-5 has stated that at the time when the informant brought written report, S.I. Ram Awadh Singh was the Officer and on his orders he filed the check F.I.R. He

was not ordered to lodge the F.I.R. in writing but orally. There is no entry in G. D. and that check FIR was written on the instructions of S.I. Ram Awadh Singh. There was no written order in his knowledge as to whether the Bhogaon police had sent the force on the spot or not. Whether any cognizable offence was registered or not could not be stated by him as the concerned G.D. was not in front of him. The informant Surendra Singh had given a written report to him and no conversation was held with him about the incident. He has denied that since he was known to Updesh Singh i.e. the brother of first informant Surendra Singh, therefore, he has lodged an ante-timed F.I.R.

P.W-6 Mr. Mubeen Ahmed the then S.H.O, Kotwali Mainpuri

58. This witness has stated that on information that a Maruti car was standing in New Bagwan colony for three days, he reached the New Bagwan colony and found that on the vacant plot of one Mukesh Kumar Shukla, a covered maruti car was parked. On removing the cover, he found that there were blood stains on the back seat and a live brass cartridge on the front foot board of the car on which P.K.B 30 was written and an empty on which K.F. 92 8MM was written. He also found that on the back seat there were two empties on which P.K.B 30 was written on the bottom of one and P.K.B 67 was written on the bottom of the other.

P.W.7 H.C.P. Mangal Singh, the then Head Moharir at Police Station-Bhogaon

59. This witness has stated that on the basis of written report of the first informant Surendra Singh and copy of check FIR of

Police Station Kotwali, he has registered the case at Police Station-Bhogaon at 18:10 p.m. bearing Report No. 30 on 6th September, 1996 as Case Crime No. 286 of 1996. He has denied that the information of the incident was given to Kotwali Bhogaon at 5:35 p.m. by public.

P.W.-8 Rampal Singh, then Station House Officer of Police Station-Bhogaon, District Mainpuri/Investigating Officer

60. This witness has stated that on 6.9.96, he was posted as Inspector-in-Charge of Police Station Bhogaon, District Mainpuri. On that day, at about 4:50 p.m., information was received from a public person at the police station that firing was taking place at Rui Tiraha (cross road). Receiving the said information and after making necessary endorsement in the G.D. he left the Police Station along with other police personnels for the place of incident and on reaching the spot he saw that a Jeep No. UP 84A-0340 had collided with a Eucalyptus tree and the front bumper of the Jeep got stuck in the tree. A dead body is lying on the steering inside the jeep; another dead body broke the front window pain of the jeep due to which its half part is lying inside the jeep and half on the bonnet; a dead body is lying on the right seat behind the driver; two dead bodies lying on the right and left side of the jeep; one dead body is lying fifteen feet away from the jeep in the north-west direction. About the incident, immediately information was given to the higher officers on wireless. SI Vijay Singh Kagla, H.C. Raghunath Singh and Constable Bani Singh also reached the spot. From the spot, HC Raghunath Singh was sent to Bhogaon to get camera for taking photographs of the dead bodies. Constable Premkumar Awasthi was deployed for security at the spot till the

spot was inspected. SI Vijay Singh and Constable Sukhveer Singh were directed to search the accused. Devendra Singh, Santosh Singh and Santosh Gupta, who were present at the spot, were inquired, and they disclosed that informant Surendra Singh had gone to Mainpuri Kotwali to lodge report about the incident, and after some time, Constable Sumit Narayan gave him a copy of the check FIR, G.D. entry and blank document for holding inquest etc. It was then that the informant Surendra Singh came and his statement was recorded. After taking the photographs of the dead bodies of deceased, the inquest of deceased Hem Singh was first conducted between 18.20 to 19.20 hours and same was handed over to H.C. Raghunath Singh Constable Bani Singh and Constable Mahesh for the postmortem after sealing the clothes. Along with the same, the documents relating to the letter C.M.O, sample seal challan lash, photo lash duplicate chik, duplicate report etc. on which exhibits K-13 and K-20 were also marked, were given to the police personnel along with the dead bodies of the deceased. Inquest of other dead bodies of the deceased were also conducted in the same manner and after sealing the same and following due procedure, the same were sent to Mortuary with Police personnels for their post-mortem. After that, he inspected the place of occurrence at the instance of the informant Surendra Singh. The site plan was prepared by P.W.-8 himself and he has also appended his signatures thereon, the site plan was marked as Exhibit-ka/62. P.W.-8 has also inspected the Jeep bearing No. UP 84A-0340, which was standing at the place of occurrence and has collected blood stained rexine from the front seat of the jeep and a few samples of bloodless rexine from nearby the seat. He has also collected blood stained rexine and few

samples of bloodless rexine from the back seat of the jeep and same were sealed in four different clothes separately. Recovery memo of the same has also been prepared by him, which was marked as Exhibit-ka/63 and on the said recovery memo, the signatures of witnesses have also been taken. Thereafter, the blood stained earth and plain earth were collected from the places where the dead bodies of deceased Naresh Dixit, Mahesh Fauzi and Ashok Parihar were lying and kept in separate boxes and prepared recovery memos of the same. After that P.W.-8 also collected the other things which were lying on the place of occurrence like empties, slippers, spectacles etc. and recovery memos of the same have also been prepared.

61. In the cross-examination, P.W.-8 has stated that the place of incident is 3 kms away from Bhogaon police station. There is no railway crossing between the place of incident and Bhogaon police station. They were coming from Mainpuri to Bhogaon. There is a railway crossing between the place of incident and Mainpuri. He did not know as to how far the railway crossing is from the spot. He has further stated that there is only one railway crossing between the place of incident and Mainpuri. He was present at the police station when the incident was reported. He did not know the name of the person who gave the information and where he lived as he did not try to know the name and address from him. When he proceeded for the place of incident, one SSI, one SI and three constables accompanied him in Commander Jeep. When he reached the spot, he found three persons present there. He has also stated that It was not noted as to when he reached the place of incident, nor was it mentioned in the case diary. The presence of the three

surviving persons on the spot was not mentioned in the case diary. At 4.55 PM. when he was nominated as Investigating Officer, he proceeded with the same.

62. P.W.-8 has stated that it was clear from the statement of the informant that the three persons are eyewitnesses of the incident but due to paucity of time, the statements of those three persons were not recorded on the spot. It is not correct that he did not meet the three persons on the spot, nor did he ask them. After arrival of P.W.-8 at the place of occurrence, the Mainpuri Police also reached there after half an hour. The inquests were prepared by his assistant policemen on his instructions. The inquest was conducted in his presence. He had also instructed the concerned police personnel to get the fard prepared. Apart from recording the statement of the informant, he has also prepared the site plan, recovery memos, etc. in his own handwriting. Seeing the photographs bearing paper nos. 10 A/1 and 10 A/17 available on record, P.W.-8 has stated that all these photographs are of the place of incident, where the jeep hit the Eucalyptus tree. He has stated that there are many Eucalyptus trees at a distance of four to five steps. There were small bushes attached to these trees. Seeing the photograph bearing Paper No. 10 A/1, he (PW.8) has stated that there are no five feet tall bushes in it. After having a glance at the photograph bearing paper no.1 10A/1, P.W.-8 has stated that the bush which is visible in front of the jeep is a fallen branch of Eucalyptus tree. He had seen the tree whose branch got damaged and was stuck in the jeep. He has further stated that Eucalyptus trees stood very tall.

63. P.W.-8 has further stated that one by one inquest was prepared of which

details are mentioned in the case diary. At 1:30 a.m. in the night the last inquest was prepared. He has further stated that after making endorsement of details of inquests in C.D. he inspected the spot and prepared the site plan. While inspecting the place of occurrence, he found one empty and blood. The distance from which place the empty was found from the jeep was marked in C.D. No empty was found on the road. He has further stated that to the south of pigeon pea (Arhar) field, there is a maize field. P.W.-8 has also stated that he collected earth and other objects. All empties were found on the right side of the jeep. No empties were found on the left side or behind the jeep. He has also stated that there is no mention of any weapon in the column of the first page of any inquest report. He has stated that this column is not related to weapon. In inquest report, on the back side of the first page, where the details of the information are given, there is no name of the accused in it. He has denied that till the completion of inquests of the body of the deceased, FIR was not registered in this case.

64. P.W.-8 has further stated that he has written the first paper only in C.D. and the rest of the contents have been made by the second I.O. in the C.D. A copy of the FIR and G.D. entry were sent along with each inquest report. Some photocopies of the FIR and G.D. entry and some handwritten copies were received by him from constable Suryanarayan of Police Station Bhogaon at 6.15 pm. He has further stated that the dead bodies were sent from the spot in his presence at 1:45 a.m. on the same night. He did not remember as to by which vehicle dead bodies of the deceased were taken. The distance of the police line from the place of incident is about 10 kilometers. P.W.-8 has further stated that

informant Surendra Singh had given his statement that ten persons including himself had returned from Bewer in that jeep after seeing his maternal aunt. The informant/P.W.-1 had not disclosed in his statement about any person sitting in the Jeep near the Mainpuri Jail. It has been disclosed by the first informant in his statement that when the driver Hem Singh Yadav tried to save the jeep from the offending vehicles, the jeep got dis-balanced and collided with the Eucalyptus tree. Immediately thereafter the accused got down from the Gypsy and Maruti Car, surrounded them and started firing indiscriminately. The informant had also disclosed him that he somehow reached Mainpuri by concealing himself. The informant went to Mainpuri by a tempo.

65. P.W.-8 has also stated that he did not care whether Updesh Singh Chauhan contested against Mr. Mulayam Singh Yadav in the general elections for Member of Parliament in the year 1996 or not. As soon as he reached the spot, he took control of that area and also took precautions that no tampering is done on the spot. P.W.-8 has also stated that the presence of the eyewitness on the spot is an important issue, which was photographed on the spot. He did not have the photographs of the informant Surendra Singh and the three persons accompanying him. The photography was done by a friend of the first informant. After meeting these three persons for the first time, he did not meet them again. He has also stated that the officers of CBCID had recorded his statement twice. In the statement which he gave to the CBCID, there is no mention of these three persons with whom he met on the spot. He could not give any reason why these three persons were not mentioned in his statement. He could not send the

information of the incident to the relatives of the deceased through any means because he did not have time. He did not know whether any person from the house of the deceased had come to the spot or not. He has also stated that the second Investigating Officer also did not mention in the Case Diary as to whom the six dead bodies were handed over after post-mortem.

66. P.W.-8 has also stated that it has come to his notice that the bodies of the deceased were handed over to their heirs. The names and addresses of the heirs have not been recorded in the Case Diary. P.W.-8 and the second investigating officer did not investigate whether the six deceased had any criminal history or not, nor did they verify it from the concerned police stations. He was not aware whether the cases under 302, 307, 345 IPC are pending against the deceased Ashok Parihar and Mahesh Fauji or not. He has further stated that the rear cover of the jeep was down, while taking out the dead bodies and taking photographs, the curtain was rolled up and tied up. Jeep is a case property. Rolling up its cover and tying it up would not be considered as tampering with the case property. He has denied that he had not restored the cover of the jeep with a view to defraud or tamper with the case property and to help the prosecution.

67. This witness also stated that there is no such column in the inquest/panchayatnama form for mentioning the name of weapon with which the deceased was hurt. It is printed in the Government Press. He has denied that he has not followed the procedure prescribed under the provisions of Code of Criminal Procedure. He has further denied that at the time of inquest he did not have the check FIR and the statement of the witnesses and

therefore, he has not mentioned in the inquest as to by which weapon the deceased sustained injury. During inspection, neither at the place of occurrence nor inside the jeep, any bag was found. He has further stated that he did not remember whether the higher officials had seen the spot and recovered empties etc. or not. He has further stated that 10 to 11 days before the incident in question persons of Subhash gang had an encounter with the police in which empties were recovered. The empties recovered in the said encounter and the empties recovered in the incident in question were sent to the court of Chief Judicial Magistrate Mainpuri for investigation. No pellets or cardboard of cartridges were recovered from the spot and the jeep. None of the accused was taken into police custody. Witness P.W.-1 Surendra Singh had disclosed him that his jeep was overtaken and the vehicles of the accused were positioned in front of it. PW-1 did not disclose that the windows of the vehicles of the accused were open and they were carrying weapons in their hands. Witness Santosh Gupta has not given the statement that he had gone to see the maternal aunt of the informant at village Odai along with PW-1 on the date of incident. Aforesaid witness i.e. Santosh Gupta has not disclosed to him that Naresh Pandit and Ram Kishan Ex-Pradhan met them at Jail intersection while they were returning and they met him in the jeep. Aforesaid witness Santosh Gupta also did not disclose in his statement under Section 161 Cr.P.C. as to what weapons were in the hands of the accused.

68. P.W.-8 has further stated that witness Devendra Singh (P.W.-2) had disclosed the police that after the incident all four came to the railway crossing and got the informant Surendra Singh seated in

a tempo. Naresh Dixit and Ram Kishan had met him at Jail intersection. This witness had also disclosed that Hem Singh, driver of the jeep in which the deceased and four others were travelling, wanted to take the jeep ahead for saving the passengers in the jeep due to which the jeep got dis-balanced and collided with the Eucalyptus tree. After getting down from the Gypsy and Maruti car, the accused Ramanand etc. armed with rifles, guns, automatic and semi-automatic weapons in their hands exhorted that they would take revenge and finish all of them, who were sitting in the jeep. P.W.-8 has denied that investigation was done under political pressure and influence of the first informant and the charge-sheet was submitted. It has come to his notice that the investigation of the case was transferred to the C.B.C.I.D. on the orders of the State Government where also the investigation was conducted.

69. P.W.-8 has also stated that in this case raids were conducted before the submission of the charge-sheet. During that period he did not know about the bodyguard of accused Kaushalendra Pal Singh. Raid was conducted at the place of accused Kaushalendra for his arrest. Police personnel from several police stations were deputed to arrest the accused in this case. The statement of the bodyguard of accused Kaushalendra was not taken by the police. P.W.-8 has also stated that name of Ram Kishan is not mentioned in the FIR. He himself has stated that in the FIR his name has rather been mentioned as Ex-Pradhan. Aforesaid fact had been discovered later on the disclosure of witnesses. The name Devendra Singh has been mentioned in the First Information Report. In the inquest report Exhibit K-29, name of Devendra Singh was wrongly written, which was scored out and re-written as Ramkishan. On

top of the first page of that inquest report, only the name of the deceased Ram Kishan is written, but the father's name is not written. However, in the concerned column, the father's name is written as Kalyan Singh. On the back of the first page of this inquest report the name of Devendra Singh was written at two places, which was corrected as Ram Kishan.

70. P.W.-8 has further stated that before reaching the spot, he did not get the copy of the First Information Report and other documents. He got the said documents about quarter to one hour after reaching the spot. He has further stated that after reaching the spot but before getting the above documents, he had inquired from the three persons present on the spot. Before preparing the inquest, he had seen the check FIR and other relevant records and accordingly started with the proceedings of inquest of the dead bodies and completed it. P.W.-8 has denied that the name of Devendra Singh was crossed out in the inquest report and Ramkishan was mentioned as per the FIR i.e. Exhibit K-29.

71. P.W.- 8 has also stated that the informant could have told about the collision of the jeep with the Eucalyptus tree in the incident, but he had not told so and that he had seen with his own eyes that the jeep collided with the tree. Witness Devendra Singh did not state in his statement under Section 161 Cr.P.C. that the accused stayed at the spot for seven to eight minutes. All the accused had come near the jeep and fired bullets and in spite of them coming close four person ran away.

**BRIEF STATEMENTS OF THE
ACCUSED RECORDED UNDER
SECTION 313 Cr.P.C.**

72. In his statement the accused-appellant Vipin Kumar has stated that he has not committed any offence as alleged by the prosecution and he has been falsely implicated in the present case by the first informant/P.W.-1 due to enmity, as his land is adjacent to the house of P.W.-1 which he had refused to sell. He has further stated that he neither belongs to the family of co-accused Jagannath nor has any relation with him.

73. The accused-appellant Kaushalendrapal Singh has stated that since the first informant/P.W.-1 and his brother have enmity with him due to school, for the post of Manager and political rivalry, he has been falsely implicated in the present case. He has further stated that when he was working on the post of Vice-President, Amarshaheed Inter College, for non performing of his duties, the uncle of the deceased, who was working on the post of P.T.I. in the said school, a notice was given to him for removing him from his service and because of it, the uncle of the deceased harboured a grudge with the accused-appellant and he has falsely implicated him in the murder of his nephew i.e. the deceased.

74. Accused-appellant Chandrakant Dixit has stated that he has not committed the alleged offence and due to litigation and enmity between the first informant/P.W.-1 and his family members, he has been falsely implicated in the present case. He has also stated that the first information report has been scribed by P.W.-1 after consultation with Police and the Police has also conducted false investigation against the accused. He is a Government servant and is working as a Junior Clerk in the Commercial Taxes Department. He doesn't have any criminal history.

75. It has been stated by the accused-appellant Devendra that since litigation is going on between his family and the family of the informant/P.W.-1, he has been falsely implicated in the present case. He has further submitted that the murders of all the six deceased were carried out by the gang of Subhash Pandey. He has also stated that he has fifty bighas of land which the first informant/P.W.-1 neither allows him to plough nor sow. The bundle of mustard crops of the accused-appellant was burnt by the first informant/P.W.-1 and his sons and in that regard he had lodged a report at Bhogaon police station against them due to which he has been falsely implicated in the present case.

76. Accused-appellant Ramakant Dixit has stated that he has not committed the alleged offence and since litigations are going on between his family members and first informant/P.W.-1, he has been falsely implicated in the present case. He has further stated that at the time of the alleged incident, he was present at home in Hathras, as his wife was unwell and he was on leave.

77. The accused-appellant Jagannath has also stated that due to litigations which are going on between his family members and first informant/P.W.-1, he has been falsely implicated in the present case. It has also been stated that he was working as conductor in U.P.S.R.T.C. and was posted at Hathras. On the day of the alleged incident, he and his nephew i.e. co-accused Ramakant Dixit were present at home and he was in the company of the police guards.

78. The accused-appellant Hariom has also pleaded innocence. He has stated that he has fifty bighas of land and orchard in village Kishanpur Gadhiya, which the first

informant/P.W.-1 and his relatives do not allow him to sow and cultivate, due to which some altercations took place between him and them.

**TESTIMONY OF DEFENCE
WITNESSES**

79. In order to establish their innocence, the accused-appellants produced six witnesses who are detailed hereinunder.

D.W.-1 (Mr. Ramesh Chandra Shamra, Senior Assistant in the office of Trade Tax at Shikohabad)

80. This defence witness has stated that on 6th September, 1996 the accused-appellant Chandrakant Dixit was posted as Junior Clerk in the office of Trade Tax Officer, Shikohabad namely Sri Pradeep Kumar Yadav. He produced the attendance register of September, 1996. He has also verified the attendance register brought by Rakesh Chaturvedi, Senior Clerk wherein Chandrakant Dixit is shown to be present in the office on 6th September, 1996. His signatures also appeared in the attendance register. As per this register the accused-appellant Chandrakant Dixit attended the office between 10:00 a.m. to 05:00 p.m. Chandrakant Dixit has also received salary for the period 1st September, 1996 to 6th September, 1996. This witness has also been cross-examined wherein he has stated that he cannot tell as to when other 8 workers had come to the office and thereafter left the office. This witness has stated that he cannot say as to at which time Chandrakant Dixit had left the office on 6th September, 1996.

D.W.-2 (H.C.-179 Surya Pal Singh, Head Constable, who was then deputed to work as Gunner with the accused

Kasuhlendra Pal Singh till 7th September, 1996, whereafter he returned to Police Line)

81. This defence witness has stated that he was with Kaushlendra Pal Singh on 6th September, 1996. He visited Amar Saheed Intermediate College Bawer at 11.00 a.m. along with Chandra Pal Singh and remained there till 12.30 p.m. Thereafter Kaushlendra Pal Singh along with D.W.-2 went to the place of Tota Ram at 03:00 p.m. as uncle of Tota Ram had died and remained there till 06:30 p.m. It is at the place of Tota Ram that this witness came to know that some incident has occurred at Bhogaon in which certain persons were killed. He has then stated that he along with Kaushlendra Pal Singh had gone to this place at 06:30 p.m. and remained with him till 08:00 p.m. and after Kaushlendra Pal Singh went inside his room for rest, this witness came back. Later this witness came to know that name of Kaushlendra Pal Singh had figured in the incident. In the cross-examination this witness could not give the detail of other persons with whom he had worked as gunner. This witness has further stated that he knows Tota Ram from 1990. He always accompanied Kasuhlendra Pal Singh. The Police raided his house on 6th September, 1996 at 09:00 p.m. and interrogated him but Kaushlendra Pal Singh was not found. He was not informed as to whether he was to go anywhere late in the evening. This witness informed the Police of Bawer Police Station that since Kaushlendra Pal Singh is not present, therefore, he is leaving for Police Line. He had not given any information that Kaushlendra Pal Singh was not traceable from 09:00 p.m. on 6th September, 1996 till 07:00 a.m. on the next morning. This witness has been confronted on the need to maintain the diary and he

has admitted that movement of the presence is mentioned but he has not brought such daily diary. He has denied the suggestion that since the facts about the movement of Kasuhlendra Pal Singh was not mentioned in the diary, therefore, he has not produced the same. He has also denied that he was not with Kaushlendra Pal Singh on 6th September, 1996. He has also denied having given any statement to Inspector C.B.C.I.D. that he was a gunner with Kaushlendra Pal Singh since 1st September, 1996.

D.W.-3 (Mr. Rajesh Kumar Singh, the then Inspector of C.B.C.I.D. Agra (from July, 1997 to July, 1999))

82. This witness has stated that after receiving the investigation, he recorded the FSL report dated 28.9.96, which was received from the Forensic Science Laboratory, Agra and attached the related documents along with it. On 5.2.99, he also recorded the statement of Mr. Rampal Singh, Station In-charge of Police Station. On 23.4.99, after reaching the Commercial Tax Office at Mainpuri, he inspected the attendance register dated 6th September, 1996 which relates to accused Chandrakant Dixit, and obtained certified photocopy of the attendance register for the month of September 1996. He also recorded the statement of Mr. R.S. Vimal T.T.O. He then obtained photocopy of the records regarding criminal history of accused of Police Station-Bhogaon. On 01.5.99 he recorded the FSL report which was received from Forensic Science Laboratory Agra. On 07.5.99 he recorded statement of Mr. Pradeep Kumar Yadav, Trade Tax Officer. On 13.5.99, he has verified the death of named accused Samanand Dixit from Police Station Bawer.

83. D.W. 3 has then stated that the In-charge officer of Police Station-Bhogaon Rampal Singh had disclosed in his statement that information was received at the police station at 16:50 hours by a member of the public that firing has taken place at Rui Tiraha. Ballistics expert's report dated 31.7.98 was copied by him in the C.D. He has further stated that from the perusal of result column of the aforesaid report, it was opined that empties recovered in the incident of Case Crime No. 539 of 1996, Police Station Kotwali, Mainpuri vide Paper no. EC-32 and EC-34 and the empties EC-15 EC-17 EC-19 and EC-29 recovered from the Maruti car were fired from the same firearm. He has further stated that in the incident of Case Crime No. 539/96 Police Station Kotwali Mainpuri, two empties being Ch. E.C.-31 and E.C.-33 were recovered. He had investigated the case from 31.7.98 to 13.5.99. After that investigation was done by Mr. Mehak Singh. He has further stated that from the statement of Rampal Singh, which has been recorded by him on 5.2.1999, he came to know that Constable Vijay Singh, Head Constable Raghunath Singh and Bani Singh went to the place of occurrence. In the statement of Rampal Singh, there is no mention of presence of witnesses Surendra Singh, Devendra Singh, Santosh Singh and Santosh Gupta on his reaching the spot nor the same has been mentioned in their statements under Section 161 Cr.P.C.

D.W.-4 Sri S.C. Pal Retd. Deputy S.P., then Inspector of C.B.C.I.D., Agra (from 30.11.1996 to 28.01.1998)

84. This defence witness has stated that from perusal of the records of Police Station-Bawer, it was discovered that on 23rd May, 1996 a shoot-out allegedly took

place between these two parties and in that regard Shiv Raj Singh P.T.I. brother of the informant/P.W.-1 had lodged the FIR which was registered as Case Crime No. 153 of 1996 under Sections 147, 149 and 302 I.P.C., Police Station -Bhogaon, District Mainpuri. In the aforesaid FIR Ramakant and 6 others along with his two gunners were nominated as accused. However, on 7th July, 1996 a police report (final report) was submitted. A cross case being Case Crime No. 153A under Sections 147, 148, 149, 307 and 302 I.P.C. was lodged by accused Jagannath Dixit against Shiv Singh, Updesh Singh, Surendra Singh @Mallu and Sushil Gupta in which charge-sheet was submitted on 7th July, 1996. He has further stated that Anand Dixit told him that his father Jagannath Dixit had gone to Delhi for his treatment and after his coming back statements of all could be recorded. Statements of named accused Rajbhushan Singh and Kaushalendra Pal Singh were recorded on 1.12.96. He has further stated that the higher officials had suggested the former investigating Officer Mr. Nand Kumar that there was possibility of involvement of Subhash Gang in the incident in question, therefore, information of sending the empties recovered in respect of Case Crime No. 539 of 1996, which was connected with Subhash Gang and empties recovered in the incident in question for forensic examination, was recorded by him on the statement of Mr. Mall. In his statement Mr. Mall did not state that there was possibility of involvement of Subhash Gang in the incident in question but when he inquired from Mr. Mall, he stated that on the orders of the S.S.P., some of the empties recovered in both the incidents have been sent for forensic examination. He has then stated that Constable Munshi Lal told him that on 6th September, 1996, the accused Jagannath was with them

throughout the day. A similar statement has also been given by Constable Vijay Kumar but he has only indicated him as old man. Witness Santosh Kumar told him that on the alarm of a women that there is firing on the road, he had written in the C.D. near the school that Maharani Avanti Bai Primary School is located on the side of the road, about 100 steps south of the place of incident.

85. D.W.-4 has further stated that Daggi Lal had told him that at the time of the incident, he was in the village with his family and it was raining mildly between the village and the place of incident and there were crops of maize and there were tall bushes near the Eucalyptus trees on the side of the road. He has then stated that the informant/P.W.-1 Surendra Singh also told him on 15.5.97 that he had gone to Mainpuri Kotwali and not to Bhogaon Kotwali because the Police of Bhogaon was under the influence of the accused.

86. D.W. 4 has then stated that he had inspected the place of incident on the telling of witness Devendra Singh. He has not prepared any site plan. The site plan prepared by the Civil Police has been confirmed by him. D.W.-4 has further stated that before starting the investigation, he examined the FIR. The informant Surendra Singh and the witnesses Devendra Singh and Santosh Gupta did not disclose that Naresh Dixit and the former Pradhan of Humayupur, namely, Ramkishan, met at Jail intersection, while returning from Odai Padariya and they were seated in the same jeep. The said three witnesses had disclosed that their jeep was overtaken by vehicles of accused which positioned itself in front of their jeep, on which their jeep driver tried to overtake after avoiding them due to which their jeep got disbalanced and

collided with the Eucalyptus tree. It was not disclosed by any of the witnesses that the jeep collided with the Eucalyptus tree after the driver Hem Singh was shot. He has further stated that Devendra Singh had given his statement to him that all four of them had witnessed the whole incident by hiding in the mustard field but he had not disclosed that he had seen the incident by hiding in the pigeon pea (Arhar) field. It has also not been disclosed by any of the witnesses that the nick name of Ramkishan is Kishanpal. The informant Surendra has not disclosed him as to how and by what means he had reached Mainpuri Police Station Kotwali but on 15.5.97 he has disclosed that after incident occurred, leaving three survivors on the spot, he reached on the road by foot and thereafter travelled to Mainpuri on a three wheeler tempo.

D.W.-5 (Shri Kamlesh Kumar, Revenue Inspector, District Panchayat Mainpuri, District, Mainpuri)

87. This defence witness has stated that he is posted in the office of District Panchayat for the last three months. Signatures appended on the paper No. 129, are his own and he has issued it. He has also certified it on which exhibit kha-3 has been marked. He has further stated that the licence for holding Rui Cattle Fair has been given since 1988. According to records, this fair is held on Tuesday and Friday. He cannot say as to whether this fair is held at the spot or not. This witness has also been cross-examined in which he has stated that such cattle fairs are held at about twenty places in Mainpuri district. In connection with such cattle fair, some persons deposit the requisite fee but do not get it organized. In the certificate marked as Exhibit Kha-3 the place of cattle fair has been mentioned

as Rui and village Rui is 3 to 4 kilometres from Mainpuri- Bhogon road. He does not know whether any cattle fair was held in Rui on 6th September, 1996 or not?

D.W.-6 (Shri Mehak Singh, Retired Inspector C.B.C.I.D. Agra)

88. This witness has stated that he had conducted the investigation of the case from 18.2.2000 to 14.3.2000. He recorded the statements of many witnesses including Arvind Singh Tomar, who disclosed that he had heard that on 06.09.1996 on Bhogaon to Mainpuri road in front of railway crossing, Gajendra Singh @ Tillu, nephew of Shiv Raj Singh, resident of Bewer, along with his five companions, who were travelling in a jeep after meeting Updesh Singh and Shiv Raj Singh in Jail, were killed. Tomar also disclosed that Shivraj Singh and Updesh Singh (of Fata) were related to the Janta Party. He has further stated that Tomar did not disclose him that there was any other person in the jeep other than the six deceased.

89. D.W.-6 has further stated that Rambabu Kushwaha also reiterated the version of Arvind Tomar. Rambabu has also disclosed that he heard that Ramnand Dixit, Rajbhushan etc. were named accused in the incident in question and there was enmity due to party bandi between them. D.W.-6 has also stated that he had inspected the place of occurrence. At the time of inspection, he found a primary school on the south side of the place of occurrence. Thereafter he has described the place of occurrence with reference to its vicinity. He has also stated that at the time of his inspection, he found that the primary school was closed. Matadeen had disclosed him that when the police arrived at the place of occurrence he also reached there

and saw that six persons were lying dead but he did not know as to who were the assailants and what was the quarrel and how many persons were there. A similar statement was also given by Mohan Lal but he did not disclose as to whether any person other than police was present at the place of occurrence or not?

90. D.W.-6 has further stated that during the course of investigation, he came to know that the accused was known to Subhash Pandey but after sometime, he has stated that only Anand Dixit knew the accused Subhash Pandey and was not related. He has further stated that during the investigation, Deputy Jailor Mr. Pathak had disclosed him that on 6.9.96 no one had met Updesh, Shivraj Singh who were detained in the District Jail. Witness Arvind Tomar had also not disclosed him that from whom he came to know about the incident during the course of investigation. He has also stated that he came to know that Subhash Pandey is not related to the Dixit family gang. Criminal history was also found against Subhash Pandey. He has also stated that during the investigation, no witness disclosed him about the involvement of Subhash Pandey or his gang members in the incident in question.

91. D.W.-6 has further stated that in the murder of Subedar, brother of Subhash Pandey, neither the informant, nor deceased nor the family members were named as accused. He has further stated that the witness Matadin had disclosed him that when the shots were fired, he saw that there are about 10 to 12 persons who were firing from the road due to which he got scared and went to the village and hid himself. Witness Mohan Lal has disclosed him that some persons, who were about 10 to 12 in number, were firing.

**ARGUMENTS ADVANCED ON
BEHALF OF THE ACCUSED-
APPELLANTS**

**92. On behalf of Accused-appellant-
Rama Kant Dixit**

Mr. V.P. Srivastava, the learned Senior Counsel has made the following submissions:

(i) the FIR which was lodged on the basis of written report submitted by the first informant/P.W.-1 is ante-timed;

(ii) the prosecution witnesses were actually not present at the time and place of occurrence and the evidence to show their presence as such is manufactured;

(iii) the prosecution story that first informant/P.W.1 had gone to meet his maternal aunt (Mausi) along with nine others is a story full of concoction inasmuch as neither the informant/P.W.1 knew her name nor there was any reason to take seven persons (outside of his family) with him for the said purpose;

(iv) it is emphasized that if the purpose of such visiting was to see his maternal aunt, it was expected that some ladies of his family would also go, which is not the case here; justification that the male members accompanied informant/P.W.1 for his safety and security, is fallacious, since none of them carried any firearm/weapon;

(v) the alleged cause of shoot-out was the enmity of the accused-appellants with informant/P.W.-1 and it would be highly improbable that P.W.1 along with three others would be spared unharmed and uninjured while the six others were shot dead and that too when P.W.-1 was the primary target on account of enmity;

(vi) the prosecution story is contradictory as at one place it is alleged that the accused-appellants positioned their vehicles while the other version is that the

driver sustained gun shot injuries on account of which the jeep in which the deceased and the prosecution witnesses of fact were travelling collided with the tree;

(vii) the prosecution version that four persons could jump out of running jeep without any injury and could flee unhurt is improbable;

(viii) the prosecution version that the prosecution witnesses could see the incident from pigeon pea (Arhar) field is highly improbable when the accused-appellants primarily wanted to alienate the first informant/PW-1 in the shoot-out;

(ix) the F.I.R. version of the prosecution story that first informant/P.W.-1 having gone to Police Station- Kotwali, District Mainpuri for lodging a report after travelling about 9-10 Kilometers even when the Bhogaon Police Station is situated much closer to the place of occurrence casts a serious doubt in the prosecution case. It was otherwise impossible for the first informant/P.W.-1 to have travelled such a long distance on foot while concealing himself and in a short span of less than an hour;

(x) the fact that the name of Devendra Singh Ex-Pradhan of Himayunpur is mentioned in the F.I.R. whereas his name is Ramkishan shows that the informant/P.W.-1 has not witnessed the occurrence;

(xi) the circumstance that Santosh Singh son of P.W.-1 (not produced in evidence) P.W.-2 and P.W.-3 were not examined by the Investigating Officer on the spot under Section 161 Cr.P.C. and they are also not the witnesses of inquests including P.W.-1, are circumstances indicating that these witnesses were not present at the spot when the incident occurred;

(xii) the first informant/P.W.-1 stated that other three persons were left at the spot and he alone come to Police Station

Kotwali, District Mainpuri for lodging the F.I.R. is contradicted by P.W.-2 and P.W.-3 who have stated that they accompanied P.W.-1 uptill railway crossing;

(xiii) in the F.I.R. the offending vehicles are mentioned as Gypsy and Maruti Van, whereas in the testimonies of the prosecution witnesses the vehicles have been described as Gypsy and Maruti Car, which too raises a doubt as to whether the prosecution witnesses have seen the incident and;

(ivx) as per prosecution witnesses, accused-appellants only had guns and riffles whereas the injured have sustained explosive injuries and also bullets fired from automatic and semi-automatic guns, which raises doubt as to whether the prosecution witnesses have seen the incident i.e. the medical evidence does not fully corroborate the ocular version of the occurrence.

**On behalf of accused-appellants
Vipin Dixit, Chandrakant and Hari Om**

93. Mr. Brijesh Sahai, the learned Senior Counsel for aforesaid appellants while adopting the arguments of Mr. V.P. Srivastava, the learned Senior Counsel has laid much emphasis in challenge to the prosecution case and submitted as under:

(i) the prosecution witnesses are not consistent inasmuch as the witnesses at one place claim to have seen the incident from pigeon pea (Arhar) field while at other place they claim to have seen the incident from mustard field;

(ii) the jeep in which the deceased along with P.W.-1, P.W.-2, P.W.-3 were travelling, was not recovered and its whereabouts was also not available;

(iii) the details of the manner of incident have not been disclosed and it is

not clear as to how four persons who were also travelling in the same jeep were spared which included the primary target i.e. P.W.-1;

(iv) the story of stopping of the jeep after it collided with the tree has come up for the first time during the course of trial;

(v) the fact that out of four alleged to have been spared in the attack, it is the eldest who was the prime enemy and he came to lodge the F.I.R. leaving behind three young survivors renders the prosecution version of the occurrence improbable;

(vi) the inquest of the last deceased is shown to have been completed at 01:30 A.M. on 7.9.1996, whereas the prosecution witnesses disclosed its time as 02:30 A.M. on 7.9.1996. As such there is contradiction in the testimonies of P.W.-1 and P.W.-2;

(vii) it is also not established from the evidence brought on record by the prosecution as to when the dead bodies of the deceased were sealed and when the constables, who carried the dead bodies reached the mortuary for their autopsy as there is an issue as to at what time the dead bodies were sent to mortuary for post-mortem;

(viii) the investigation is wholly dishonest;

(ix) criminal background of the prosecution witnesses have also been emphasized:

(x) there are material improvements i.e. embellishment and contradictions in the depositions of the prosecution witnesses;

(xi) the manner of assault is contradicted by the autopsy reports of the deceased;

(xii) there are three distinct versions of the incident, namely,

(a) version as per prosecution witness;

(b) version as per Autopsy Surgeon; and

(c) version as per Investigating Officer.

all of three of which are mutually inconsistent; and

(xiii) the prosecution witnesses have alleged that the accused-appellants fired from the front while the Investigating Officer claims that the empties were recovered from the right side of the jeep whereas the Autopsy Surgeon has proved that the injuries have been caused from the both sides of the jeep i.e. the left and right side and even from the front but none of the injuries have been caused from behind, which conclusively proves that the prosecution witnesses were neither present at the spot nor they have witnessed the occurrence.

On behalf of accused-appellant - Devendra

94. Mr. Rajiv Lochan Shukla, the learned counsel for the accused-appellant Devendra, while adopting the arguments of the aforementioned two Senior Advocates has highlighted the evidence on record to show the involvement of Subhash Gang in the shoot-out, which has been fully discarded by the prosecution.

95. It is also highlighted that in a different incident where Subhash Gang was involved in a shoot-out, certain empties were recovered. The said empties were matched with the empties recovered in the case in hand and it was established in forensic examination that the two sets of empties were fired from the same firearm. The original communication of Joint Director, Forensic Science Laboratory, U.P. Agra dated 31st October, 1996 in the case of State Vs. Ramanand & Others, was not produced in evidence and its photo alone was brought on record vide

Paper No. 131Aa/10 The then Investigating Officer of C.B.C.I.D. has proved the report which has also been incorporated in case diary of the investigation of the case in hand.

96. Mr. Shukla also submits as under:

(i) the above evidence clearly casts a doubt in the prosecution case in face of credible evidence suggesting involvement of Subhash Gang in the crime in question;

(ii) the informant/ P.W.-1 comes from a very influential family as his two brothers were M.L.As. (Members of Legislative Assembly);

(iii) the Jeep in which deceased were travelling was covered from the back side. Thus, it was impossible for P.W.-1 along with three others, who were sitting on the rear side of the jeep, to come out from the back door of the jeep easily, particularly when stepney was fixed on the back door of the jeep, which would act as an hurdle;

(iv) seeing the criminal antecedents of the prosecution witnesses,, their conduct is not natural and reliable;

(v) the statements of defence witnesses about the existence of Forensic Science Laboratory Report was not challenged nor the defence witnesses were controverted on this aspect and, therefore, the statements of defence witnesses remains intact; and

(vi) the photographs available on record would clearly show that the place of occurrence was such that it rendered impossible for someone to see the incident from pigeon pea (Arhar) from a distance of 40 to 50 paces.

On behalf of accused-appellant Kaushlendra

97. Mr. A. K. Shukla, the learned counsel for appellant Kaushlendra adopts

the arguments advanced by Mr. V.P. Srivastava and Mr. Brijesh Sahai, learned Senior Advocates as well as Mr. Rajiv Lochan Shukla, Advocate.

Arguments advanced on behalf of State

98. Per contra, Mr. Arunendra Singh and Mr. Amit Sinha, the learned A.G.A. opposing the appeals submit as under:

(i) present case is a case of brutal shoot-out in which six persons have been shot dead on account of indiscriminate firing by accused-appellants;

(ii) the incident was reported to the Bhogaon-Police Station and as the information was circulated on wireless, the authorities responded and promptly rushed to the spot;

(iii) mere inadvertent omission would not discredit the prosecution case;

(iv) merely an error of punctuation i.e. a “comma” was left out in between Devendra and Ex-Pradhan of Humayunpur will not render the prosecution story unworthy of trust;

(v) there was no Ex Pradhan in the name of “Devendra” whereas his name is “Ramkishan” and that is why corrections were incorporated, wherever required including the inquest reports of the deceased;

(vi) in an incident of such a kind, it is but natural for anyone to rush to the Police Station situated in prime location of a city like Police Station Kotwali Mainpuri, rather than come to Police Station Bhogaon, which is situate outside the city. As such prosecution case cannot be disbelieved merely on the ground that the FIR was lodged at a police station which is situate far away even when another police

station is already situated at a short distance.

(vii) no major inconsistency is shown in the prosecution case which may discredit the prosecution story;

(viii) in an incident of present kind where indiscriminate firing was made, it would be difficult to ascertain as to who had hit whom, from which side and these aspects cannot be decisive and the arguments that the manner of assault is inconsistent is misconceived; and

(ix) in an incident of firing one would rush in the safe direction available and it cannot be pin pointedly explained. As such the place of the injuries sustained by the deceased cannot be explained with precision.

FACTUAL ISSUES WHICH REQUIRE CONSIDERATION

99. The prosecution has come up with a specific case that accused-appellants are the persons who carried out the brutal shoot-out in which six persons have been done to death. The guilt of the accused-appellants is proposed to be established on the basis of documentary evidence filed before court below which we have already tabulated in the earlier part of this judgment as also the oral testimonies of witnesses of fact, namely, Surendra Singh (first informant/P.W.-1), who happens to be the father of the deceased, namely, Gajendra Singh; Devendra Singh (P.W.-2), who is the son of P.W.-1 and brother of the deceased Gajendra Singh; and Santosh Gupta (P.W.-3), who happens to be a close associate of P.W.-1/first informant.

100. In addition to above witnesses of fact, the prosecution has also adduced Dr. R.P.S. Chauhan (P.W.-4), who conducted the autopsy of the bodies of all the six

deceased and proved the post-mortem reports. Other witnesses including the formal witnesses who have proved the police papers and the Investigating Officer, who had conducted the investigation have also produced.

101. With the above spectrum of these appeals in hand we now proceed to deal with each of the issues raised before us in support as well as in opposition to these appeals.

INIMICAL RELATIONSHIP BETWEEN THE PARTIES AND GENESIS

102. Before embarking upon the evaluation of evidence it would be worth noticing the inimical relations between the parties. According to the prosecution the shoot-out was a result of enmity between P.W.-1 and the accused party and the object of the shoot-out was to take revenge from P.W.-1. The aspect of enmity is also reflected in the statements of two other prosecution witnesses of fact i.e. P.W.-2 and P.W.-3.

103. P.W.-1 in his examination-in-chief has stated that there is an old enmity continuing with the accused. Prior to the incident in question earlier an incident had occurred at Lucknow in which the brother of P.W.-1, namely, Shiv Raj Singh was shot and he was injured. In the said case, Chhotey son of accused Jagannath and Hukum Chand father of accused Ramanand were accused. Whereafter another incident occurred in which the brother of P.W.-1 Shiv Raj Singh was again shot and he thus injured. His associate, namely Jai Govind Dixit was killed and Chhote son of Jagannath, Anand brother of Jagannath and accused Hariom son of Hukum Chand were

implicated in the said case, which is said to be pending. The exact testimony of P.W.-1 in this regard is worth reference and is accordingly extracted hereinunder:-

"यह सही है कि वर्ष 1985 में मेरे भाई शिवराज सिंह पर बेवर में प्राणघातक हमला किया गया। वर्ष 1986 में उन्होंने पर लखनऊ में प्राणघातक हमला हुआ तथा सन् 1986 में मेरे भाई शिवराज सिंह व उपदेश सिंह आदि पर हमला किया गया। जिसमें हमारे साथी श्री जयगोविंद दीक्षित की हत्या हो गई थी। इसी संदर्भ में मैंने दरोगा जी को बताया था कि इन्हीं रंजिशों के कारण यह घटना हुई है।"

104. P.W.-1 in his cross-examination has admitted that in the murder of Ramesh Chandra Dixit, father of accused Vipin Dixit, names of P.W.-1, his son Devendra (since deceased), his brothers Shiv Raj Singh and Updesh Singh, Santosh Singh (P.W.-2) along with others surfaced. P.W.-2 in his cross-examination has also verified the said statement of P.W.-1 and admitted as under:

"रमेश दीक्षित की हत्या के मामले में उनके पिता श्री कृष्ण ने मेरे परिवार वालों के खिलाफ रिपोर्ट लिखाई थी। यह कहना गलत है कि रमेश दीक्षित की हत्या वाले मुकदमे में सभी गवाही होस्टाइल हुए थे इसलिए वह केस छूट गया था।"

105. P.W.-1 has further stated in his cross-examination that Hukum Chandra Dixit, father of accused Hariom and Ramanand was earlier shot dead in which the son of P.W.-1, namely, Munesh and his brother Updesh along with others were accused. He has again stated that he knew Chhotey @ Rajveer son of accused Jagannath and in whose murder, Updesh Singh, Shiv Raj Singh, his son Mallu were accused and name of Santosh Gupta (P.W.-3) has subsequently been included in the said case. The cousin brothers of Rajveer @ Chhotey are Ramakant Dixit (accused-appellant herein), Chandrakant and Billu.

Though in his cross-examination, P.W.-1 has stated that he does not remember as to whether any case was lodged by Jagannath and his family members against him but he has admitted that there is an ongoing enmity between Jagannath and him for the last ten years prior to this incident. The statement of PW-1 in this regard reads as under:

"जगन्नाथ के परिवार के इस मुकदमे में कुल चार लोग मुल्जिम हैं जगन्नाथ से इस घटना से दस वर्ष पहले से मेरी रंजिश चली आ रही है मुझे ध्यान नहीं है कि जगन्नाथ व उनके परिवार में अन्य मुल्जिमान ने मेरे विरुद्ध घटना के पूर्व कोई मुकदमा लिखाया है या नहीं। मैंने दरोगा जी को यह बता दिया था कि जगन्नाथ वगैरह ने मेरे परिवार वालों के खिलाफ कई झूठे मुकदमे दर्ज कराए थे। मैंने यह बयान सही दिया था। यह बात हम लोगों को बुरी लगी थी कि जब जगन्नाथ वगैरह ने हम लोगों के खिलाफ मुकदमे दर्ज कराए थे। यह कहना गलत है कि इसी रंजिश के कारण मैंने भी जगन्नाथ आदि के खिलाफ झूठी रिपोर्ट लिखाई हो।"

106. In his cross-examination, P.W.-1 has admitted that accused Kaushlendra had lodged a case of theft of stepney against the brothers of P.W.-1, namely, Shiv Raj Singh and Updesh Singh.

107. Lastly, P.W.-1 has stated in the cross-examination that there was enmity between the deceased Mahesh Fauji and the accused persons. He has denied the suggestion that he had more enmity with the accused than the deceased Mahesh Fauji.

108. P.W.-2 in his examination-in-chief has verified the said statement of P.W.-1 by stating that on the date of incident his uncles Shivraj Singh @ P.T.I., Updesh Singh, his brother Vijender @ Mallu were in jail in connection with the murder case of Chhote alias Rajveer. In his cross-examination, P.W.2 has stated that he

had informed the Investigating Officer that his family is having enmity with the accused Jagannath since before ten years and that is why the accused Jagannath has committed this incident.

109. P.W.-2 in his examination-in-chief has stated that enmity between his family and the accused is going on since 1985. In between Devki Nandan, cousin of the accused Hariom, had lodged a report under Section 302 I.P.C., against him, his uncles Updesh Singh and Santosh Singh and his father (P.W.-1) and since they have been in jail for a month due to the said FIR, they were angry. P.W.-2 in his cross-examination regarding enmity with the accused Kaushlendra Pal, has stated as under:

"घटना के पहिले मेरे परिवार के लोग बी०एस०पी० एवं 1 बी०जे०पी० से सम्बन्धित थे मुल्जिम कौशलेन्द्र पाल सिंह सहित सभी मुल्जिम सपा से सम्बन्धित थे और आज भी है। यह सही है कि भिन्न 2 पार्टियों के होने के नाते मेरे परिवार से व मुल्जिम कौशलेन्द्र पाल से पार्टी को लेकर भी रंजिश हो।"

110. The aforesaid facts as born out from the testimonies of P.W.-1 and P.W.-2 are the genesis of enmity existing between the family of informant (P.W.-1) and the accused.

111. It is thus evident from the depositions of PW-1 and PW-2 that the main prosecution witnesses are not independent witnesses but are interested witnesses. P.W.-3 is a close associate of P.W.-1 and in the murder of Chhotey @ Rajveer son of accused Jagannath name of Santosh Gupta (P.W.-3) his name has subsequently surfaced along with brothers of P.W.-1, namely, Updesh Singh, Shiv Raj Singh and his son Mallu and therefore, he

too would fall in the category of an interested witness.

112. In what manner should the statement of an interested witness be scrutinized by Court is not shrouded in obscurity but is now well settled that though it is admissible but is subject to critical scrutiny.

113. In **Md. Jabbar Ali and others Vs. State of Assam**, reported in 2022 SCC OnLine SC 1440, the Court has observed as under in paras 55 to 58 of the report:-

"55. *It is noted that great weight has been attached to the testimonies of the witnesses in the instant case. Having regard to the aforesaid fact that this Court has examined the credibility of the witnesses to rule out any tainted evidence given in the court of Law. It was contended by learned counsel for the appellant that the prosecution failed to examine any independent witnesses in the present case and that the witnesses were related to each other. This Court in a number of cases has had the opportunity to consider the said aspect of related/interested/partisan witnesses and the credibility of such witnesses. This Court is conscious of the well-settled principle that just because the witnesses are related/interested/partisan witnesses, their testimonies cannot be disregarded, however, it is also true that when the witnesses are related/interested, their testimonies have to be scrutinized with greater care and circumspection. In the case of Gangadhar Behera and Ors. v. State of Orissa (2002) 8 SCC 381, this Court held that the testimony of such related witnesses should be analysed with caution for its credibility.*

56. In *Raju alias Balachandran and Ors. v. State of Tamil Nadu* (2012) 12 SCC 701, this Court observed:

"29. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in Dalip Singh [AIR 1953 SC 364] and pithily reiterated in Sarwan Singh [(1976) 4 SCC 369] in the following words: (Sarwan Singh case [(1976) 4 SCC 369, p. 376, para 10)

"10. ... The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration."

57. Further delving on the same issue, it is noted that in the case of *Ganapathi and Anr. v. State of Tamil Nadu* (2018) 5 SCC 549, this Court held that in several cases when only family members are present at the time of the incident and the case of the prosecution is based only on their evidence, Courts have to be cautious and meticulously evaluate the evidence in the process of trial.

58. It is thus settled that the evidence of the related witnesses have to be considered by applying discerning scrutiny.
....."

(Emphasis supplied by us)

Criminal antecedents to the credit of informant (P.W.-1) and his family including P.W.-2 and the deceased Devendra (son of P.W.-1)

114. In the cross-examination, the star witness i.e. P.W.-1 has stated that some cases have been filed against his brother Updesh Singh due to political rivalry, in some of which he has been acquitted whereas some are pending. He cannot say as to how many cases are pending against Updesh Singh. There are some criminal cases against his another brother Shivraj Singh. In some cases, Shivraj Singh has been acquitted while some are pending. He again cannot disclose as to how many cases are pending against Shivraj Singh. Some criminal cases are also pending against his son Mallu but he does not remember their numbers. There are some criminal cases against his son Munesh, whose number cannot be disclosed by him but in some cases he has been acquitted and only two are pending. There are some cases against his son Devendra (since deceased). He has further stated that some cases have also been filed against his brother Santosh but nearly in all cases he has been acquitted. This witness himself has stated that all the above cases are false and have been filed only due to political vendetta.

Criminal antecedents to the credit of P.W.-3

115. In his cross-examination P.W.-3 has admitted that he has been implicated in one or two cases along with the family of the informant (P.W.-1) and one of them is under Section 302 I.P.C., one under Section 307 I.P.C., one relates to robbery and one relates to kidnapping. After that he has admitted that he has been named as an accused in two kidnapping cases. He was

facing total number of four-five criminal cases. When he was in Chilousa, no case was filed against him. He has then stated that he was also prosecuted in the cases under the Goonda Act and the Gangsters Act. This witness has also denied that there were twenty criminal cases against him from 1990 to 2004 at Police Station-Kotwali and Police Station-Bhogaon.

116. Though, testimony of a witness with criminal antecedents can be relied upon but such evidence has to be scrutinized very closely. In **Murli & Another Vs. State of Rajasthan** reported in (2009) 9 SCC 417 the Supreme Court has observed as under:

*“There can be no doubt that the witness was of criminal character and that his statement was recorded later, but even then, if that caution is kept in mind while appreciating the evidence and if his evidence inspires confidence, it is not incorrect to accept such evidence. However, for that purpose, his evidence has to be scrutinized **very closely**.”*

**THE EVIDENCE TO QUESTION
THE PRESENCE OF WITNESSES OF
FACT AT THE TIME AND PLACE OF
OCCURRENCE**

117. The testimony of the prosecution witnesses requires to be examined with caution and circumspection.

118. The first limb of the argument on behalf of appellants essentially questions the presence of the prosecution witnesses of fact at the time and place of occurrence and also discredits their testimony on this ground. There are different facets of this argument which need to be noticed and therefore referred to hereunder:-

I. First and foremost, it is commonly urged by the counsel for appellants that in a case of brutal shoot-out wherein six persons sitting in a Commander Jeep were shot dead, which incident occurred suddenly the passengers of the jeep had hardly any time to save themselves. The dead body of the driver Hem Singh was at the driver's seat with multiple gunshot wounds which appear to have been fired from different sides including from behind. The dead body of the passengers sitting next to the driver's seat was partly in the jeep and partly on the bonnet. Only two inmates could come out of the jeep from left and right sides but they were shot dead. It is, therefore, urged that the incident occurred suddenly and all the passengers of the jeep were shot dead. The possibility of the four passengers jumping out of the running jeep seems highly doubtful. The version of the prosecution witnesses that the accused-appellants had fired at them but did not chase them or cause any harm/hurt to them also seems improbable when the prime target for the accused-appellants would have been P.W.-1/first informant on account of the pre-existing enmity as noted in the earlier part of this judgment.

It is thus strenuously urged that the manner of shoot-out completely rules out the possibility of four passengers fleeing from the back of the Jeep and therefore, the prosecution version that the four persons escaped unhurt in the brutal shoot-out is a fanciful illustration and, therefore, not worthy of acceptance.

II. The accused-appellants have relied upon the testimony of the autopsy surgeon, who conducted the post-mortem of the bodies of all the deceased. As per the testimony of the autopsy surgeon the deceased were fired from left, right and behind without any shot having hit from the

front. It is thus urged that the aforesaid clinching evidence clearly shows that there was no possibility of four persons coming out of the Jeep unhurt even when there was flow of bullets. This clearly belies the prosecution story.

III. Apart from above, another circumstance which has been raised to doubt the presence of prosecution witnesses at the time and place of occurrence is the alleged use of explosives in the crime in question. According to the learned counsel for accused-appellants, the prosecution witnesses have alleged use of fire arms in the incident (guns and rifles), alone whereas the Autopsy Surgeon has proved the presence of explosive injuries sustained by the deceased which remains unexplained and, therefore, creates a doubt in the prosecution case making it improbable. In short the medical evidence does not corroborate the ocular version.

IV. Inherent contradictions in the testimonies of the prosecution witnesses is highlighted with reference to the manner and direction in which P.W.-1 left the place of occurrence to lodge the FIR which also creates a doubt in the prosecution story.

V. It is then submitted that the prosecution witnesses claim to have seen the incident from a distance of 40 to 50 paces while shielding themselves in between the standing crops in a pigeon pea (Arhar) field. The place where the prosecution witnesses are said to have been hiding is a low/crater and it was therefore, difficult for anybody to have seen the incident from such a situation.

VI. The prosecution story that informant/P.W.1 had gone to meet his maternal aunt (Mausi) along with nine others is a story full of concoctions inasmuch as neither the informant/P.W.1 knows the name of her aunt, nor there was any reason to take seven persons (outside

of his family) with him for the purpose; it is emphasized that if the purpose of visiting was to see his maternal aunt it was expected that some ladies of his family would also go, which is not the case here; justification that the male members accompanied informant/P.W.1 for his safety and security is fallacious, since none of them carried any firearm/weapon;

VII. The alleged cause of shoot-out is said to be the enmity of the accused-appellants with informant/P.W.-1. It would be highly improbable in such circumstance that P.W.1 along with three others would be spared while the six others would be shot dead;

VIII. The prosecution story is contradictory as at one place it is alleged that the accused-appellants parked their vehicles in front of the Commander Jeep in which the deceased and others were travelling while the other version is that the driver sustained gun shot injuries on account of which the jeep collided with the tree;

IX. The F.I.R. version of the prosecution story that informant/P.W.-1 had gone to Police Station- Kotwali, District Mainpuri for lodging an FIR after travelling about 9-10 Kilometers concealing himself on the way even when Bhogaon Police Station is situate at a much small distance casts a serious doubt in the prosecution case. It was otherwise impossible for the informant/P.W.-1 to have travelled such a long distance on foot while concealing himself in a short span of less than an hour;

X. The name of Devendra Singh Ex-Pradhan of Himayunpur is mentioned in the F.I.R. whereas his name is Ramkishan. This also is an additional circumstance to infer that informant/P.W.-1 has not seen the occurrence;

XI. The circumstances that P.W.-2 and P.W.-3 were not examined by the Investigating Officer on the spot under Section 161 Cr.P.C. and they are also not the witnesses of inquest, are such circumstances which go to indicate that these witnesses were not present at the spot when the incident occurred; the first informant/P.W.-1 stated that other three persons were left at the spot and he alone came to Police Station Kotwali, District Mainpuri for lodging the F.I.R. is contradicted by P.W.-2 and P.W.-3 who have stated that they accompanied P.W.-1 up-till railway crossing.

XII. In the F.I.R. the offending vehicles are Gypsy and Maruti Van, whereas in the testimonies of other prosecution witnesses of fact the vehicles are described as Gypsy and Maruti Car. This too raises a doubt as to whether the prosecution witnesses have seen the incident.

XIII. The prosecution witnesses are not consistent inasmuch as the witnesses at one place claim to have seen the incident from pigeon pea (Arhar) field while at other place they claim to have seen the incident from mustard field; the jeep in which the deceased along with P.W.-1, P.W.-2, P.W.-3 were travelling was not recovered and its whereabouts were also not available; the details of the incident have not been disclosed; the story of stopping of jeep after hitting the tree has come up for the first time during the course of trial. This is a departure from the basic prosecution case as unfolded in the FIR, for which no plausible explanation has been offered.

XIV. The inquest is shown to have been completed at 01:30 A.M. on 7.9.1996, whereas the prosecution witnesses disclosed its time as 02:30 A.M. on 7.9.1996; there is contradiction in the

testimonies of P.W.-1 and P.W.-2; it is also not established from the evidence brought on record by the prosecution as to when the dead bodies of the deceased were sealed and when the constables, who carried the dead bodies for post-mortem reached the mortuary for their autopsy as there is an issue as to on what time the dead bodies were sent to mortuary.

XV. The investigation is wholly dishonest as no attempt has been made to fully investigate the involvement of Subhas Gang in the crime in question. The criminal background of the prosecution witnesses have also been emphasized to discredit them.

XVI. The prosecution witnesses have alleged that the accused-appellants fired from the front while the Investigating Officer claims that the empties were recovered from the right side of the jeep whereas the Autopsy Surgeon has proved that the injuries have been caused from both the sides of jeep i.e. the left and the right side and also from behind but none of the injuries have been caused from the front, which conclusively proves that the prosecution witnesses were neither present at the time and place of occurrence nor they have seen the occurrence.

XVII. PW-4 the autopsy surgeon has opined that none of the deceased sustained pellet injuries. However, PW-3 in his deposition before court below has stated that four of the accused had guns in their hands whereas the other six accused were armed with rifles.

119. On behalf of the accused-appellants it is also emphasized that the FIR is ante-timed and the prosecution version disclosed in the FIR about P.W.-1 travelling a distance of 8-9 kilometres on foot while concealing himself is highly improbable as it is impossible for anyone to

cover such a long distance in half an hour. It is on account of above that material improvement was made in the testimony of P.W.-1 regarding use of Tempo from the Railway track to the police station. In short the submission is that the improvement made in the prosecution case during the course of trial is an unexplained embellishment which again creates a serious doubt regarding the probability of the prosecution case.

120. In addition to above, it is urged on behalf of the accused-appellants that the evidence on record clearly shows that P.W.-1 had enmity with Subash Pandey's Gang and its involvement was suspected during the course of investigation. Certain empties found from the place of occurrence were therefore, matched with the empties used in a distinct incident caused by Subash Pandey's Gang and it was conclusively established that the empties so recovered were fired from the same fire-arm, which thus proves the involvement of Subash Pandey's Gang in the commission of the crime in question, but this line of investigation was suddenly dropped which casts a serious doubt in the impartiality of the investigation as also the prosecution case.

121. It is in the light of above embellishment and contradiction in the prosecution story which the prosecution to set out to prove that this Court has to evaluate the evidence on record with great care and caution in order to arrive at a conclusive opinion before concluding that the alleged guilt of the accused appellants is proved beyond doubt or that the accused appellants are innocent.

122. The trial court came to the conclusion that the prosecution has

succeeded in establishing the guilt of the accused-appellants on the basis of documentary and oral evidence led by the prosecution. The presence of the prosecution witnesses of fact i.e. PW-1, PW-2 and PW-3 at the time and place of occurrence has not been doubted. Resultantly their testimonies have been relied upon. The trial court has not found any major exaggeration, contradiction or embellishment in the testimonies of the prosecution witnesses of fact so as to make them unworthy of trust, and therefore they have been relied upon. As a consequence of above court below has returned a finding of guilt against the accused-appellants. It is this conclusion recorded by court below which requires to be considered by us in the light of the submissions urged by the counsel for the parties, and keeping in mind the reasoning given by the Supreme Court in *Md. Jabbar Ali* (supra).

CONSIDERATION

123. First and foremost, we would like to take up the argument raised by all the counsel for appellants questioning the presence of the prosecution witnesses of fact i.e. PW-1, PW-2 and PW-3 at the time and place of occurrence. The grounds on which the presence of aforesaid witnesses of fact are challenged, have already been referred to above. The argument is now being evaluated with reference to the evidence on record. The first circumstance for doubting the presence of aforesaid witnesses of fact at the time and place of occurrence is the absence of possibility of four persons to flee from a running Jeep when firing was taking place from all sides of the Jeep in which the deceased and the four persons who are said to have escaped unhurt were travelling.

124. P.W.-1 in his examination-in-chief has stated that he was returning after

meeting his maternal aunt (Mausi). There were 10 occupants in the Jeep including P.W.-1. The Jeep belongs to PW-1. According to this witness, as they crossed the railway crossing, a Jeep and a Maruti Van overtook the Commander Jeep and positioned themselves ahead of it at about 04:30 p.m. The expression used by this witness to describe the same is as under:-

"समय लगभग 4.30 बजे दिन ,का० फटा) हमारी गाडी के सामने एक मारुति कार व दूसरी वेन ,का० फटा) जो हमारी गाडी को ओवर टेक करके हमारी गाडी के सामने लगा दी।"

125. In the FIR the two vehicles, which overtook the Jeep had been mentioned as Gypsy and Maruti Van, whereas in the testimony of P.W.-1 the two vehicles have been described as Maruti Car and Van. As per the testimony of P.W.-1, the accused-appellants were armed with Guns and Rifles when they came out of their vehicles and exhorted that all the passengers in the Commander Jeep be shot dead and thus take revenge.

125. P.W.-1 has stated that on seeing the armed accused-appellants coming out of the offending vehicles, he along with Santosh Singh (not produced), P.W.-2 and P.W.-3 jumped out from the back of the Jeep and rushed towards pigeon pea (Arhar) field. In his cross-examination P.W.-1 has stated that his jeep was surrounded by the two vehicles and later the Jeep collided with the Eucalyptus tree through the road side Patri. The testimony of P.W.-1 in that regard is as under:-

"हमारी गाडी को मुल्जिमान के दोनो गाडियों ने ओवर टेक करके घेरा था। हमारी गाडी को मेन रोड पर ही घेरा था बाद मे मेरी जीप पटरी से होकर पेड़ से टकराई थी। मेरी जीप बाई तरफ जा कर टकराई। सड़क से तीन चार कदम दूरी पर

पेड़ है वहाँ टकराई यूकेलिस्टिक व सीसम दोनो तरफ के पेड़ है मौके पर सड़क से खेत 10-12 कदम पर थे।

इस घटना में आगे वाली सीट पर बैठे तीनों लोगों की मृत्यु हो गई थी। दो लोग गाडी में मर गये थे एक व्यक्ति गाडी के पायदान के पास गिर कर मरा था। बीच वाली सीट के तीनों लोग मरे थे। एक गाडी के अन्दर व दो गाडी के बाहर गिरे थे।"

126. P.W.-1 in his examination-in-chief has stated that on account of firearm injuries sustained by the driver of the Jeep, namely, Hem Singh, he lost his balance and the vehicle stopped after colliding with the Eucalyptus tree. The statement of P.W.-1 regarding above reads as under:

"मुल्जिमान की दोनो गाडिया मेरी जीप के सामने खड़ी थी। सामने से गाडी घेर कर मुल्जिमानों ने ललकारा व फायरिंग शुरू कर दी। सभी मुल्जिमान मेरी गाडी आगे से घेरे थे मुल्जिमान द्वारा ललकारने पर पीछे बैठे हम चारो लोग पश्चिम की तरफ भागे थे। गाडी से लगभग 50, 55 कदम थे। माडी की दूरी पर अरहर के खेत में भाग गए थे वही से घटना देखी थी।"

(Emphasis supplied)

127. Thus the statement of P.W.-1 clearly shows that the vehicle was in motion and had not been stopped by the accused-appellants. The Jeep was in motion when the driver sustained bullet injuries and resultantly the vehicle got uncontrolled. The vehicle ultimately stopped after it collided with the Eucalyptus tree.

128. As per testimony of P.W.-1, two vehicles surrounded his Jeep. As is clear from the testimony of P.W.-1, his jeep was intercepted on the main road and later the Jeep steered on the left and collided with the Eucalyptus tree. The question that arises is as to whether the Jeep actually stopped when the two vehicles overtook it from behind and stopped in front of it or

the Jeep on being overtook from behind steered towards left and collided with the Eucalyptus tree. P.W.-1 is not specific in stating as to whether Jeep had fully stopped or whether the driver turned on the left of the road and thereby collided with the Eucalyptus tree after crossing the road side Pathway (Patri).

129. In the above conspectus it is apposite to ascertain whether the vehicle was in motion when it steered towards the left and collided with the Eucalyptus tree or it stopped on the road and then later the driver steered it left and collided with the Eucalyptus tree.

130. On this aspect the testimony of P.W.-2 Devendra Singh is somewhat distinct. In his examination-in-chief, P.W.-2 has deposed as under:

“उस समय शाम लगभग साढ़े चार बजे शाम के होंगे कि एक नीले रंग की जिप्सी एक मारुती कार क्रीम कलर की थी जिनमे जिप्सी आगे थी इन दोनों गाड़ियों ने मेरी गाड़ी को ओवरटेक किया, इस बीच मेरे ड्रायवर हेम सिंह ने अपनी कुछ वाए करके ओवरटेक की कोशिश कि दोनों गाड़ियां मेरी गाड़ी के आगे बढ़कर रुक गई उस समय मेरी गाड़ी चल रही थी इसी बीच उन गाड़ियों से रामानंद, जगन्नाथ, हरिओम, आनन्द, देवेन्द्र, राजभूषण, कौशलेन्द्र, विपिन, विल्लू उर्फ चन्द्रकान्त व रमाकान्त कुल दस लोग उतरे और कहा कि इन सभी सालो को भून देंगे और वदला ले लेंगे वैसे ही मैं व मेरे पिताजी, सन्तोष गुप्ता व सन्तोष चाचा हम चार लोग अपनी गाड़ी से पीछे से कूद पड़े और खेत अरहर खेत की तरफ भागे अरहर के खेत से (sic) दिखाई दे रही थी रामानंद के पास बन्दूक, आनंद के पास राइफल, जगन्नाथ के पास बन्दूक, विपिन के पास व राजभूषण सिंह के पास बन्दूक थी और शेष पांचों के हाथों में रायफिले थी इन सभी लोगों ने फायरिंग की थी जिससे हेम सिंहए गजेन्द्र उर्फ टिल्लू, महेश फौजी, अशोक परिहार पूर्व प्रधान राम किशन सिंह व नरेश दीक्षित कुछ छह लोगो की मौके पर ही मृत्यु हो गई थी इनकी फायरिंग से ड्रायवर हेम सिंह यूकलिप्टस की मृत्यु हो गई थी इससे जीप असंतुलित होकर फुलिलिप्टस के पेड' से टकरा गई थी इन सभी दसो

मुल्जिमान से मेरे परिवार की पुरानी रंजिश है मुल्जिमान इस घटना के बाद अपनी दोनों गाड़ियों से मैनुपुरी की तरफ भाग गए।”

131. In his cross-examination, P.W.-2 has stated as under:

“जिस समय मुलजिमान की दोनो गाड़ियाँ मेरी गाड़ी को ओवरटेक किए उस समय मेरी गाड़ी की स्पीड प्रति घन्टा कितने कि०मी० थी नहीं बता सकता वैसे ठीक ठाक चल रही थी जिस समय हम लोग अपनी जीप से कूदे उस समय जीप चल रही थी हडवडाहट में जान बचाने के लिए कूदे थे और जान बचाने के हिसाब से ही खेत में भागे चले गए थे जब हम लोग भाग रहे थे तब हम लोगों का किसी ने पीछे नहीं किया था हम लोग भागते समय पीछे मुड़कर देख रहे थे जब हम लोग भाग रहे थे तो हम लोगों की जीप की तरफ फायर किये थे हम लोगों को लगे नहीं की चोट हम चार लोगों को इसलिए नहीं लगी थी फायर करने वालों एवं हम लोगों के बीच हमारी जीप थी हम चार लोगों के गाड़ी से कूदने के बाद हम लोगों की जीप करीब 10, 12 कदम चली होगी। ऐसा नहीं है कि किलिप्टस जब हम लोगों की जीप जब फुलिलिप्टस के पेड से टकरा गई तब हम मुलजिमान को अपनी गाड़ियों से निकलते देखा हो।”

(Emphasis supplied by us)

P.W.-2 has further stated as under:

“ऐसा नहीं है कि मेरी जीप का ड्रायवर जीप को मुलजिमान की गाड़ियों से आगे निकालने के प्रयास जीप असंतुलित होकर पेड से टकरा गई है।”

P.W.-2 has then stated as under:

“मैंने दरोगा जी को यह बयान नहीं दिया था कि हमारी जीप के ड्रायवर हेम सिंह यादव ने उनसे बचाकर जीप आगे निकालने चाही कि जीप असंतुलित होकर यूलिलिप्टस के पेड से टकराई बल्कि यह बयान दिया था कि ड्रायवर को गोली लगने के बाद जीप असंतुलित होकर पेड से टकराई थी यदि मेरा इस तरह का बयान नहीं लिखा है तो उसकी वजह नहीं बता सकता सी.वी.सी.आई.डी वालो को भी ड्रायवर के गोली लगने के बाद जीप के असंतुलित होने के बाद बताई थी यदि उन्होने मेरे बयान मे ऐसा न लिखा हो तो मैं इसकी भी कोई वजह नहीं बता सकता।

जब मुलजिमान गाड़ियों से निकले उससे पहिले मेरी जीप पेड से नहीं टकराई थी”

(Emphasis supplied by us)

132. P.W.-2 was confronted by the defence with his previous statement under Section 161 Cr.P.C. wherein he admitted that the Jeep got dis-balanced and collided with the Eucalyptus tree, whereafter the accused persons alighted from their vehicle. They thereafter exhorted and fired. Statement of P.W.-2 in that regard is extracted herein under:

"मैंने दरोगा जी एवं सी.वी.सी.आई.डी वालो कोयह नही बताया था कि 'जीप असंतुलित होकर यूकीलिप्टस के पेड़ से टकराई कि एकदम जिप्सी व मारुति कार से उतर कर मुलजिमान रामानंद आदि अपने हाथो राइफल, बन्दूके निकलकर बढ़ते हुए यह कहकर बढ़े की सभी सालों को भून दें ऐंसा ब्यान उन्होंने कैसे लिख लिया उसकी वजह नहीं बता सकता किन मुलजिमान के हाथ में बन्दूके थी और किसके हाथ में साइकिले थी यह बात न तो दरोगा जी ने मुझसे पूछी और न सी.वी.सी.आई.डी वालो ने मुझसे पूछी और न मैने उन्हे बताई आज पहिली बार यह बात अदालत में बता रहा हूँ अपनी जीप से हम चारो लोग अरहर के खेत में पश्चिम तरफ भागे। जब हम जीप से उतरकर भागे उस समय हमारी जीप सडक की पटरी की ओर चल रही थी मुलजिमान की दोनो गाड़ियां पक्की सडक पर खड़ी थी मुलजिमान हम लोगो की जीप से पूरव की तरफ से फायर किए थे तावडतोड गोलियाँ चल रही थी"

In his further cross-examination by the accused Vipin, P.W.-2 has stated as under:

“मुलजिमान की दोनो गाड़ियो से मेरी जीप दस बारह कदम दूरी पर थी मेरी जीप के ड्रायवर ने मुलजिमान की गाड़ियो से आगे निकलने की कोशिश की किन्तु इसी बीच मुलजिमान फायरिंग करने लगे इसी बीच ड्रायवर के गोली लग गई मेरे ड्रायवर ने मुलजिमा की गाड़ियो को क्रास करने के लिए स्पीड बढ़ाई तभी ड्रायवर के गोली लग गई जिस समय ड्रायवर से गोली लगी उस समय मेरी गाड़ी मुलजिमान से आठ,दस कदम की दूरी पर होगी उस समय मुलजिमान जीप से पूरब तरफ की गोली लगने के बाद जीप असंतुलित हो गई ड्रायवर के गोली

लगने वाले स्थान से वह पेड़ जिससे जीप टकराई लगभग 7,8 कदम की दूर होगा”

(Emphasis supplied by us)

He has also stated as follows:

“जिस समय हम चारो लोग जीप के पीछे से कूदे थे उस समय जीप धीमी रफ्तार मे चल रही थी। जीप के पीछे से हम चारो लोग वारी-2 से सेकंडो मे कूद गए थे जिस समय हम लोग जीप से कूदे थे जीप डाला बन्द था परन्तु हाल से जीप के ऊपर फेंककर कूदे थे।”

In his cross-examination P.W.-2 has stated as under:

"हम चारो लोग जो जीप के पीछे से कूदकर भागे थे उनमें से किसी को खरोच या अन्य कोई चोट नहीं आई थी अरहर के खेत हम चारो लोग 15 मिनट तक छुपे रहे मुलजिमान मे से कोई भी खेत के पास हम लोगो को मारने अथवा घेरने नहीं गया था।”

P.W.-2 was also cross-examined on the feasibility of a person to jump out of a running Jeep when the door of the back side of jeep is closed. In response to such question, P.W.-2 has stated as under:

“यह कहना गलत है कि जीप को पीछे वाला डाला यदि मय स्टेपनी के बद हो तो जीप से पीछे की तरफ कूदना कठिन होगा जीप मेरे चाचा ने बेंच दिया है।”

P.W.-2 has categorically stated that the accused fired on the vehicle when it was in motion and also at then (the four persons) when they were coming out of the Jeep. The following passage from the testimony of P.W.-2 is relevant and therefore extracted herein-below:

“मुलजिमान ने हमारी चलती हुई गाड़ी पर फायर किया था, सभी मुलजिमानों ने चलती हुई गाड़ी पर फायर किये थे। जिस समय हम चारों आदमी गाड़ी से कूदे उस समय मुलजिमान आठ-दस कदम

की दूरी पर थे. हम चारों के जीप के पीछे से कूदते समय हम लोगों पर भी जीप की तरफ मुल्जिमानों ने फायर किए थे।"

(Emphasis supplied by us)

133. P.W.-3 in his examination-in-chief has stated that the Gypsy as well as Maruti Car came from behind and stopped in front of the Jeep from which the accused persons came out armed with guns and rifles. On seeing them this witness along with three others jumped out of the Jeep and saw the accused firing leading to the death of the six inmates. In his cross-examination P.W.-3 has stated that the driver was hit while the Jeep was in motion on account of which the vehicle got dis-balanced and collided with Eucalyptus tree. His testimony in this regard reads as under:

“चलती हुई जीप में ड्राइवर को गोली लगी और जीप असंतुलित होकर पेड़ से टकराई यह बात मैंने दरोगा जी को बताई यदि यह बात मेरे ब्यान में नहीं लिखी गई।”

This witness when confronted with his own previous statement given to the Investigating Officer has stated as under:-

“मैंने दरोगा जी को यह ब्यान नहीं दिया था कि "दोनों गडियां जीप के आगे लगा दी यह देखकर हमारे जीप के ड्राइवर हेमसिंह यादव ने उनसे बचाकर जीप आगे निकालनी चाही कि जीप असंतुलित होकर युकेलिप्टस पेड़ से टकराई कि एक दम कहते जिप्सी व मारुति कार से उतरकर मुल्जिम यह कहते हुए कि आज बदला ले लेगे सभी को भून देंगे हमारी तरफ बढ़े कि मैं सुरेन्द्र सिंह व देवेन्द्र सिंह जीप से निकले" यदि दरोगा जी ने मेरे ब्यान में यह बातें लिखी तो मैं इसकी कोई वजह नहीं बता सकता.”

(Emphasis supplied by us)

This witness was also confronted with his own previous statement under Section 161 Cr.P.C. which is reflected from the following part of his statement:

"साढ़े चार बजे हमारी जीप ड्राइवर ने मुल्जिमान की दोनो गाड़ियो को बचाकर आगे निकलने की कोशिश की कि जीप असंतुलित होकर पेड़ से टकराई" यह ब्यान कैसे लिख लिया वजह नहीं बता सकता।"

P.W.-3 has further been confronted with his previous statement under Section 161 Cr.P.C. to the C.B.C.I.D. in which he has alleged that the driver sustained fire-arm injuries after the vehicle collided with the Eucalyptus tree. The exact testimony reads as under:

"मैंने C.B.C.I.D वालो को यह ब्यान नहीं दिया था कि जीप टकराने के बाद ड्राइवर को गोली लगी थी।"

134. From the evaluation of the testimonies of the prosecution witnesses, it is apparent that they have come out with distinct versions of the occurrence at the stage of investigation i.e. the police and C.B.C.I.D. and during the course of trial. While at the stage of investigation they have alleged that the two offending vehicles came from behind over took the jeep in which the deceased and the prosecution witnesses of fact and another person were travelling, and stopped in front of it on account of which the Jeep was steered leftward and collided with the Eucalyptus tree whereafter the accused-appellants came out, whereas during the course of trial, their version is to the effect that the prosecution witnesses of fact alongwith one another jumped out of the vehicle from behind, on seeing the accused persons. coming out of two vehicles with fire arms. This embellishment in the testimonies of the prosecution witnesses is to the effect that the four passengers of the jeep (survivor) jumped out after seeing the accused persons coming out of their vehicles with firearms. The vehicle as per the prosecution witnesses was in motion. It

is not clear as to how four survivors could see the accused persons, who were alighting from their vehicles armed, from a running Jeep, particularly when the back door (Dala) of the Jeep was closed. The version of the prosecution witnesses that they could jump out of a running Jeep without sustaining even a scratch, on their bodies, creates a serious doubt regarding the reliability of their statements.

135. The second ground on which the presence of the prosecution witnesses of fact at the time and place of occurrence is doubted by the counsel for the appellants is the use of explosives in the incident as per the post-mortem report of the deceased/opinion of the Autopsy Surgeon who deposed before the court below as PW-4. However, in their depositions before court below no explanation has been offered by the prosecution witnesses of fact regarding the explosive injuries sustained by the deceased.

136. In his examination-in-chief, P.W.-4, while referring to the second ante-mortem injury of the deceased Ram Kishan, has stated that the brain matter was coming out. The exact statement reads as under:

“चोट नं0 2- एक फटा हुआ घाव (अग्नेयास्त्र की गोली के निकलने से सम्बन्धित) 18 cm x 8 cm, चेहरे के बाई ओर माथे तथा सिर पर था। मस्तिष्क (भेजा) घाव से बाहर निकल रहा था।”

While referring to the ante-mortem injuries of the deceased Mahesh, qua Injury nos. 1, 5 and 6, P.W.-4 has opined as under:

“1. Lacerated firearm wound 18 cm x 5 cm x brain deep on left side of forehead

and head. Margins are blackened. Bone of left side skull are fractured. Brain matter coming out of bone.

5. Firearm lacerated wound over front of right knee joint 12 cm x 8 cm. Bones are fractured. Margins blackened.”

6. Firearm lacerated wound 11 cm x 4 cm x bone deep over left scapula of back.”

Insofar as ante-mortem injuries of the deceased Ashok Parihar is concerned, P.W.-4 has found lacerated wound 18 cm x 9 cm on lower part of buccal cavity (lower jaw which is missing) over lower part of the face and neck of the deceased.

In the cross examination, P.W.-4 has clearly stated that injury no.1 found on the body of the deceased Ashok Parihar was due to explosive. He has further stated in his cross-examination that metallic substance removed from the body of the deceased could have entered the body due to the blast of a hand grenade. The statement of the P.W.-4 in this regard is as under:

“जो धातु के टुकड़े शवों से निकाले गए हैं वे ऐसे टुकड़े भी हो सकते हैं हथगोला वगैरह ब्लास्ट होने पर शरीर में घुस सकते हैं। अशोक परिहार की चोट नं0 6 जोर से लाठी मारने से आना संभव है।”

With reference to the above statement of P.W.-4, it is strenuously urged by the learned counsel for appellants that explosives were used in the commission of the offence, which caused blast injuries and that non disclosure of the use of explosives in the testimonies of prosecution witnesses clearly suggests that the prosecution witnesses of fact have actually not seen the incident. Resultantly the prosecution witnesses of fact were not present at the time and place of occurrence.

137. Mr. Amit Sinha, the learned A.G.A., in opposition to the aforesaid submits that injuries referred to above could have been caused by use of hollow point bullets.

138. In support of this plea, he has referred to various authorities on Ballistic in order to emphasise the impossibility of the (above extracted injuries) being caused by the exit of a firearm bullet and in such circumstances the argument that explosives were used in the crime in question, cannot be accepted.

139. Countering the above submission urged by the learned AGA, learned counsel for some of the appellants namely Mr. Rajiv Lochan Shukla, submits that the argument advanced by the learned AGA regarding the possibility of use of hollow point bullets need not be entertained by this Court particularly as P.W.-4 has not been examined on this aspect with reference to the provisions of the Indian Evidence Act.

140. He further submits that in the event, the prosecution intended to impeach the testimony of P.W.-4 (Autopsy Surgeon) regarding the use of explosives in the crime in question on account of alleged use of hollow point bullets, then the Autopsy Surgeon (P.W.-4) ought to have been confronted with the above. It was only in the above situation that the accused would have an opportunity to counter the same during the course of trial. He therefore submits that the plea as urged by the learned AGA before this Court having not been taken before court below which plea is essentially a plea of fact this Court should not allow the same to be taken by the learned AGA at appellate stage.

141. We have carefully considered the contentions made by the learned counsel

for the parties. We find substance in the argument advanced by Mr. Rajiv Lochan Shukla that the plea not raised during the course of trial on which the prosecution witness has not been confronted, cannot be allowed to be raised for the first time at the appellate stage. The manner of examination of witnesses is clearly specified in Section 138 of the Indian Evidence Act which provides a scheme for examination of witnesses on matters in issue. For ready reference Section 138 of the Indian Evidence Act is reproduced which reads as under:

“138. Order of examinations.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”

142. It is true that some of the injuries sustained by the deceased resemble to explosive injuries. The Autopsy Surgeon (P.W.-4), who is a prosecution witness and a competent witness regarding above anomaly has been specifically confronted during the course of trial regarding the same. The Doctor (P.W.-4) has clearly opined that some of the injuries on the body of the deceased could have been caused due to explosives. The Autopsy Surgeon (P.W.-4) has not been got re-examined by the prosecution on the issue

relating to use of hollow point bullet in the incident. No suggestion was made to the Autopsy Surgeon (P.W.-4) about use of specific bullet (hollow point bullet herein). It is, therefore, clear that the Autopsy Surgeon (P.W.-4) has not been confronted by the prosecution during the course of trial on the possibility of use of hollow point bullet in the incident and therefore, we are not inclined to accept the submission made by Mr. Amit Sinha, the learned A.G.A. that some of the injuries found on body of the deceased which have been opined as explosive injuries were actually caused on account of use of hollow point bullet.

143. An argument was also raised about some of the injuries on the deceased having been caused by hard and blunt object, which was not explained by the prosecution witnesses. This argument on behalf of the accused appellant does not impress us inasmuch as the possibility of such injuries being caused due to inmates colliding with iron rods fixed in the jeep, cannot be ruled out. It is, otherwise, the specific case of the prosecution that the Jeep was in motion when it collided with the Eucalyptus tree. The testimony of the prosecution witnesses cannot be questioned merely on the ground that the deceased were assaulted with hard and blunt objects and that non narration of such facts creates a doubt in the testimony of prosecution witnesses.

144. Mr. Brijesh Sahai, the learned Senior Counsel appearing for some of the accused-appellants has placed the testimony of the first informant/P.W.-1, as per which the accused-appellants started firing on the inmates of the jeep from the front. Incidentally, in his cross-examination, P.W.-1 has clearly stated as under:

"सामने से गाड़ी घेर कर मुल्जिमानों ने ललकारा व फायरिंग शुरू कर दी। सभी मुल्जिमान मेरी गाड़ी आगे से घेरे थे मुल्जिमान द्वारा ललकारने पर पीछे बैठे हम चारो लोग पश्चिम की तरफ भागे थे।"

145. The above statement shows that the accused-appellants positioned their vehicles in front of the Jeep; surrounded them; exhorted; and started firing. The accused-appellants were in front of the Jeep and that is how the four passengers could escape from the back door of the Jeep towards west.

146. This statement of PW-1 is sought to be impeached by the learned counsel for accused-appellants by placing reliance upon the testimony of P.W.-4, who has explained the direction from where the bullets had hit the inmates. The Autopsy Surgeon (P.W.-4), while explaining the injuries caused on deceased Ashok Parihar, has stated that the second injury was wound of entry and could have been caused on the deceased when bullet was shot from the left of the deceased. The exact statement of P.W.-4 is as under:

"अशोक परिहार की चोट नं० 1 Explosive थी/ चोट नं० 2 Entry Wound के रूप में थी जो कि मृतक के बाईं ओर से फायर करने वाले ने फायर किया होगा तब यह चोट आई होगी"

With regard to injury no.4 on the body of deceased Ashok Parihar, P.W.-4 has opined that the same could have been caused from the right side. For ready reference the exact statement of PW-4 regarding above is extracted herein under:

"चोट नं० 4- दाहिनी तरफ से पहुँचाना सम्भव है।"

Qua Injury no.1 on deceased Ram Kishan, P.W.-2 has opined that the same

could have been caused from the right side, whereas injury no.3 could have been caused from left side. The exact statement is as under:

"मृतक रामकिशन के शव पर आई चोट नं० 1 दाहिनी तरफ से पहुंचाया जाना संभव है।

चोट नं० 3 बाई तरफ से पहुंचाई जाना संभव है।"

Similarly in respect of first injury on the body of deceased Naresh Dixit, P.W.-4 has opined that the same could have been caused from the left side. The exact opinion is as under:

"मृतक नरेश दीक्षित के शव पर आई चोट नं० 1 बाई तरफ से पहुंचाया जाना संभव है। चोट नं० 3 व 4 अग्नेयास्त्र से निकली हुई गोली के रगड़ से आ सकती है। यह चोट बाई तरफ से पहुंचाना संभव है।"

Similarly, first and third injuries on the body of deceased Hem Singh could have been caused from the right side, whereas the second injury could have been caused from behind. The exact opinion of P.W.-4 in that regard is as under:

"मृतक हेमसिंह के शव पर आई चोट नं० 1 दाहिनी तरफ से पहुंचाई जाना संभव है यह चोट अग्नेयास्त्र की गोली से आना संभव है। चोट नं० 2 पीछे की तरफ से पहुंचाई जा सकती है। चोट नं० 3 पीछे की तरफ से दाहिने से पहुंचाया जाना संभव है।"

The above opinion of the Autopsy Surgeon (P.W.-4) is clearly reflected in the statement of P.W.-1, which has already been quoted herein-above.

In respect of injury no.1 on the body of deceased Gajendra Singh, P.W.-4 has stated that the same could have been caused from the left side, whereas injury nos. 3, 4, and 5 could have been caused from the

right side. The statement of P.W.-4 regarding above is extracted herein-below:

"मृतक गजेन्द्र सिंह के शव पर आई चोट नं० 1 बाई तरफ से पहुंचाया जाना संभव है। चोट नं० 3 कुन्द आले से दाहिने तरफ से पहुंचाया जाना संभव है। चोट नं० 4 दाहिनी तरफ से अग्नेयास्त्र की गोली लगने से आना संभव है। चोट नं० 5 दाई तरफ पीछे की ओर से अग्नेयास्त्र की गोली से सामने से आना संभव है।"

Qua injury nos. 1, 6 and 7 on the body of deceased Mahesh, P.W.-4 has stated that same could have been caused from the left side, injury no. 2 could have been caused from the right side, whereas injury no.5 could have been caused from front right side. The exact statement of P.W.-4 reads as under:

"मृतक महेश के शव पर आई चोट नं० 1 बाई तरफ से सामने से गोली से पहुंचाया जाना संभव है। चोट नं० 2 सामने दाहिनी तरफ से पहुंचाना संभव है। चोट नं० 5 अग्नेयास्त्र की गोली से सामने दाहिनी तरफ से आना संभव है। चोट नं० 6 पीछे बाई तरफ से अग्नेयास्त्र की गोली से पहुंचाया जाना संभव है। चोट नं० 7 कुन्द आले से बायी तरफ से पहुंचाना संभव है।"

147. Much emphasis has been laid by Mr. Brijesh Sahai, the learned Senior Counsel appearing for some of the accused-appellants on the following part of the statement of P.W.-4 in his cross-examination:

"मृतक अशोक परिहार की सभी चोटे दाहिने, बाएं एवं पीछे से पहुंचाया जाना संभव है। मृतक रामकिशन की सभी चोटे दाहिने एवं बाएं से पहुंचाया जाना संभव है।

मृतक नरेश दीक्षित की सभी चोटे बायी तरफ से पहुंचाया जाना संभव है। मृतक हेमसिंह की सभी चोटे दाहिने एवं पीछे से पहुंचाया जाना संभव है।

मृतक गजेन्द्र सिंह की सभी चोटे दाहिनी एवं बायी ओर से पहुंचाया जाना संभव है।

मृतक महेश सिंह की सभी चोटे दायें एवं बाएँ से पहुंचायी जाना संभव है।

यह मैं नहीं बता सकता कि यदि मृतक किसी चलने वाले वाहन मसलन जीप में बैठे हो तो उनके ऊपर फायर करने वालों ने दाहिने एवं बाएँ से ही फायर किए हो।

मृतकों के चोटों में कोई चोटे छर्रे की नहीं है सभी अग्नेयास्त्र की गोली की है।"

148. On the above premise, it is urged that while star prosecution witness i.e. P.W.-1 alleges that the accused-appellants surrounded the jeep from the front and commenced firing but none of the injuries sustained by the deceased has been caused from gunshots fired from the front but rather from gunshots fired from the left, right and behind. It is further urged that some variation due to movement of inmates is possible but the direction of bullets when cumulatively assessed clearly reveals that the firing on the jeep was not from the front but from the left, right and from behind the jeep. It is also emphasized that the jeep driver got hit while sitting on the driver seat, where his dead body was found. The fact that the bullets were fired from the right and behind by the assailants, creates a doubt in the testimonies of the prosecution witnesses about the direction of firing by the accused persons, who surrounded the Jeep from the front. The same in turn further creates a doubt regarding the presence of the prosecution witness of fact on the spot.

149. On behalf of the accused-appellants it was also empathetically urged by the counsel for appellants that the existence of bullet injuries on the six deceased from the right, left and behind contradicts the testimony of P.W.-1 about firing on the passengers of the Jeep from the front, which also creates a serious doubt regarding the presence of P.W.-1 at the time and place of occurrence.

150. We now propose to examine the evidence in respect of the argument advanced on behalf of appellants that there are serious contradictions in the testimonies of the prosecution witnesses. P.W.1 has stated that the accused-appellants fired on them also, but the bullet did not hit them and in the cover of trees they could hide themselves at the distance of one furlong from the place of incident. He has stated that after the firing concluded and the accused-appellants left, they came out of the pigeon pee (Arhar) field and stopped at the place of occurrence for 2-3 minutes. All the accused-appellants had left towards Mainpuri. P.W.-1 claims to have come to the Railway Crossing and thereafter took a tempo to come to Mainpuri. This testimony of PW-1 in this regard reads as under:

"सभी मुल्जिमान मैनपुरी की तरफ भागे थे मौके से मैं रेलवे फाटक की तरफ आया और वहाँ से टैम्पो पकड़कर मैनपुरी आया। टैम्पो से मैनपुरी आने वाली बात तहरीर में नहीं लिखी है दरोगा जी ने न तो मुझसे पूछा था और नहीं मैंने टैम्पो से आने वाली बात बताई थी।"

151. P.W.-1 has been confronted with his written report wherein there is no reference of his coming on a tempo, rather he has stated that he came to the Kotwali Police Station, Mainpuri on foot concealing himself on the way. The recital in the written report/FIR is as under:

"मैं पैदल भागकर छुपते छुपाते रिपोर्ट लिखाने आया हूँ।"

152. P.W.-1 when confronted with the aforesaid anomaly has stated that in haste he forgot to mention the fact about his coming on a tempo to the Kotwali Police Station, Mainpuri. At this juncture we may reiterate the argument on behalf of the appellants that the subsequent plea of P.W.-1 coming in a tempo is an afterthought and

exposes the fallacy in the prosecution case. The unexplained embellishment is an additional ground to infer that the prosecution story is false.

153. It is admitted to the prosecution that the distance between the place of occurrence and the Kotwali Police Station, Mainpuri is about 9-10 kilometres and the report itself was lodged just after about half an hour. The argument with regard to the anti-timing of FIR has been raised precisely on the ground that it was not possible for anyone to travel 9-10 kilometres on foot and get the FIR registered in half an hour. The argument of Mr. V.P. Srivastava, learned Senior Counsel appearing for some of the accused-appellants is that in-fact the incident of firing was reported by someone else at Police Station-Bhogaon.

154. Since the shoot-out and killing of six persons immediately got the attention of the residents, as such informant/P.W.-1 has cooked up a story on the basis of information received as he was in Mainpuri, where he had political influence (it is an admitted fact that the brothers of P.W.-1 were Ex-Members of Legislative Assembly from Mainpuri). It is thus argued that the initial version in the written report was that the cause of occurrence was the enmity with the accused persons and the aspect of travelling such a long distance on foot apparently escaped their attention. It is urged that when aforesaid anomalies were realized then improvement was made in the statements of the prosecution witnesses regarding the alleged use of a tempo. The same amounts to embellishment in the testimony of PW-1 which remains unexplained. When PW-1 was confronted with the above aspect, he gave the following explanation regarding the same:-

"तहरीर में छुपते छुपाते आने वाली बात लिखाई है टैम्पो से आने वाली बात नहीं लिखाई है इस सम्बन्ध में तहरीर में टैम्पो वाली बात हडबडाहट में लिखने से छूट गयी है इसलिए पैदल आने वाली बात लिखी है। मौके से रेलवे फाटक तक पैदल आया। जिसमें 10-12 मिनट लगे होंगे। रेलवे फाटक पर पहुंचने के एक दो मिनट बाद ही टैम्पो मिल गया था।"

155. In the examination-in-chief, P.W.-1 has stated that after the firing concluded, leaving the three survivors, who were with him, on the spot, first informant/P.W.-1 then came to Police Station-Kotwali. The exact testimony of P.W.-1 reads as under:

"मेरे साथ के तीन लोग वही मौके पर रह गए। मैं कोतवाली आया।"

In the cross-examination, P.W.-1 has stated that his brother Santosh (not produced) said to go and lodge a report and all three survivors would stay around the place of occurrence. The exact statement is as under:

"मेरे भाई सन्तोष ने कहा था कि आप जाकर रिपोर्ट लिखाओ हम तीनों यही आसपास हैं।"

156. As against the above testimony of P.W.1, P.W.-2 has stated that he accompanied his father (P.W.-1) upto the railway crossing and returned after he sat on a Tempo. P.W.-3 has stated that all the four survivors came upto railway crossing and returned only after P.W.-1 got seated in a tempo. This witness has also been confronted with his previous statement wherein this part is missing. He has explained the circumstance in the following manner:

"घटना के बाद हम चारो लोग रेलवे फाटक तक गए थे और वादी सुरेन्द्र सिंह को टैम्पो पर बैठाया था यह बात दरोगा जी को

बताया था उन्होंने मेरे ब्यान में नहीं लिखी है तो मैं इसकी वजह नहीं बता सकता। मैंने दरोगा जी को यह ब्यान नहीं दिया था कि मुल्जिमान के जाने के बाद हम चारो लोग छिपकर मैनपुरी गए थे यह ब्यान कैसे लिख दिया वजह नहीं बता सकता।"

157. From the statements of prosecution witnesses referred to above, it transpires that the initial written report (Ext.Ka.1) was submitted by P.W.-1. This witness alleges to have come to Kotwali Mainpuri on foot whereas his version has been subsequently improved upon in his deposition before court below so as to bring a story of coming to the Police Station on a Tempo. P.W.-1 has alleged that the other three survivors stayed behind and he alone came to the railway crossing but P.W.-2 and P.W.-3 have taken a different stand about coming to the railway crossing with P.W.-1 and then they returned from there to the place of occurrence.

158. An argument has also been raised to doubt the veracity of the prosecution witnesses on the ground that it was impossible for the witnesses to have seen the incident from a distance of 40-50 paces while hiding in the standing crops (Pigeon pea - Arahara field). The place from where the prosecution witnesses are alleged to have seen the occurrence is a crater and, therefore, there was no possibility for the prosecution witnesses of fact to have witnessed the occurrence. Therefore, the statements of prosecution witnesses about witnessing the occurrence is highly improbable.

159. On behalf of the accused-appellants, it is also urged that the entire story of P.W.-1, having gone to see his maternal aunt (Mausi), as she was sick, is also doubtful on the ground that neither the name of maternal aunt is known to P.W.-1 nor the story sounds credible as a lady in

the family would be expected to accompany other family members and her absence raises doubt in the prosecution case. Reason for taking 7 other persons including the outsiders was the alleged threat to P.W.-1. However, none of these persons had armed himself. According to the learned counsel for the accused-appellants this version in the prosecution story is not credible and the entire story set up by the prosecution is therefore not worthy of acceptance.

160. It is also urged on behalf of the accused appellants that P.W.-1 has himself admitted that Police Station-Bhogaon is at a distance of nearly 3 kilometres and it remains unexplained as to why P.W.-1 had chosen to go to Police Station Kotwali at Mainpuri which is at a distance of 9-10 kilometres, when the above mentioned Police Station is situated much nearer the place of occurrence. Apart from above, it is also impossible to understand as to why after the firing stopped and all the assailants proceeded towards Mainpuri, yet PW-1 choose to go in the same direction, when it is an admitted fact that there was pre-existing old enmity in between the assailants and PW-1 and he was the primary target.

161. The other circumstance to doubt the presence of prosecution witnesses of fact is that none of the four survivors including P.W.-1 to P.W.-3 were witnesses of inquest (panchayatnama) of the bodies of the six deceased, even when they allege to be present at the time and place of occurrence and also at the time when police arrived at the spot.

162. In the cross-examination, P.W.-8 (Investigating Officer) has stated that witnesses of the inquest/panchayatnama of

the bodies of six deceased are residents of two different Police Stations. The exact statement is as under:

"मैं अपने काम में व्यस्त था। इसलिये बता नहीं सकता कि मौके निरीक्षण के समय घटना स्थल पर आस पास के लोग आए थे या नहीं लेकिन पंचायतनामों के गवाहान मौके पर थे। पंचायतनामों के गवाहान अलग-2 थाना क्षेत्रों में रहने वाले हैं।"

The testimony of P.W.-1 in that regard reads as under:

"दरोगा जी पंचायतनामा भरा था दो-ढाई बजे रात तक पंचायतनामा भरे गए थे। हम चारों में से किसी ने पंचायतनामा पर हस्ताक्षर नहीं किए थे।

प्रश्न:- क्या आपने पंचायतनामा भरने वाले अधिकारी (पुलिस कर्मियों) को यह बताया था कि मृतको को किस-2 व्यक्तियों ने मारा था ?

आपत्ति द्वारा अभियोजन पक्ष

चूंकि यह साक्षी पंचायतनामा का गवाह नहीं है इसलिए यह प्रश्न इस साक्षी से नहीं पूछा जा सकता।"

The statement of P.W.-2 in that regard is as under:

"लिखा पढ़ी के समय हम तीनों लोग अलग बैठे थे उस समय पुलिस वालों ने ना तो हम लोगों से कुछ पूछा था और न बताया हम चारो लोग पंचायतनामा के गवाह नहीं हैं।"

163. The presence of the prosecution witnesses of fact at the time and place of occurrence is also doubted by the learned counsel for accused appellants on the ground that the statement of P.W.-1 alone was recorded under Section 161 Cr.P.C. by P.W.-8 on the date of incident, whereas the statements of other survivors were not recorded under Section 161 Cr.P.C.

164. It is also urged that the Police of Police Station Bhogaon including P.W.8 arrived first at the place of occurrence and as per the prosecution case, three survivors

(except P.W.-1) were present at the place of occurrence. In that eventuality it would be quite natural that Police of Police Station Bhagaon would enquire from these three survivors about the manner of incident and record their statements immediately under Section 161 Cr.P.C.

The testimony of P.W.-8 S.I. Ram Pal Singh in this regard is relevant and accordingly extracted herein-below:

"चार बजे सुबह तक मैं उक्त तीनों व्यक्तियों का ब्यान अंकित नहीं किया था। वादी का ब्यान मौके पर लिया था वादी के ब्यान से यह स्पष्ट हो गया था कि उक्त तीनों व्यक्ति घटना के चश्मदीद गवाह है समय की कमी के कारण उन तीनों व्यक्तियों का ब्यान मौके पर नहीं लिया। ऐसा नहीं है कि उक्त तीनों व्यक्ति मौके पर हमें न मिले हो और न मैंने उनसे पूछताछ की हो। मौके पर उक्त तीनों व्यक्तियों से पूछताछ का कोई उल्लेख C.D. पर नहीं है। ऐसा नहीं है कि अपने ब्यान खाश में हमने उक्त तीनों खाश व्यक्तियों की मौजूदगी व उनसे पूछताछ करना सिखाने पर बताया हो। मैंने केवल एक परचा इस घटना के सम्बन्ध में काटा है।"

165. The very fact that the statements of these three survivors were not recorded under Section 161 Cr.P.C. raises a serious doubt regarding their presence at the time and place of occurrence.

166. The presence of prosecution witnesses of fact at the time and place of occurrence is further questioned on the ground that the description of the passengers of the Jeep was not correctly mentioned in the FIR and that the name of Ex-Pradhan of Humayunpur is mentioned as "Devendra Singh". The FIR while referring to the passengers of the jeep mentions the Ex-Pradhan of Humayunpur as Devendra Singh. Much emphasis has been laid by the counsel for the appellants on this aspect, as it has later been admitted by the prosecution witnesses that the correct name of Ex-Pradhan of

Humayunpur is not Devendra Singh but Ram Kishan.

167. Mr. Arunendra Singh, the learned A.G.A., however, submits that in recording the contents of the FIR, a comma has been inadvertently omitted between the “Ex-Pradhan Humayunpur Devendra Singh”. He submits that one of the passengers of the jeep who got killed was “Devendra Singh”.

168. Our attention has been drawn to the statement of P.W.-1 who has stated that the name of Ex-Pradhan of Humayunpur was not immediately known, as such he was referred to as “Ex-Pradhan of Humayunpur” and Devendra Singh is not his son. This is clearly reflected in the following testimony of P.W.-1:

“हुमायूँ पुर के पूर्व प्रधान देवेन्द्र सिंह का नाम तहरीर में लिखा है स्वयं कहा हुमायूँ पुर के पूर्व प्रधान का नाम हमें उस समय ज्ञात नहीं था इस लिये पूर्व प्रधान के रूप में उन्हें इंगित किया, देवेन्द्र सिंह पूर्व प्रधान नहीं अपितु मेरा लड़का है। तहरीर में मैंने अपने दो पुत्रो देवेन्द्र सिंह व राजेन्द्र उर्फ टिल्लू का नाम लिखा है। प्रश्न- तहरीर प्रदर्श क-1 में अपने लड़के देवेन्द्र सिंह का नाम आपने नहीं लिखा है केवल एक लड़के गजेन्द्र उर्फ टिल्लू का नाम लिखा है?”

In response to the question posed in cross examination about Devendra Singh having not been referred to as son of P.W.-1, the witness (P.W.-1) has furnished the following explanation:

“प्रश्न- तहरीर प्रदर्श क-1 में अपने लड़के देवेन्द्र सिंह का नाम आपने नहीं लिखा है केवल एक लड़के गजेन्द्र उर्फ टिल्लू का नाम लिखा है?

उत्तर:- मैंने तहरीर में दोनों लड़कों का नाम लिखा है। देवेन्द्र सिंह को अपना पुत्र नहीं लिखा है लेकिन वह मेरा पुत्र है।”

169. We have analysed the evidence on record pertaining to above in the light of

the submissions urged before us and upon careful and cautious evaluation of the same, we find substance in the explanation furnished by Mr. Arunendra Singh, the learned A.G.A. that the Ex-Pradhan of Humayunpur and Devendra Singh are not one and the same person but are two different entities. Admittedly the name of Ex-Pradhan of Humayunpur is “Ram Kishan” and not “Devendra Singh”. Devendra Singh admittedly was one of the passengers, who got killed in the shoot-out. This anomaly apparently was the reason for some corrections in the inquest report also, where the name of Ram Kishan was mentioned after scoring out the previous description of the deceased.

170. In view of the specific and unambiguous explanation offered by the learned AGA, we are inclined to accept the argument of Mr. Arunendra Singh, the learned A.G.A. as per which the Ex-Pradhan of Humayunpur and Devendra Singh are two separate and distinct persons. The argument to the contrary raised on behalf of the appellants regarding above is therefore rejected.

171. The other limb of the argument pressed by the learned counsel for the appellants is regarding to the involvement of Subhash Pandey gang in the commission of the crime in question. The basis for such claim is the assertion reflected in the case diary regarding an incident of Police encounter in respect of which Case Crime No. 539 of 1996 under Section 307 I.P.C. was registered at Police Station Kotwali, District Mainpuri. In this incident certain empties were recovered by the Police from the place of occurrence. According to the learned counsel for appellants, the informant Surendra Singh (P.W.-1) has enmity with various persons and dozen of

criminal cases are registered against his sons, namely, Mallu and Santosh relating to loot, robbery, dacoity, kidnapping, murder etc. Subhash Pandey allegedly is a criminal, who was operating a gang. Brother of Subhash Pandey, namely, Subedar Pandey was killed allegedly by Rakshpal Singh, who is the brother-in-law of informant's real brother Shiv Raj Singh. The real sister of Rakshpal Singh, namely, Kanti Devi was married to Shiv Raj Singh. It is further alleged that the informant (P.W.-1) with his real brothers, namely, Shiv Raj Singh and Updesh Singh used to actively help Rakshpal Singh with whom Subhash Pandey maintained enmity.

172. Soon after the incident of shoot-out in respect of which Case Crime No. 286 of 1996 was registered, the Superintendent of Police, Mainpuri and the Inspector of Police Station-Bhogaon as well as other police personnel apparently suspected the role of Subhash Pandey gang in the commission of the shoot-out. Pursuant to the order of the Superintendent of Police, Mainpuri and with the permission of the Chief Judicial Magistrate, Mainpuri, some of the empties recovered in the incident (Case Crime No. 286 of 1996) were sent to Forensic Science Laboratory, Agra for matching them with some of the empties recovered in the incident (Case Crime No. 539 of 1996) with regard to the Police encounter. The Scientific Officer of F.S.L. Agra submitted the report dated 31st October, 1996, which is on record as Paper No. 131A/10. After comparing the empties recovered from the aforementioned two incidents, the Scientific Officer opined as under in his FSL report:

"परिणाम:-

अपराध सं० 539/96 थाना कोतवाली मैनपुरी के घटनास्थल से प्राप्त खोखे कारतूस चि० ईसी-32 व ईसी- 34 उसी आग्नेयास्त्र से चले हैं जिससे घटनास्थल से प्राप्त खोखे

कारतूस चि० ईसी-15, ईसी-17 व ईसी-19 तथा मारुति कार से प्राप्त खोखे कारतूस चि० ईसी-29 चले हैं।

अपराध सं० 539/96 थाना कोतवाली मैनपुरी के घटनास्थल से प्राप्त शेष दो कारतूस चि० ईसी-31 व ईसी-33 अन्य आग्नेयास्त्रों द्वारा चले हैं।"

173. This report has, however, not been produced by the prosecution but has been brought on record by the defence. According to the defence, the prosecution has not been fair and impartial in conducting the investigation in the present case and that is why the evidence relating to involvement of Subhash Pandey gang in the present incident has been deliberately excluded, as it would have demolished the entire prosecution case.

174. The arguments at length have been advanced from both sides with regard to the admissibility of the F.S.L. report Agra dated 31st October, 1996 (Paper No. 131A/10) as also the extent of reliability which could be placed upon such evidence. It therefore becomes imperative for us in such circumstances to address on the aspect relating to the evidence regarding involvement of Subhash Pandey gang in these two incidents.

175. The photo copy of the report of the F.S.L. Agra sent by the Joint Director, F.S.L. Agra dated 31st October, 1996 under the signatures of Ramesh Kumar Rawat, Scientific Officer vide office order no. /96168531/Agney/349 addressed to the Chief Judicial Magistrate, Mainpuri is on record. The defence, in addition to above, placed such photo copy on record, has produced the testimony of Rajesh Kumar Singh (D.W.-3) who was Inspector in C.B.C.I.D. Agra between July, 1997 to July, 1999. From 31st July, 1998 this witness had partly conducted the

investigation in C.B. No. 420/98 arising out of Case Crime No. 286 of 1999. In his deposition, D.W.-3 has stated that the report of the F.S.L. Agra was incorporated in case diary on 1st May, 1999 and he had also recorded the statement of Ram Pal Singh, Officiating Inspector. In his examination-in-chief D.W.-3 has deposed as under:

".....एक्सपर्ट रिपोर्ट की मूल प्रति पत्रावली पर कागज सं० उपलब्ध है इस रिपोर्ट के परिणाम वाले कालम में अप०सं० 539 /96 थाना कोतवाली मैनपुरी के घटना स्थल से प्राप्त खोखे कारतूस चि० ई०सी०-32 व ई०सी०-34 उसी अमनेयाख से चले है जिससे घटना स्थल से प्राप्त खोखे कारतूस चि० ई०सी०- 15, ई०सी०- 17, ई०सी०-19 तथा मारुति कार से प्राप्त खोखा कारतूस चि० ई०सी०-29 चले है अप०सं० 539/96 थाना कोतवाली मैनपुरी के घटना स्थल से प्राप्त शेष दो कारतूस चि० ई०सी०-31 व ई०सी०-33 अमनेयाख द्वारा चले है। मैने इस केस की तफतीश दिनांक 31.7.98 से 13.5.99 तक की है। इसके बाद यह तफतीश श्री महक सिंह द्वारा की गई है दिनांक 5.2.99 को मैने रामपाल सिंह के बयान में अंकित किया है कि तलविदा विजय सिंह काजला, एच०सी० रघुनाथ सिंह सी०/ बनीसिंह मौके पर घटना स्थल पर आए थे। निरीक्षक रामपाल सिंह के बयान में गवाह सुरेन्द्र सिंह, देवेन्द्र सिंह, सन्तोष एवं सन्तोष गुप्ता के मौके पर पहुचने/मिलने का 161 सीआर०पी०सी० में उल्लेख नहीं है अपराध संख्या की विवेचना में पूर्व विवेचक द्वारा की गई कार्यवाही का संछिप्त कथन अंकित किया जाता है।"

176. This witness has also been cross-examined wherein he has stated that investigation could not be concluded by him and no supplementary report under Section 173 (2) Cr.P.C. was submitted by him. However, there is no challenge to the correctness of report of the F.S.L. Agra nor the report has even been questioned by the prosecution. No suggestion has even been given to this witness for doubting the report of the F.S.L. Agra. The conclusions drawn in the report of the F.S.L. have also not been questioned.

177. In addition to the testimony of D.W.-3, the defence has also produced S.C. Pal (D.W.-4), who was Inspector in C.B.C.I.D. Agra Division, Agra between 30th November, 1996 to 28th January, 1998. He has stated that between the same parties a previous shoot-out was carried out on 23rd May, 1996 in which a report was lodged against seven persons by Shiv Raj Singh, brother of the informant (P.W.-1) against Ramakant and others. This case was registered as Case Crime No. 153 of 1996 under Sections 147, 148 and 302 I.P.C. in which final report was submitted on 7th July, 1996. A cross case was also lodged from the side of the accused, wherein Jagannath Dixit was the informant, under Sections 147, 148, 149, 307 and 302 I.P.C. at Police Station-Bhgaon. In this cross case a charge-sheet was submitted against the informant of this case, namely, Surendra Singh (P.W.-1), his two brothers, namely, Shiv Raj Singh and Upedesh Singh, his son Mallu as well as one Sushil Gupta on 7th July, 1996. These materials were included in the case diary. This witness in his deposition has clearly stated that the higher authorities had suggested the previous Investigating Officer Mr. Nand Kishor Mall of involvement of Subhash Pandey gang in respect of which Case Crime No. 539 of 1996 was lodged. On interrogation, this witness was informed by one Mr. Mall that some of the empties recovered in two cases were sent on the direction of the Senior Superintendent of Police for forensic examination. This witness has also stated that the informant/P.W.-1 Surendra Singh had disclosed him on 15th May, 1997 that he had not gone to Bhogaon Police Station as the Police of Bhogaon Police Station was under the influence of the accused persons. In his further cross-examination he has stated that no further investigation about Subhash Pandey gang

was made by him and the case diary only records as was informed to him by the Inspector Sri Nand Kishor Mall.

178. The defence had also produced Mahak Singh, retired Inspector, C.B.C.I.D. as D.W.-6, who had investigated this case between 18th February, 2000 to 14th March, 2000. This witness has stated that during investigation he found that in 1984 the elder brother of Subhash Pandey, namely, Subedar Pandey was killed in village Elahabas, Police Station Elow, wherein Tukpal Singh, Rakshapal Singh and few others were suspected to be accused and in respect of which Case Crime No. 183 of 1984 under Sections 302 and 394 I.P.C. was registered. He also found that sister of Rakshapal Singh, namely, Kanti Devi is married to Shiv Raj Singh on account of which enmity was going on between the informant's party and Subhash Pandey gang.

179. In his further cross-examination this witness stated that he came to know that the accused persons were also known to Subhash Pandey. He clarified his statement while stating that the accused Anand Dixit was known to Subhash Pandey gang. There is no relationship between them. He also discovered the criminal history of 9 cases against Subhash Pandey. He also stated that none of the witnesses in this case had disclosed to him about the involvement of Subhash Pandey gang in the commission of the offence.

180. The first and foremost since we have to consider is as to whether the F.S.L. report dated 31st October, 1996 i.e. Paper No. 131A/10 can be read in evidence in this case or not? This report is the photo copy and its original has not been produced. This document could be in possession of the

prosecution and cannot be expected to be available with the defence. The reference of this document is clearly made in the case diary which we have perused.

181. The defence has tried to bring this document as secondary evidence since the original was not available and to prove the same. The defence has produced D.W.-3, D.W.-4 and D.W.-6 in this regard. All these defence witnesses had been Investigating Officers of the case while the investigation was with the C.B.C.I.D.

182. We are informed that the decision to transfer the investigation to C.B.C.I.D. was ultimately quashed but during the course of argument our attention has not been drawn to any such order. However, existence of such fact is not doubted even by the appellants. The mere fact that the investigation was restored to Civil Police would not mean that the material collected during the course of investigation by the C.B.C.I.D. cannot be looked into. The Investigating Officers of C.B.C.I.D. i.e. D.W.-3, D.W.-4 and D.W.-6 have specifically stated that the decision was taken by the higher authorities for recovered empties to be sent to F.S.L. Agra in order to explore the possibility of the involvement of Subhash Pandey gang in this shoot-out/incident. The F.S.L. report dated 31st October, 1996 has been taken note off by D.W.-3, D.W.-4 and D.W.-6 and the contents of the said report have been mentioned in the case diary. The scientific report is otherwise a report which need not be proved by producing the Scientific Officer/Forensic Expert by virtue of the exception carved out in Section 293 Cr.P.C. The defence has placed the photo copy of the scientific report and has also shown that the contents of this report were recorded in the case diary but the

prosecution at no stage has either challenged the existence of this report or the incorporation of the contents of the report in the case diary. The prosecution has also not furnished any explanation as to why involvement of Subhash Pandey gang had not been investigated further, despite the F.S.L. report, as per which some of the empties recovered in the Case Crime Nos. 539 of 1996 and 286 of 1996 were fired from the same firearm.

182. The learned AGA has contradicted the argument raised by the learned counsel for accused appellants regarding involvement of Subhash Pandey gang in the present incident on the basis of F.S.L. report dated 31st October, 1996. It is urged by the learned AGA that no firearm was recovered from any of the two places of occurrence and in its absence it is not conclusively proved on the strength of the F.S.L. report alone that the some of the empties recovered in both the incidents were fired from the same firearm.

183. The above objection of Mr. Amit Sinha, the learned A.G.A. has been opposed by Mr. Rajiv Lochan Shukla, who by placing reliance upon the Literature regarding Forensic Science has endeavoured to show that even in the absence of firearm, it was possible to hold that the empties recovered from two different places of occurrence were fired from the same weapon.

184. Irrespective of the submissions urged on behalf of the parties regarding the admissibility of FSL Report, we do find that material in the form of FSL Report dated 31.10.1996 had surfaced on record during investigation suggesting possible involvement of Subhash Pandey Gang in the shoot-out in question. The investigation

has neither probed this line of investigation nor has disclosed any reasons to give it up. The FSL Report has otherwise been suppressed. This unexplained act of the investigation does create a shadow of doubt upon the conduct of the investigating agency in not completing the investigation, in the light of the above FSL Report, to a logical conclusion.

CONCLUSIONS ON THE BASIS OF ANALYSIS

185. The prosecution on the commencement of trial has set out to prove the incident of shoot-out in question as per which it was the accused-appellants who indiscriminately fired on the jeep in which the deceased, three prosecution witnesses and one else were travelling and led to the brutal murder of six passengers travelling therein. According to the prosecution the incident is seen by three prosecution witnesses of fact i.e. P.W.-1, P.W.-2 and P.W.-3 who are said to have jumped out of the running jeep alongwith another from the back door and have further witnessed the occurrence. The evidence on record reveals that these witnesses of fact are highly interested witnesses and their credibility and reliability as well as their presence at the place of occurrence becomes doubtful on account of the facts noted hereinabove and also their criminal antecedents. We are, therefore, called upon to determine whether the prosecution witnesses of fact are credible and their statements are worthy of trust before returning a finding regarding the guilt of the accused appellants beyond doubt or their innocence.

186. We have already referred to the various anomalies in the prosecution case with reference to the credibility and

reliability of the prosecution witnesses of fact, the various contradictions and embellishment in their statements, their presence at the time and place of occurrence being seriously doubtful, the medical evidence not corroborating the ocular version, the long pre-existing enmity in between the accused-appellants and the first informant PW-1. Upon evaluation of the entire material on record with caution and circumspection we however find it difficult to agree with the reasoning and the conclusion recorded by the trial court. Having gone through the record and upon critical appraisal and appreciation of the evidence on record in the light of the submissions urged for and against the appeals as noted above we are inclined to allow the appeals preferred by the accused-appellants, who are otherwise in custody and have undergone incarceration for more than 18 years for the following reasons:-

(I) it seems doubtful to us that the four passengers of the jeep (including the three witnesses of fact, namely, P.W.-1, P.W.-2 and P.W.-3) could jump out of a running jeep and escape unhurt when ten armed men are indiscriminately firing at the jeep. We further find it difficult to believe that in such a shoot-out, the prime suspect (P.W.-1) would be spared by the assailants, particularly when they (the four who escaped) were unarmed and in close range of the assailants and were also seeing the assailants. It is apparent from the nature of the crime that the assailants had no intentions to spare any of the passengers of the jeep. We have difficulty in accepting the explanation of the prosecution witnesses that they jumped out of the running jeep, without sustaining any injury, and hide themselves at a distance of 40 to 50 paces in a pigeon pea field (arahar) and witnessed the occurrence from there. We

have already stated in the earlier part of this judgment that the place from where the three prosecution witnesses of fact are alleged to have witnessed the occurrence is a crater in a pigeon pea field (Arahar) and, therefore, it was virtually impossible for the prosecution witnesses of fact to have witnessed the occurrence. The witnesses of fact have alleged that they were fired upon by the accused but they escaped unhurt because the jeep came in between them and the assailants. Even if this was to be accepted, we find it unnatural that having spotted these four passengers, the assailants would allow them to leave and would not walk a few paces further to eliminate them, particularly when P.W.-1 was their prime suspect on account of their pre-existing enmity. We, therefore, do not find the testimonies of the prosecution witnesses of fact trustworthy and reliable, particularly as they are highly interested witnesses. Their very presence at the place of occurrence is doubtful and hence their testimonies are not worthy of trust.

Having given our anxious consideration and upon realistic assessment we find that it would not be safe us to rely upon the statements of the three eye witnesses in view of their incredible character for the reasons noted above.

187. We are further inclined to ignore the minor inconsistencies and contradictions in the testimonies of the prosecution witnesses. But even if we ignore them, yet, we find that it would not be prudent to rely upon the prosecution case as explained by the three prosecution witnesses of fact. In this regard we deem it appropriate to clarify that many of the issues pressed by the learned counsel for accused-appellants do not merit serious consideration like inconsistencies in the

prosecution case about P.W.-1 going to meet his ailing maternal aunt (Mausi) or the fact that no ladies had accompanied them though several persons had gone with P.W.-1 to cater to his safety but none of them carried any firearm or weapon; the fact that the prosecution version is shaky on account of two inmates, namely, Naresh Dixit and Ram Kishan (former Pradhan) joining later on the Mainpuri jail crossing; whether the witnesses have seen the incident from pigeon pea (Arhar) field or mustered field; the contradiction in the timing when the autopsy was concluded; error in recording the name of Pradhan of Humayunpur, namely Ram Kishan etc. yet the prosecution does not succeed in establishing its case beyond doubt for the reasons set-forth above.

188. We also find some substance in the argument of the learned counsel for the appellants about the possibility of Subhash Pandey gang being responsible for carrying out the shoot-out with whom also the informant's side had inimical relations. As already noted above, the FSL Report submitted by the FSL Agra was incorporated in the case diary which clearly shows that the empties recovered from different incidents were fired from the same weapon. In spite of this the Investigating Officer has not taken the investigation to its logical end. Even if the FSL Report is not strictly read in evidence, yet, it being a material gathered during investigation was required to have been further probed to ascertain involvement of Subhash Pandey Gang in the shoot-out and the failure of investigation to do so has rendered the investigation questionable.

189. When the judgment of the trial court is examined in the light of the facts and circumstances of the case, the inherent

fallacy in the prosecution story which the prosecution set out to prove and noticed by us in the previous part of this judgment coupled with the fact that the prosecution witnesses of fact are not credible, therefore, their testimonies are not worthy of trust, the very presence of the three prosecution witnesses of fact at the time and place of occurrence being not fully established, the ocular version of the occurrence not being corroborated by the medical evidence, we have no hesitation to hold that the findings returned by the trial court for recording the guilt of accused-appellants are not only illegal but also perverse.

190 Summing up our conclusions, we have no hesitation to hold that the prosecution has not been able to establish the very story which it set out to prove, on the basis of evidence adduced by the prosecution itself. Having said so, we disapprove the findings returned by court below and also the reasons assigned by court below for recording the guilt of the accused appellants. We, accordingly, disagree with the same.

191. In view of the discussions and deliberations made above, these appeals succeed and are liable to be allowed. They are accordingly allowed. The judgment and order dated 1st February, 2007 passed by the Sessions Judge, Mainpuri in Sessions Trial No. 97 of 2005 (State Vs. Jagannath and 5 Others) and Sessions Trial No. 104 of 2005 (State Vs. Hariom), arising out of Case Crime No. 286 of 1996, under Sections 147, 148, 302/149, 307/149 I.P.C., Police Station-Bhogaon, District-Mainpuri, against the accused-appellants, is hereby set aside.

192. The accused appellants, who are reported to be in jail for nearly 18 years,

12. Veeran & ors. Vs St. of M.P. (2011) 5 SCC 300

13. Mohd. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

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

15. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

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

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

18. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

19. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

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

(Delivered by Hon'ble Dr. Kaushal
Jayendra Thaker, J. & Hon'ble Umesh
Chandra Sharma, J.)

1. Heard Sri Jugal Kishor Khanna assisted by Sri Amit Khanna, learned counsel for the appellants in both these appeals and the learned AGA for the State in both these appeals.

2. These appeals challenge the judgment and order dated 19.02.2018 passed by Special Judge (SC/ST Act)/Additional Sessions Judge, Court No.2, Farrukhabad in Sessions Trial No.91 of 2014 (State Vs. Aslam Noor Khan and another) convicting accused-appellants under Sections 452, 304/34 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced them to undergo imprisonment for life with fine of Rs.10,000/- under Section 304/34 of IPC and in default of fine further to undergo six

months additional imprisonment each and they have been also convicted for three years rigorous imprisonment each under Section 452 IPC and fine of Rs.5,000/- and in case of default of payment of fine, further to undergo three months additional imprisonment each.

3. Factual scenario as culled out from the record and the judgment of the court below are that both the accused tried to do away with the wife of informant by setting her ablaze. The incident took place on 04.11.2013 at 06:00 p.m. in the evening when the deceased requested the accused to return/leave the land belonging to the deceased as they were hand to mouth. This request caused anger in mind of both accused. Aslam Noor Khan started using filthy language. The deceased went in her house, the two followed her and poured kerosene on her and set her ablaze.

4. The postmortem report shows that there were antemortem burn injuries on face, neck, chest, arms and both the legs. The death was due to septicemic shock as a result of antemortem burn injuries. The death occurred on 14.11.2023 namely after 10 days of the incident.

5. On investigation being put into motion, the investigating officer recorded the statements of all the witnesses and submitted the charge sheet to the learned Magistrate. The learned Magistrate summoned the accused and committed them to Court of Sessions as prima facie they were to be tried for offences committed under Sections 304, 452, 504 IPC read with Section 34 IPC.

6. On being summoned, the accused persons pleaded not guilty and wanted to be tried. The charges were framed for

conviction of offences under Sections 452, 504, 304 read with Section 34 of IPC. The trial started and the prosecution examined 10 witnesses who are as follows:-

1	Shahnawaj Khan	PW-1
2	Yusuf Khan	PW-2
3	Ajit Pratap Singh	PW-3
4	Manish Kumar	PW-4
5	Dr. Kalka Prasad	PW-5
6	Khush Nawaj	PW-6
7	Rukhsar	PW-7
8	Virendra Kumar Yadav	PW-8
9	Mahendra Pal Singh Chauhan	PW-9
10	Rajendra Prasad Chaudhari	PW-10

7. In support of ocular version following documents were filed:-

1	FIR	Ex.Ka-2
2	Written Report	Ex.Ka-1
3	Dying Declaration	Ex.Ka-12
4	Postmortem Report	Ex.Ka-8
5	Panchayatnama	Ex.Ka-4
6	Charge Sheet	Ex.Ka-9
7	Site Plan	Ex.Ka-10

8. At the end of the trial and after recording the statement of the accused under Section 313 CrPC and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned above.

9. It is submitted by learned counsel for the appellants that the witnesses of facts have not supported the prosecution and therefore, the accused are entitled to be acquitted. In support of his submission learned counsel has relied on the decisions in **G.V. Siddhramesh Vs. State of Karnataka, (2010) 3 SCC 152; Hari Om Vs. State of Haryana and another, 2014 0 Supreme (SC) 783; Ravi Pratap Singh Vs. State of UP, 2020 SCC OnLine All 841; Chhaganbhai Limjibhai Palas Vs. State of Gujarat, Criminal Appeal No.806 of 2011; Raju @ Rajeev Vs. State of UP, Criminal Appeal No.4701 of 2013; Shyam Mishra Vs. State of UP, 2022 (9) ADJ 322 (DB) and State of UP Vs. Madan Mohan and others, AIR 1989 SC 1519** and has contended that there is faulty charge. The learned counsel for the appellants has submitted that this is a case which does not go beyond Section 304 Part-I or Part-II of IPC. It is submitted that there was quarrel between accused and deceased, there was no intention on part of the accused to do away with the deceased. It is further submitted that the dying declaration should not have been relied by the learned Trial Judge, reason being, the officer who had noted the dying declaration was not examined on oath.

11. As against this, learned AGA for the State has contended that the dying declaration is believable. The learned Judge has not committed any error or there is no error which calls for interference by this Court in these appeals.

12. We have heard learned counsels for the parties. The fact that the dying declaration of the deceased was recorded on 05.11.2013 where the deceased categorically mentioned the name of

accused appellants to have first beaten her and then set her ablaze.

13. Learned counsel for the appellants has submitted that the deceased died due to burn injuries which she sustained accidentally while cooking food. While going through the dying declaration and the postmortem report, we cannot accept the submission of counsel for the accused-appellants that it was an accidental death, the accused authored the offence.

14. Therefore, we are of the considered opinion that the learned Judge has not committed any mistake in relying on the dying declaration. In the light of the decision in **Govindappa and others Vs. State of Karnataka, (2010) 6 SCC 533**, there is no reason for us not to rely on the dying declaration. The evidentiary value under Section 32 of Evidence Act, 1872 fulfils the contours of acceptance of dying declaration. We are convinced that PW-1 has though declared hostile he has narrated the incident and, therefore, the contention of the counsel that it was an accidental death arising out of accidental burning during cooking in the house belies this fact. The totality of the evidence before us will have to be examined. The finding of fact by learned Additional Sessions Judge that it was a homicidal death and not accidental death is concurred by us and we hold that conviction under Section 304 Part-I IPC has been properly recorded and the terms laid down by courts are satisfied as discussed herein after.

15. The question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellants under Section 302 of IPC should be upheld or the conviction deserves to be converted under

Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

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

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

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done.	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention	(2) with the

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

17. In latest decision in **Khokan@ Khokhan (Supra)** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in the case of **Anversinh Vs. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments.

Judgments in **Pravat Chandra Mohanty Vs. State of Odisha, (2021) 3 SCC 529 & Pardeshiram Vs. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

18. From the dying declaration of the deceased and the depositions of the prosecution witnesses, it cannot be said that it was premeditated act of the accused. The injuries which were caused were burn injuries which show intention coupled with knowledge that man of prudence would know that if somebody is set ablaze, he/she would suffer severe injuries or death may also occur. The investigation were also carried under Section 304 of IPC and charge-sheet was also led under Section 304 of IPC. Unfortunately, the charges framed were for higher offence. Burn injuries were on vital parts of the body of the deceased and it was sufficient in the ordinary course of nature to cause death but would fall in exceptions of Section 300 of IPC.

19. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that it was a case of homicidal death not amounting to murder and the offence is punishable under Section 304 Part I of I.P.C.

20. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and

intention to cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

21. However it is to be seen whether the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

22. In **Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926**, explaining rehabilitary and reformatory aspects in sentencing it has been observed by the Supreme Court:

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

retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

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

24. In **Ravada Sasikala Vs. State of AP, AIR 2017 SC 1166**, the Supreme Court referred the judgments in **Jameel Vs. State of UP, (2010) 12 SCC 532**, **Guru Basavraj Vs. State of Karnatak, (2012) 8 SCC 734**, **Sumer Singh Vs. Surajbhan Singh, (2014) 7 SCC 323**, **State of Punjab Vs. Bawa Singh, (2015) 3 SCC 441** and **Raj Bala Vs. State of Haryana, (2016) 1 SCC 463** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence

and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

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

26. As discussed above, 'reformatory theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of

impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

27. Therefore, we convert the sentence of 'life imprisonment' to period undergone for both accused appellants. Fine is reduced to Rs.5,000/- under Section 304 IPC and default sentences are maintained. The accused-appellants be set free if not wanted in any other case. However, if fine is not paid, the default sentence will run after the completion of 9th year.

28. In view of the above, both the appeals are partly **allowed**. Judgment and order passed by the learned Sessions Judge shall stand modified to the aforesaid extent. The records be transmitted to court below forthwith.

(2023) 5 ILRA 964

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 01.05.2023

BEFORE

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

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 1566 of 2011

Mohd. Azeem & Ors.	...Appellants
Versus	
State of U.P.	...Respondent

Counsel for the Appellant:

Sri Sushil Shukla, Sri A.K. Srivastava, Sri Mohd. Faiz, Sri Shiv Narain Singh

Counsel for the Respondent:

G.A., Sri Mohd. Asif, Sri N.I. Jafri

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Sections 302, 304B/34 - Challenge to-Conviction-homicidal death-In-laws set the deceased ablaze by pouring kerosene oil-deceased died due to septecimia-The dying declaration mentions, the presence of the two women which developed the cause of the death occurred due to burning-two brothers can not convict on the basis of dying declaration as there is no demand of dowry immediately prior to the commission of incident-The incident occurred on the spur of the moment when the deceased was being abused by mother-in-law and jethani-the main culprits have undergone 12 years of incarceration, hence they would be freed on completing 10 years-More so, role of the other two accused is not proved, the husband took deceased to the hospital and brother-in-law is not even named in dying declaration, they are acquitted. (Para 1 to 34)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Pushpa Devi Vs St. of U.P. CRLA No. 1689 of 2017
2. Smt. Kiran & anr. Vs St. of U.P. CRLA No. 2218 of 2018
3. Girish Singh Vs St. of U.K. (2020) 18 SCC 423
4. Satbir Singh Vs St. of Har. (2021) 6 SCC 1
5. Govindappa & ors. Vs St. of Karn. (2010) 6 SCC 533
6. Veerla Satyanaranyana Vs St. of A.P. (2009) 16 SCC 316
7. Tukaram & ors. Vs St. of Mah. (2011) 4 SCC 250
8. B.N. Kavatakar & anr. Vs St. of Karn. (1994) SUPP 1 SCC 304

9. Veeran & ors. Vs St. of M.P.(2011) 5 SCC 300

10. Bengai Mandal @ Begai Mandal Vs St. of Bih.

11. Chirra Shivraj Vs St. of A.P.

12. Smt. Rama Devi @ Ramakanti Vs St. of U.P.

13. Mohd. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

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

15. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

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

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

18. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

19. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

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

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

1. Heard learned counsel for the appellants and learned A.G.A. for the state.

2. This appeal challenges the judgment and order dated 05.03.2011 passed by Addl. Sessions Judge/Special Judge (Anti-corruption), Bareilly in Session Trial No. 301 of 2001 (State v. Mohd. Azeem and others). All the appellants were charged for offences as defined under Section 304-B IPC and in addition and alternatively, the appellant Nos.3 & 4 were charged for commission of offence as defined in Section 302 IPC also. By the judgment & order dated 05.03.2011 passed

by Additional Sessions Judge/Special Judge (Anti-corruption), Bareilly, the appellants have been convicted under Sections 304-B read with Section 34 IPC. The appellant nos.3 & 4 have also been convicted under Section 302 IPC but the punishment at the end except mentioning Section 302 IPC, the punishment of all appellants were convicted under Section 304B read with Section 34 of IPC. The appellant nos. 3 & 4 have been sentenced to life imprisonment whereas appellant nos. 2 & 3 have been sentenced to 10 years of rigorous imprisonment.

3. Brief facts as culled out from the record are that on 18.07.2000 at about 8:00 p.m. sister of the informant was burnt to death after pouring kerosene oil and by being set ablaze by the accused. The accused persons fled away with injured Shakira (deceased) from Bareilly and, lastly, when he came to the hospital, where his sister was lying in a burnt up condition, none of family members from the side of her in-laws were present. The informant finally raised the inference about the commission of the act perpetrated by accused persons in furtherance of their common object of doing away the deceased. The victim also told the informant that the appellants had burnt her by pouring kerosene oil.

4. The accused were summoned and charges were framed by learned Additional Sessions Judge on Mohmad Azeem and Mohmmad Idris whereas all four accused were charged with commission of offence under Sections 302, 304-B IPC read with Section of I.P.C.. The accused-persons pleaded not guilty and wanted to be tried. The offences for which accused were charged were triable by the Court of Sessions, hence, the accused-appellants were committed to the Court of Sessions.

5. The Trial started and the prosecution examined 10 witnesses who are as follows:

1	Jisan Khan	PW1
2	Dr. A.K. Agarwal	PW2
3	Mohd. Mobeen Khan	PW3
4	Dr. K.S. Gupta	PW4
5	Dr. S.K. Saxena	PW5
6	Raja Ram	PW6
7	Mohd. Siddique	PW7
8	Raghubanshi Lal	PW8
9	Bhupendra Singh	PW9
10	Dr. P.N. Pandey	PW10

6. In support of ocular version following documents were filed:

1	First Information Report	Ex.Ka.13
2	Written Report	Ex.Ka.1
3	Recovery momo of Kerosene Oil Lamp and half burn Sofa	Ex.Ka.17
4	Note of Dr. A.K. Agarwal	Ex.Ka.2
5	Statement of Smt. Shakira (dying declaration)	Ex. Ka.4
6	Note of Dr. A.K. Agarwal	Ex.Ka.3
7	Post mortem report	Ex. Ka.5
8	Site plan with index	Ex. Ka.16

7. Should a husband and brother-in-law always be held to have been guilty of demanding dowry and the punished even though there may not be any allegation leveled against them by the deceased wife

in her dying declaration where husband was not present when incident occurred and took her to hospital to save her. The brother in-law's name nowhere figured in the dying declaration. A completely concocted story was made out by family members of deceased. This is a glaring case where there is not only miscarriage of justice, but there is overzeal of judge to see that the accused are punished. The learned Judge has devoted more than 80 pages when the matter could have been disposed of, in brevity on the basis of dying declaration of the injured who died after a period of 10 days, wherein a dying declaration, there was no mention that the husband or brother in had set her ablaze. In dying declaration it is mentioned that it was the husband, who had after the incident occurred rushed home from his shop between the women of the house and had taken her to the hospital and got her treated. The brother-in-law was unfortunately not even named in the dying declaration. The learned Judge had relied on the dying declaration even reproducing the same in the judgment and we are convinced that the learned Judge in his overzeal to record conviction has mislead himself into non-observing the tenants and contours of criminal jurisprudence for appreciating evidence when it was grossly pointed out before the learned Judge that the oral evidence by the brother of the deceased, who is involved in the several criminal crimes which has been brought on record. During his cross examination, who has disturbed married life, his testimony which is dimetrically opposite to dying declaration could have been accepted by the learned Judge. The dying declaration nowhere mentions that any amount was demanded either by the ladies of the family or the husband. The omnibus allegations by person whose credence is not worthy of credence has been elaborately discussed by

the court below while holding that Section 304-B I.P.C is made out against all the accused.

8. The learned Additional Sessions Judge has convicted the accused-appellants as above.

9. Learned counsel for the appellants has relied on the decisions of the Division Bench of this Court passed in Criminal Appeal No. 1689 of 22017 (**Pushpa Devi v. State of U.P.**) decided on 05.07.2022 and in Criminal Appeal No.2218 of 2018 (**Smt. Kiran and another v. State of U.P.**) decided on 29.11.2022 and has contended that there is faulty charge and the charge could not have been re-framed after the examination of witnesses of prosecution side, who did not support the prosecution. This is the contention of the learned counsel for the appellant, and in the alternative, it is submitted that this is a case which does not go beyond Section 304 Part I or Part II of IPC. There was no intention of the accused to do away with the deceased. It is submitted that the death was due to septicemia after 10 days of incident as per the testimony of P.W.1 also that deceased died after 10 days of incident.

10. Learned counsel for the appellants has submitted that the deceased died due to burn injuries which she sustained accidentally while cooking food. While going through the dying declaration and the postmortem report, we cannot accept the submission of counsel for the accused-appellants that it was an accidental death.

11. As against this, learned A.G.A. for the State has contended that the dying declaration is believable and, therefore, the learned Judge has not committed any error or there is no error which calls for

interference by this Court in this appeal. Moreover, looking to the gruesomeness of the offence and the evidence of prosecution witnesses, this Court should not show any leniency in the matter. It is further submitted by learned A.G.A. that ingredients of Section 304B of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

12. We have considered the evidence of witnesses and the Postmortem report which states that the burn injuries on the body of the deceased developed into septicaemia and that was the cause of death and that it was homicidal death, we concur with the finding of the Court below that it was homicidal death.

13. The dying declaration mentions, the presence of the two women which developed which caused the death occurred due to septicaemia death and, therefore, homicidal death is established.

14. This takes us to the fact whether we can convict the two brothers, namely, Mohd. Azeem and Mohd. Idris. The accused even on basis of dying declaration presence is not established will have to be acquitted as there is no demand of dowry immediately prior to the commission of the incident. The dying declaration categorically states that the incident occurred on the spur of the moment when the deceased was being abused by mother-in-law and sister-in-law (jethani). The allegations required conviction under Section 304-B I.P.C. have been reiterated ***Girish Singh v. State of Uttarakhand, (2020) 18 SCC 423***. The essential ingredients have again being reiterated in ***Satbir Singh v. State of Haryana, (2021) 6 SCC 1***.

15. The prosecution, defence and guidelines prescribed in *Satbir Singh (supra)* have to be seen in our case. Section 133-B evidence could not have been invoked by learned Judge and pand under Section 106 Evidence Act could not have been invoked.

16. The learned Judge accepted the dying declaration which is silent about any overt act on part of the any of the accused. The accused cannot be convicted for Section 304-B I.P.C. on the oral testimony of the witnesses whose presence is not established. The deceased had remained in treatment for about 10 days, the dying declaration has been relied by the learned Judge by relying on catena of decisions.

17. Hence we cannot concur with the learned Judge as far as the dowry death is concerned, qua any of the accused. There is no evidence to prove that deceased was subjected by anyone to cruelty pursuant to demand of dowry ingredients of Section 304-B are absent. The presumption raised by learned Judge falls to the ground on the basis of the dying declaration, we are fortified in our view by the judgment of *Girish Singh (supra)*

18. We are of the considered opinion that the learned Judge has not committed any error in relying on the dying declaration. In the light of the decision in ***Govindappa and others Vs. State of Karnataka, (2010) 6 SCC 533***, there is no reason for us not to accept the dying declaration. The evidentiary value of dying declaration under Section 32 of Evidence Act, 1872 is proved. The contention of the counsel that it was an accidental death arising out of accidental burning during cooking in the house has not been accepted by trial court and we have concurred with

the same. We are of the view that it was a homicidal death and not accidental death.

19. On 18.07.2000, the brother of the deceased who is shown as PW1. In this case, on whose testimony the learned Judge has heavily relied on the ocular version is the contrary to the evidence on record. He has categorically mentioned that he went to the hospital at Bareilly and his sister was admitted in Hospital and the nurse was looking after her. The oral dying as declaration narrated by the brother is absolutely doubtful and is contrary to the written proved dying declaration of the deceased. Could the learned Judge have relied on this oral dying declaration which is admittedly absent in written dying declaration of the deceased. Even if the said evidence is accepted, it cannot be said that brother-in-law or the husband who were instrumental in causing the incident is accepted by this witness his cross examination. He has accepted that he has strained matrimonial life he was an accused in case involving smack which a contraband. We are not concerned with these facts but this shows the character of the witness who even does not know place where his sister was being treated.

20. This takes us to the next question whether it was a perpetrated murder with common object of doing away with deceased or would it fall within any of the exceptions to Section 300 of IPC?

21. Section 34 of Indian Penal Code reads as follows:

"Section 34 in The Indian Penal Code. [34. Acts done by several persons in furtherance of common intention. --When a criminal act is done by several persons in furtherance of the common intention of all,

each of such persons is liable for that act in the same manner as if it were done by him alone.]"

22. Can it be said that there was common object of doing away with the deceased. The husband and the brother-in-law were not present at the place of the said incident which leaves us with act of two ladies.

23. It cannot be said that there was any common object of doing away with the deceased. Therefore, the conviction with the aid of Section 34 is set aside. The principles to invoke Section 34 and Section 304-B of IPC have not been made out as per Judgment of Supreme Court in ***Veerla Satyanarayana v. State of Andhra Pradesh, (2009) 16 Supreme Court Cases 316.***

24. It would be relevant to refer to Section 299 of the Indian Penal Code, which reads as under:

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

25. The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the Courts. The confusion is caused, if Courts lose sight of the true scope and meaning of the terms used by the legislature in these sections, and allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be is to keep in focus the keywords used in the

various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.

INTENTION

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

26. It is an admitted position of fact that the death was due to septicemia and had occurred after 10 days of incident. The accused-appellants are husband, brother-in-law (jeth) and sister-in-law (jethani) of the deceased. The accused-appellants are in jail for more than 10 years and requesting for lesser sentence. Hence, on overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principles laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304 & Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300**, we come to the definite conclusion that the death was not premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part II) of I.P.C. We are also fortified in our view by the decisions relied upon by learned Counsel for the appellants in **Bengai Mandal alias Begai Mandal vs. State of Biha, Chirra Shivraj vs. State of Andhra Pradesh, Smt. Rama Devi alias Ramakanti vs. State of U.P. &b Smt. Kanti and Another vs. State of U.P. (Supra).**

27. It is now to be seen as to what would be the quantum of sentence for the two ladies. In this regard, we have to analyse the theory of punishment prevailing in India.

28. In **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]**, explaining rehabilitary & reformative aspects in

sentencing it has been observed by the Supreme Court:

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

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

30. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, the Supreme Court

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

sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

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

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

33. Therefore, accused-persons are punished under Section 304 (Part II) of IPC. As far as the main culprits namely Smt. Azzo Bano & Ajaib Bano @ Jabbo and Smt. Razia Begum, are concerned, they have undergone 12 years of incarceration, hence, we hold that on completing 10 years, they would be freed. Fine not paid be adjusted towards default sentence which is 3 months starting after 10th year of incarceration. As far as the other two

accused namely Mohd Azeem and Mohd Idris are concerned, their role in the above incident is not proved. The husband took deceased to Hospital. The brother in-law is not even named in dying declaration, they are acquitted. They need not surrender if released on bail pursuant to order not warranted in any other offence.

34. In view of the above, the appeal is **partly allowed**. Judgment and order passed by the learned Sessions Judge shall stand modified to the aforesaid extent. Record be sent back to the Trial Court forthwith.

35. The accused are ordered to be released on bail on 11.4.2023, they need not surrender, but if yet not released, they be released forthwith.

(2023) 5 ILRA 972
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
 THAKER, J.**
**THE HON'BLE ARUN KUMAR SINGH
 DESHWAL, J.**

Criminal Appeal No. 2942 of 2012
 with
 Criminal Appeal No. 7154 of 2011

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

Counsel for the Appellant:

Sri Ravinda Prakash Srivastava, Sri Gaurav Kumar Shukla, Sri Shesh Narain Mishra, Sri Surendra Kumar Tiwari, Sri Prashant Kumar, Sri Gopal Das Srivastava

Counsel for the Respondent:

Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Sections 498A, 304B and 3/4 D.P. Act-Challenge to-Conviction-homicidal death-husband along with his parents set her ablaze on non-fulfillment of dowry-Trial court awarded punishment for life time is very harsh-the husband has been incarcerated for 15 years period would be enough punishment, looking to the advanced age of other accused who would now be of 80 years and 70 years respectively, period undergone would be sufficient for them as punishment-Thus, the sentence is modified.(Para 1 to 24)

B. 'Proper Sentence' was explained in Deo Narain Mandal Case by observing that Sentence should not be either excessively harsh or ridiculously low. while determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case, gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. (Para 16)

The appeals are partly allowed. (E-6)

List of Cases cited:

1. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300
2. Mohd. Giasuddin Vs St. of AP (1977) AIR SC 1926
3. Deo Narain Mandal Vs St. of UP (2004) 7 SCC 257
4. Ravada Sasikala Vs St. of A.P. (2017) SC 1166
5. Jameel Vs St. of U.P. (2010) 12 SCC 532
6. Guru Basavraj Vs St. of Karn. (2012) 8 SCC 734
7. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323
8. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

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

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Arun Kumar Singh Deshwal, J.)

1. Heard Sri Prashant Kumar, learned counsel for the appellant in Criminal Appeal No. 2942 of 2012 and Sri Surendra Kumar Tiwari, learned counsel for the appellants in Criminal Appeal No. 7154 of 2011 and Sri Patanjali Mishra, learned A.G.A. for the State.

2. Present criminal appeals challenges judgment and order dated 19.11.2011 passed by the Additional District and Sessions Judge, Court No.8, Basti in Sessions Trial No. 24 of 2010 (State vs. Akram Ali and another) whereby the learned Additional Sessions Judge has convicted the accused-appellants for commission of offence under Section 304B of Indian Penal Code, 1860 (for short 'IPC') and sentenced them to undergo imprisonment for life. For commission of offence under Section 498A I.P.C they are sentenced to undergo rigorous imprisonment of two years six months with fine of Rs. 5000/- each and in case of default in payment of fine further to undergo nine months additional imprisonment. For commission of offence under Section 3/4 D.P. Act the court has sentenced accused to undergo rigorous imprisonment of six months each with fine of Rs.1000/- each and in case of default in payment of fine, further to undergo six months' additional imprisonment.

3. Brief facts as culled out from the record are that the accused-appellant Iliyas was married to the deceased two years prior to the incident, deceased was tortured and harassed by the in-laws for non fulfillment

of demand of dowry one splendor motorcycle or Rs. 50,000/- cash. On 28.02.2009 at about 1:00 p.m father of deceased got information that accused-appellants Illiyas-husband of the deceased, Akram Ali-father-in-law of the deceased, mother-in-law of the deceased, Jabbar Ali, Mohd. Tayyab had done to death his daughter and set her ablaze.

4. On the basis of F.I.R., the investigation started and charge-sheet was laid. The learned Magistrate summoned the accused-appellants and committed the case to the Sessions Court as the offences alleged to have been committed were triable by the Sessions Court. The learned Sessions Judge framed charges alternate under Section 302 of I.P.C.

5. On being summoned, the accused pleaded not guilty and wanted to be tried.

6. The Trial started and the prosecution examined 12 witnesses who are as follows:

1	Deposition of Sayee Mohd.	PW1
2	" " Habibur-Rahman	PW2
3	" " Sahira Khatoon	PW3
4	" " Saiyed Ali	PW4
5	" " Mustaq Ali	PW5
6	" " Tahira Khatoon	PW6
7	" " Dr. Dileep Kumar Gupta	PW7
8	" " Dr. Ram Kewal	PW8
9	" " Hauman Singh	PW9
10	" " Naresh Chandra	PW10
11	" " Hawaldar Yadav	PW11

7. In support of ocular version following documents were filed and proved:

1	F.I.R	Ex.Ka.20
2	Written Report	Ex.Ka.1
3	Postmortem Report	Ex.Ka.3
4	Panchayatnama	Ex.Ka.2
5	Recovery memo of burnt cloth	Ex.Ka 4
6	Recovery memo of cloth	Ex.Ka.5
7	Recovery memo of earth	Ex.Ka.6
8	Site Plan with Index	Ex.Ka.11
9	Site Plan with Index	Ex.Ka.12
10	Site Plan with Index	Ex.Ka.13
11	Charge-Sheet (Mool)	Ex.Ka.17
12	Charge-Sheet (Mool)	Ex.Ka.18
13	Charge-Sheet (Mool)	Ex.Ka.19

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

9. It is submitted by Sri. S.K. Tiwari, learned counsel for the appellant that the accused have not been proved to have demanded any dowry and death was not due to demand of dowry but as the deceased herself was not happy with the life in the village and wanted to stay with her husband in Bombay, she set herself ablaze. It is further submitted that father-in-law and mother-in-law were staying separately from the husband and wife. The Marriage took place and they were living

happily but due to poverty the accused-Iliyas who was working in Bombay could not take his wife there and there was altercation according to D.W.-1 who never went before the police till he was deposed before the court as done in hindi movies, he sprang into action only on 13.09.2011 when he was posed as defence witness, he never came before the police authorities to narrate his version, that act is not done by the accused, may that as it may be. Further it is submitted that conviction is based on presumption and is bad as the appellant has no intention to do away with the deceased. Learned counsel for the appellant has relied on the following authoritative judgments of the Apex Court:-

(i) Criminal Appeal No. 2038 of 2022 arising out of SLP (Crl.) No. 6537/2019 decided on 23.11.2022;

(ii) Criminal Appeal No. 530 of 2020 arising out of SLP (Crl.) No. 3842 of 2020 decided on 20.08.2020;

(iii) Criminal Appeal No. 1285 of 2018 arising out of SLP (Crl.) No. 8948/2018 decided on 12.10.2018.

to contend that this is case of clear acquittal/in the alternative if at all offence is made out it is under Section 304 (1) of I.P.C.

10. Learned A.G.A. has submitted that the evidences of P.W-7 and P.W-8 clinches the issue, the death was due to setting ablaze or rather due to the burn injuries which are 100%. It is not the case of the accused that they were not present at the place of the offence and has conveyed to the Court that the trial court has not committed any error in convicting the accused. It is further submitted that in none of the defences it is shown that the accused were not present at the place of offence or

they tried to save the deceased. Sri Patanjali Mishra, learned A.G.A further submitted that postmortem report goes to show that it was not a suicidal death but was first beaten and thereafter she was set ablaze. There was blood coming out of the nose. Postmortem report goes to reveal that there were:-

(i) superficial to deep burn all over the body except both sole (about 100%);

(ii) line of redness present at places;

(iii) blood coming out of both nostrils;

(iv) singeing of hair is there;

(v) The entire mass of the upper part of the right thigh is exposed, the femur bone is visible.

11. On hearing the arguments advanced by the learned counsel for the parties, two moot questions are to be addressed by us namely whether the death was homicidal death and whether the offence would be punishable under Section 302 or 304 Part I or Part II or Section 304 B of Indian Penal Code. Before sifting the evidence, it is relevant here to discuss the law pertaining to culpable homicide amounting to murder, culpable homicide not amounting to murder and the dowry death. Section 299 of the Indian Penal Code, which reads as under:

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

12. The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the Courts. The confusion is caused, if Courts

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

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately

	dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

13. It is submitted by the learned Advocates for the accused-appellants that the case of the accused-appellant-Ilyas who was very young at the time of incident and has two aged parents would fall within the purview of Section 304(1) I.P.C and the punishment of life imprisonment is not commensurate with the offence and therefore this Court to consider the facts as there was no premeditation, the deceased died due to her wish of staying in a metropolitan city like Bombay which has resulted in her committing suicide. From the upshot of the facts, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that their act would cause bodily harm to the deceased but did not want to do away with the deceased. It is submitted by learned counsel that the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

14. This takes us to the alternative submission of learned counsel for the

appellants that the quantum of sentence is too harsh and requires to be modified even if offence is believed to be committed as per Section 304B of I.P.C. and this Court concurs with the finding of Additional Sessions Judge.

15. In this regard, we have to analyse the theory of punishment prevailing in India.

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

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to antisocial behaviour has to be countered not by undue

cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the [11] rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'interrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

17. 'Proper Sentence' was explained in **Deo Narain Mandal Vs. State of UP**

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

18. In **Ravada Sasikala vs. State of A.P.** AIR 2017 SC 1166, the Supreme Court referred the judgments in **Jameel vs State of UP [(2010) 12 SCC 532]**, **Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734]**, **Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323]**, **State of Punjab vs Bawa Singh, [(2015) 3 SCC 441]**, and **Raj Bala vs State of Haryana, [(2016) 1 SCC 463]** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further held that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the

society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

19. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformatory and corrective and not retributive, this Court considers that these accused person are not incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream looking to old age of two accused (father-in-law and mother-in-law).

20. As discussed above, 'reformatory theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity

of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

21. Having given our anxious thought and going through medical evidence we are very clear that the deceased died due to what is known as homicidal death not suicide and punishable as per Section 304 B of I.P.C., it was the duty of the accused to show on preponderance of evidence that the act was not committed by them within the seven years of the marriage.

22. The facts goes to show that the culpable homicide was suicidal death, we concur with the learned Judge and invoke Section 106 of the Evidence Act for coming to the conclusion that the death was within 7 years of marriage.

23. The accused Illiyas has been incarcerated for 15 years of incarceration is enough punishment for a young person who was serving in Bombay, the parents were living separately from the children, however, the overt act has been proved by leading evidence and therefore also this Court concurs with the learned Judge, however, we will go by the theories of punishment. We are convinced that death occurred within the meaning of Section 304B of I.P.C. This takes us to the sentencing theories prevailing in India. The husband has been incarcerated for 15 years that period would be enough punishment, looking to the age of Akram Ali and the other accused would now be of 80 years and 70 years respectively, hence looking to their advanced age period undergone would be sufficient for them as punishment.

24. Both these appeals are partly allowed. The judgment and order by the

learned Sessions Judge shall stand modified to the aforesaid extent. Record and proceedings be sent back to the Court below forthwith.

(2023) 5 ILRA 979
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.05.2023

BEFORE

**THE HON'BLE SURYA PRAKASH
KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.**

Criminal Appeal No. 4774 of 2016

Veerpal & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

Sri Rajiv Lochan Shukla, Sri Ankur Singh Kushwaha, Sri Bhishm Pal Singh, Sri J.B. Singh, Sri Jai Prakash Singh, Sri Rudra Pratap Mishra, Sri Ajay Kumar, Sri V.P. Srivastava(Sr. Advocate)

Counsel for the Respondent:

G.A., Sri Pradeep Kumar Bhardwaj

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860- Sections 147 & 302/149-Challenge to-Conviction- the testimony of P.W.-1 has to be viewed in light of the testimony of eyewitness, P.W.-3 as well as all the other eyewitnesses, including the brother of the P.W.-1 (i.e., the P.W.-5) who all negated the case of the prosecution regarding the guilt of the accused-Though leading questions were put to the hostile witnesses regarding their testimony against the prosecution to the effect that due to threat or a compromise they were giving such a testimony, the witnesses denied the same-P.W.-5, the witness who turned hostile, was the real brother of the deceased and no such circumstance or motive has been demonstrated as proved

by the prosecution that would lead to a finding that his testimony is unbelievable-The testimony made by the P.W.-3 and P.W.-8 as hostile witnesses that the deceased was found impaled on the knife like grille behind the shape of the deceased has not been explored by the trial court. The doctor conducting the post-mortem examination (PW-4) that the injuries of the deceased were not stab wounds to create a doubt as to the cause of the injuries- neither the P.W.-1 nor the P.W.-3 nor the P.W.-8 were present at the site when the accused allegedly reached the site of the incident on their vehicles.- It were only the independent witnesses who could have testified the factum of the accused reaching the site and advancing towards the deceased-The location of the P.W.-1 at the time of the incident is itself under cloud in view of the testimonies of P.W.-3 and P.W.-8. The P.W.-8 has testified the reason for the police directing their investigation against the accused that the police were angered by the behaviour of the accused towards them during an incident some days prior to the death of the deceased- the police had stated that since foreigners were involved, the case would be difficult to be proved-There is an important element with regard to lack of adequate lighting at the site and so it is doubtful that the P.W.-1 could have actually seen the faces of the accused from a distance of 67 steps on a winter night-Given the entire facts the circumstances, the accused persons are entitled to benefit of doubt-The case of the prosecution has not been proved beyond reasonable doubt.

The criminal appeal is allowed. (E-6)

List of Cases cited:

1. Subramanya Vs St. of Karn.
2. Ramanand @ Nandlal Bharti Vs St. of U.P.
3. Pulukuri Kottaya & ors.. Vs The King Emperor
4. Harjinder Singh @ Bhola Vs St. of Punj.

5. Ganapathi & anr.. Vs St. of T.N.
6. Amrik Singh Vs St. of Punj. (2022) 9 SCC 402
7. Pramila Vs St. of U.P.(2021) 12 SCC 550
8. Krishan Kumar Malik Vs St. of Har. (2011) 7 SCC 130

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Jayant Banerji, J.)

1. This criminal appeal arises against the judgment of conviction and sentence dated 31.08.2016 passed by the First Additional Sessions Judge, Gautam Budh Nagar in Sessions Trial No. 248 of 2013 (State of U.P. Vs. Veerpal and three others) arising out of Case Crime No.1007 of 2012 under Sections 147, 302/149 IPC, P.S. Kasna, District Gautam Budh Nagar, whereby, all the appellants have been convicted for offences under Sections 147, 302/149 IPC and sentenced to go one year rigorous imprisonment under Section 147 IPC and to undergo life imprisonment and fine of Rs. 10,000/- each under Section 302/149 IPC and in default of payment of fine one year of additional imprisonment has been awarded. All the above mentioned sentences have been directed to run concurrently.

2. An FIR (**Exhibit Ka-2**) was lodged on 16.11.2012 on the basis of information (**Exhibit Ka-1**) received on that day at 22:30 hours bearing FIR No.786 under Sections 147/302, 34 I.P.C., Police Station-Kasna, District Gautam Budh Nagar. The informant, Vedpal s/o Shobha Ram r/o Village-Chuhadpur, Police Station-Kasna, District Gautam Budh Nagar, stated that on the previous day, that is 15.11.2012, there was an altercation between Ved Prakash @ Kalu with Pammi @ Ram Autar s/o Veerpal and they had a fight, and with that

ill feeling, on 16.11.2012 at 8:30 p.m. in the night, Veerpal and his brother Kalu @ Balraj and his sons namely Pammi @ Ram Autar and Bhura and two other people came in their Swift car and one Pulsar motorcycle to the shop of his brother Ved Prakash @ Kalu when his brother was sitting in his shop. Immediately on coming, Veerpal hurled abuses and said kill Ved Prakash and he should not escape. To save his life, his brother ran towards the highway and Veer Pal and his brother Kalu @ Balraj, Pammi @ Ram Autar and Bhura, chased him to the open space near his shop and caught him and, they assaulted him with knives and belt, due to which his brother fell on the spot. On hearing shouts, the complainant and his brother Chetram, Devendra, Mahendra, Sahamal ran to save him, but seeing them approach, those people fled away on their Swift car and motorcycle. It was stated that his brother's corpse was lying at the site.

3. An inquest report (**Exhibit Ka-3**) was prepared on 17.11.2012 and a postmortem examination was conducted and a report (**Exhibit Ka-4**) was also prepared on the same day. The complainant P.W.- 1 proved his written complaint (**Exhibit Ka-1**). The FIR (**Exhibit Ka-2**) was proved by the P.W.-2, Balraj Singh, the FIR writer. The inquest report (**Exhibit Ka-4**) was proved by P.W.-6, Anand Pal Singh, the Inspector who conducted the inquest. The postmortem report was proved by P.W.-4, Dr. Sant Ram Verma, who had conducted the postmortem examination. The inquest was concluded on 17.11.2012 at 2:00 a.m. in the presence of five witnesses. The inquest report reflects that on receiving the information regarding the incident and that the corpse of Ved Prakash was lying on the road, the officer who conducted the inquest noted that for want

of light at the site and in order to maintain law and order, as per directions of the Station House Officer, the corpse of the deceased was sent by a police vehicle to Kailash Hospital for the inquest. The opinion of the witnesses to the inquest was that the deceased-Ved Prakash was murdered by causing knives wounds and that a postmortem examination be conducted. The postmortem examination was conducted on 17.11.2012 at 2:00 p.m. by the P.W.-4 and the following injuries were noted :-

- i. Incised wound size 3 X 2 cm cavity deep present on right axilla.
- ii. Incised wound size 3 X 3 cm bone deep present on right upper arm medially and situated 2 cm below right axilla.
- iii. Incised wound size 6 X 4 cm X bone deep present on right upper arm situated 12 cm below right shoulder acromion joint.
- iv. Incised wound size 14 X 4 cm X muscle deep present on right elbow joint medially.
- v. Incised wound size 6 X 4 cm X bone deep present on right elbow joint laterally.
- vi. Incised wound size 3 X 1 cm X cavity deep present on back of left lower abdomen situated 2 cm above the iliac crest.

4. It was noted in the postmortem report that brain was congested and the right lung was lacerated on three sides. There was blood in the right lung and the left lung was congested. Right chamber of the heart was filled with blood and the left chamber was empty. There was 100 ml. Liquid in the stomach. The time since death was noted to be about $\frac{3}{4}$ days. The cause of death was mentioned as hemorrhage and shock as a result of the wounds.

5. A recovery memo dated 19.12.2012 (**Exhibit Ka-8**) reflects recovery of two weapons on the pointing of each of the two accused, namely Veerpal and Kalu @ Balraj. Another recovery/arrest memo dated 20.11.2014 (**Exhibit Ka-9**) reflects that Pammi @ Ram Autar s/o Veerpal was arrested on whose pointing out a knife was recovered. Another recovery-cum-arrest memo dated 02.12.2012 (**Exhibit Ka-10**) reflects the arrest of one Om Kumar @ Omi, on whose pointing out a knife was recovered. Yet, another recovery memo dated 23.12.2012 (**Exhibit Ka-15**) reflects that on the pointing out of accused-Sumit @ Bhura, a knife was recovered. On 17.11.2012 from the site of the incident, bloodstained soil was taken and sealed. Normal soil of a nearby area was also taken in a different box and sealed. This recovery memo is **Exhibit Ka-17**. The aforesaid Exhibit Ka-8, Exhibit Ka-9 and Exhibit Ka-10 were proved by P.W.-6, Anang Pal Singh, Inspector, and Exhibit Ka-15 and Exhibit Ka-17 were proved by P.W.-9, Shyama Kant Tripathi, the Investigating Officer. A site plan dated 17.11.2012 (**Exhibit Ka-11**) was prepared by Shyama Kant Tripathi, Inspector-in-Charge, Kotwali, Kasna, District Gautam Budh Nagar who also prepared the site plans of the recovery of weapons used for murder bearing **Exhibit Ka-12, Exhibit Ka-13, and Exhibit Ka-14**, which were proved by him. On record is a report of the Forensic Science Laboratory, U.P., Agra dated 21.06.2014 (**Exhibit Ka-19**). After conducting the investigation, the Investigating Officer filed a charge-sheet dated 30.12.2012 (**Exhibit Ka-18**), which was proved by the P.W.-9, under Sections 147, 302 and 34 I.P.C, implicating the five accused, namely Veerpal, Kalu @ Balraj, Pammi @ Ram Autar, Bhura @ Sumit and Om Kumar @ Omi.

6. On 06.09.2013, the First Additional Sessions Judge, Gautam Budh Nagar charged four of the accused namely, (1) Veerpal, (2) Kalu @ Balraj, (3) Pammi @ Ram Autar, and (4) Om Kumar @ Omi under the provisions of Section 147 and 302/149 I.P.C. It appears that one of the accused namely, Bhura @ Sumit was tried by a Juvenile Court in separate proceedings.

7. The complainant/ eye-witness, Ved Pal (**P.W.-1**), testified on 20.11.2013 and again, pursuant to a recall application filed by the defense, on 17.01.2014. He supported the case of the prosecution as an eye-witness of the incident. **P.W.-3**, Mahendra, deposed on 09.01.2014 and on that day, he supported the case of the prosecution. However, when he again testified on 15.10.2015, he turned hostile and whereafter, he was cross-examined by the Additional District Government Counsel (Criminal).

8. On 24.02.2015, Chetram (**P.W.-5**), the brother of the deceased, gave his deposition and denied having witnessed the incident. Since he turned hostile, he was cross-examined by the ADGC (Criminal).

9. Another witness, Devendra (**P.W.-7**), deposed on 10.03.2015, turned hostile and was cross-examined by the ADGC (Criminal)

10. Another eye-witness, Shahmal, (**P.W.-8**), who deposed on 14.12.2015, also turned hostile and was cross-examined by the ADGC (Criminal).

11. Statements under Section 313 of the Code of Criminal Procedure, 1973 of all the four accused were recorded on 20.05.2016 wherein they denied their

culpability and said that a false case was set up against them due to factions in the village and for exacting revenge.

12. After hearing the learned counsel for the prosecution and the defence, the assailed judgment dated 31.08.2016 was passed whereby the accused Omi @ Om Kumar was given the benefit of doubt and was acquitted. As far as the accused Veerpal, Kalu @ Balraj and Pammi @ Ram Autar are concerned, the charges against them were found to be proved beyond any doubt and they were sentenced to imprisonment and fine.

13. Shri V.P. Srivastava, learned Senior Advocate assisted by Shri J.P. Singh, learned counsel for the appellants, submitted that the prosecution has placed reliance on the testimonies of P.W.-1 and P.W.-3. It is submitted that all the accused were allegedly armed with knives who had given knife blows to the deceased. It is submitted that the P.W.-1 and P.W.-3 were not present at the time of incident and in any view of the matter, they were chance and partisan witnesses being relatives of the deceased and, therefore, their testimonies have to be seen very cautiously by the court. It is urged that as per the FIR, the deceased took his last breath at the site of the incident which is corroborated by the FIR, but the inquest was admittedly done at Kailash Hospital, Gautam Budh Nagar and the inquest memo was proved by the P.W.-6. It is submitted that in the inquest report, there is overwriting on the date of inquest and it is reflected therein that there was insufficient light on the spot and also to maintain law and order, under orders of the SHO, the P.W.-6 carried the dead body in a police vehicle to Kailash Hospital where the inquest was conducted. It is contended that there is no valid reason for conducting

the inquest at a place other than the site of the incident. It is urged that as per the prosecution case itself, there was ample light at the site and as per Regulation 132 of Chapter-XII of the U.P. Police Regulations read with Section 174 Cr.P.C., the police was required to conduct the inquest at the site. The learned counsel has stated that the P.W.-6 has failed to specify the time of commencement of the inquest. It is stated that the only plausible reason for transfer of the deceased to Kailash Hospital was that the deceased was alive when the P.W.-6 visited the site and he rushed to him to the Hospital accordingly.

14. It is further urged by the learned counsel for the appellants that as revealed in the FIR, the deceased was also assaulted with a belt, but there is no allegation that belt was tied on the neck of the deceased. It is submitted that in the entire postmortem report, there is no injury that can be said to be caused by a belt. It is stated that Pammi @ Ram Autar was arrested on 20.11.2012 and a knife was recovered on his pointing out that was hidden underground. Om Kumar @ Omi was arrested on 02.12.2012 and a knife was recovered on his pointing out from a bush near the underpass. Bhura @ Sumit (who was a juvenile) was arrested on 20.03.2012 and on his pointing out, the knife was recovered from Zero Point from a bush. All these recovered knives were blood stained and blood on them was found disintegrated as reflected in the report of the Forensic Science Laboratory. The two other accused Veerpal and Kalu were arrested on 19.12.2012 and one knife each was recovered from near a shop and from a bush on which no bloodstains were found. These recoveries, it is submitted, have been made purportedly under Section 27 of the Indian Evidence Act, 1872.

15. The learned counsel for the appellants has referred to the site plan

(Exhibit Ka-11) and submitted that the Investigating Officer has not shown where the P.W.-1 and P.W.-3 and other witnesses were present at or during the incident. He states that even the FIR is silent as to where the witnesses were present. The postmortem report reflects six injuries of which, five wounds were found on the right side and one wound is on the left side of the deceased. While referring to the report of Serologist (Exhibit Ka-19), the learned counsel for the appellant has stated that the bloodstains that were found on the exhibit reflect that other than the item nos.1, 2, 3 and 4 (which are pant, shirt, underwear and handband [kalava]), none of the bloodstains found on the other item have been identified as human blood. It is contended that the consequence of this is in favour of the defence.

16. Learned counsel for the appellants has referred to the provisions of Sections 25, 26 and 27 of the Indian Evidence Act, 1872 to contend that the word 'deposed' appearing in Section 27 denotes words "taken down in writing" which are the actual words spoken by accused in the presence of the two independent respectable witnesses who would sign on that deposition. It is stated that it is evident from the recovery memos of each of the alleged weapons of murder, namely knives, that it is not in accordance with the procedure prescribed for taking the deposition of the accused persons. Therefore, in the absence of such a deposition appearing in the recovery memos, no proof of the alleged confession is permissible. In support of his contentions, the learned counsel for the appellants has referred to the judgments of the Supreme Court in the case of **Subramanya vs. State of Karnataka**; **Ramanand @ Nandlal Bharti vs. State of**

U.P.3 and the judgment of the Privy Council in the case of **Pulukuri Kottaya & Ors. vs. The King Emperor**⁴.

17. On the issue of testing the veracity of the evidence of the P.W.-1 and P.W.-3, it is submitted by the learned counsel for the appellants that they are partisan and chance witnesses and their testimonies have to be strictly and carefully considered in view of the judgments of the Supreme Court in the case of **Harjinder Singh @ Bhola vs. State of Punjab**⁵ (Paras 6 and 14) and in the case of **Ganapathi & Anr. vs. State of Tamil Nadu**⁶. It is contended that in view of the facts and circumstances, the accused deserve to be acquitted.

18. On behalf of the State, it has been urged by Shri Rupak Chaubey, learned Additional Government Advocate that for proving the offence, the prosecution has to prove (i) the place of occurrence; (ii) time of incident; and (iii) the participation of the accused. It is submitted that subsequent events that do not directly affect the outcome of the investigation, may not be looked into by the courts.

19. It is submitted by the learned AGA that the General Diary entry and FIR were duly proved by the P.W.-2. With regard to the inquest report, it is submitted that the purpose of inquest is only to assess the apparent cause of death and for no other reason. Certain minor irregularities appearing in the inquest report would have no affect on the merit, where other aspects are proved. It is contended that the witnesses turned hostile for the first time only in the year 2015 whereas the deposition of the witnesses had started in the year 2013. It is urged that the P.W.-1 is not a partisan witness but he is a related witness. P.W.-1 is not a chance witness

inasmuch as the usage of the road and time is regular for the P.W.-1. The village of the P.W.-1 is near the site of the incident and, therefore, it was natural for him to visit. It is contended that no adverse suggestion/leading question was put to the P.W.-1 by the defence. Learned AGA has referred to the testimony of P.W.-7 who was examined as a prosecution eyewitness who turned hostile later, to contend that this witness has testified having seen the dead body of the deceased at the site. It is contended that the postmortem report corroborates the testimony of the P.W.-1. It is submitted by the learned AGA that the FIR was promptly lodged and the accused persons were named. It is submitted that the time of incident took place in the winter season and, therefore, it is quite unlikely that belt injury marks would appear due to clothes worn by the deceased. It is urged that in any view of the matter, it is a minor contradiction which would have no bearing on the case of the prosecution. It is stated that there is no material discrepancy in the testimony of the P.W.-1. It is further stated that suggestion put to the witness regarding his presence would have no bearing as it does not affect the merit of the case.

20. It is further urged by the learned AGA that P.W.-3 is also a natural witness as he regularly passed that way. Two of the witnesses went to lodge the FIR. It is submitted that the benefit of Section 27 of the Indian Evidence Act may not be available to the prosecution but other facts that are material to ensure conviction of the accused have been duly proved. While referring to the provisions of Section 134 of the Evidence Act, the learned AGA has submitted that even one witness is sufficient to prove the case of the prosecution and the P.W.-1 has proved the case of the prosecution.

21. The point that arises for consideration is that whether the prosecution has been able to prove the guilt of the accused beyond reasonable doubt.

22. The prosecution case is primarily based on eye witnesses account. The FIR dated 16.11.2012 was lodged by the PW-1 as eye witness.

23. In his testimony (examination-in-chief) on 20.11.2013, the PW1-Vedpal supported the case of the prosecution. He has stated that near about the time of the crime, he had gone to the office of the under-construction building (Durga Green), for his business of supply of building materials. When he suddenly heard shouts, he came out of the building and he saw five people whom he could identify as Veerpal, Kalu, Pammi, Bhura and Om Prakash, who had caught hold of his brother, Ved Prakash, and were stabbing him with knives. During his testimony, the PW1 identified Veerpal, Kalu and Pammi who were present in Court and said that they were present at the time of incident. He further stated that two persons were not present in Court, one of whom Omi @ Omkar had his presence exempted and another Bhura @ Sumit was declared a juvenile. He stated that all five of them were stabbing his brother with knives and had held his neck with belt. He saw all of them in the light of electricity as at the site the work of building construction were going on and lights were on. He has stated that on hearing the shouts, his two brothers Chet Ram and Mahendra (Mahendra stated to be not his real brother but a family relation) came to the site and saw the incident as they were returning after selling bricks in Greater Noida. When the PW1 shouted in order to save his brother, the accused persons threatened him. Thereafter

they ran away from the site in their Swift car and one Pulsar motor bike and thereafter his brother died at the spot after much agony. Thereafter PW1 came to the police station and lodged the report. He identified his report Exhibit Ka-1. The PW1 further stated that the police came along with him and took the corpse to Kailash Hospital in order to maintain law and order. The inquest report was prepared at the hospital in the presence of five witnesses. After seeing the record of the inquest, the PW1 said that it is the same inquest report which was prepared in the presence of five witnesses and the PW1 identified his signature thereon. Thereafter the police sealed the corpse and took it for post-mortem. The PW1 further stated that he had shown the site of incident to the police officer who had questioned him and he had told them the truth.

24. In his cross-examination, the PW-1 stated that he was sitting at a distance of 60 to 70 steps away from the site of incident in the office regarding supply of building material. In that office the door is situated outside and contains glass and the door was open at the time of incident. On the query made to him regarding non-mentioning of existence of light in the FIR, the PW1 stated that at the time of lodging of the FIR he was consumed with grief. He denied the suggestion that on the basis of legal advice he stated in his testimony regarding presence of electric light. With regard to non-mentioning in the FIR about the belt being used on the neck of the deceased, the PW-1 stated that at that point of time he was consumed with grief. He has stated that each of the five accused had knives. He stated that Pammi had stabbed his brother twice and others had stabbed his brother once each. He stated that other than his four brothers there were some other

people also. The PW-1 denied the suggestion that he was not present at the site of the incident and that therefore he could not save his brother. He stated that at the time of making of the site plan by the Investigating Officer, he had pointed out the electricity lights that were lit at the time of the incident. The PW-1 has stated that there were three shops at a little distance from his brother's shop and people from Bihar and Bengal who were mostly labourers used to come and purchase items from his brother's shop.

He stated that he did not take his brother to the hospital because he had already died. He further stated that he had no hope and, therefore, he had not taken him to the hospital. He also stated that neither he nor any of his other brothers touched or held the deceased. However, later he stated that he had touched his brother to see whether he was breathing but his brother was not breathing.

He denied the suggestion that due to dispute regarding money transactions, people from Bihar and Bengal had murdered his brother. He further denied the suggestion that he had falsely implicated the accused on the basis of village partisan politics and enmity. The PW-1 stated that the belt was held by two persons namely Om Pal and Bhura in one hand each and in the other hand they held knives. He has stated that six injuries were inflicted on his brother. He stated that perhaps one knife injury was on the elbow, one on the upper arm, one of the abdomen and three to four knife wounds on the right side of his chest. He further stated that he could not see who stabbed his brother on the elbow as he was at a little distance. The PW1 has further stated that in his presence one knife was recovered from the site which had fallen as

the accused were running away and one belt was also recovered. He identified Om Pal and Bhura as the accused who fled on the motor bike and the rest of the accused had fled by car.

25. On 17.1.2014, the PW1 was recalled as witness on an application made by the defense. The PW1 stated that he had two other brothers, Ved Prakash and Chet Ram. Chet Ram was a witness in the case. It was stated that the other witnesses of the case namely Devendra and Shahmal were the cousins of the PW1. The PW1 and the aforesaid two other witnesses stay in separate houses in the village and they work in different places. They do agricultural work. The PW1 works in the field of supply of building material. His father does agriculture work and dairy farming. The PW1 denied having any license for his work for supply of building material. The PW1 stated that his shop of building material is outside the village and is situated on his farm. The name of his shop is Jai Durga Material which is not registered. People engaged in construction used to purchase material from his shop. He denied the suggestion that at the time of the incident the PW1 had no work for supply of building material. He has stated that his shop is situated towards the highway at a distance of half to 3/4th kilometer. The PW1 further stated that from the site of the incident his brother's shop was about 20 to 30 steps away in which he used to run a grocery store. The shop was temporary, made from tin sheets. He further stated that the shop of the deceased would be about 40 to 50 steps away from the building of Durga Green and that building was on the same road on which the shop existed. The PW1 further stated that when he heard shouts, he was in the office. The office is along side the road

in which there were one or two people. It was night time and other people had gone away. He stated that the person of the office with whom he had gone to meet was not present in the office but had gone to the work site. He stated that around 8 p.m. he had gone to that office in his vehicle A-Star which was parked outside the office. He had gone to the police station in that vehicle. He stated that when he had gone to the office he had seen his brother Ved Prakash in his shop, no conversation took place between them. One or two customers were standing in his shop. The PW1 admitted that in the FIR he had not mentioned that he had gone to the office of Green Durga to speak to the clerk. He stated that on 15.11.2023 there was an altercation between the accused Pammi and his brother Ved Prakash at the shop of Ved Prakash and the PW1 was not present at the spot when the altercation took place. He stated that Pammi had a business of illicit liquor at that place which was being objected to by his brother Ved Prakash. The PW1 had come to know about the altercation about one or two hours after the altercation. He stated that he did not mention about the altercation that occurred on 15.11.2012 because the matter was settled in the village. The PW1 stated that after hearing the shouts he had come out of the office and other people present in the office also came out. When he came out of the office, his brother was at the same spot where he was found dead. His brother was stabbed when he was standing and even after he fell down he was stabbed. His brother was being stabbed from the side and while standing he was being held from all four sides. After he fell down he was stabbed twice or thrice with knives. When his brother was being stabbed, the PW1 was standing outside the office of the Durga Green about 30 to 40 steps away.

When the accused was stabbing his brother the Swift car and the Pulsar motorbike were parked near the shop. The PW1 stated that he tried to save his brother but the accused persons threatened him with knives. He stated that he had shown the spot to the Investigating Officer where the Pulsar motorbike and the Swift car were parked. The PW1 had showed the Investigating Officer the site after preparation of the inquest report and the Investigating Officer had gone to see the site after the postmortem report. He stated that his mobile phone was discharged and therefore he did not attempt to dial no. 100 for informing the police. He stated that his servant was there at the site and he was sent home to inform about the incident and he alongwith his other brothers went to the police station to lodge a report. He stated that they had reached the police station around 9:30 to 10:00 at night and the report was written at the police station. He spent nearly one hour in the Police Station in writing the report. After lodging the report, the PW1 went in the police vehicle to the spot of the incident and thereafter were present along with the Investigating Officer for one to one and half hours. Thereafter, along with the Investigating Officer they took the corpse of the deceased to the hospital where they reached about 12:30 at night. The PW1 stated that the Investigation Officer had collected the soil etc. in the night itself after preparing the inquest report which inquest report bears the signatures of the PW1. The PW1 denied the suggestion that his brother (deceased) used to sell liquor. He further denied the suggestion that his brother was killed by unknown persons and he has filed a false report against the accused. He further denied the suggestion that he was not present at the spot.

26. The testimony of the PW2, Balraj Singh who was posted as a clerk on

16.11.2012 at the police station was recorded on 9.1.2014. He proved the FIR Exhibit Ka-2. He proved the entries made in the general diary. He denied the suggestion that the report was ante-time.

27. The testimony of Mahendra, PW3, an eye witness, was first recorded on 9.1.2014. He stated that his occupation is dairy milk business. He stated that on 6.11.2012 at 8:30 PM when he was returning with Chet Ram then when they went towards their village from Chuhadpur underpass at that time the accused were stabbing the deceased with knives. He identified Veerpal, Kalu, Pammi, Bhura and Om Pal @ Om Kumar as the accused. He stated that he knew them as they belong to his village and in the village Kalu is known as Balraj and the Pammi is also known as Ram Avatar. He stated that all the accused were stabbing the deceased with knives and the time of the incident was 8:30 PM. The PW3 stated that he saw the incident as there were electricity lights on the highway. He stated that in view of the shouting Ved Pal, Devendra and Shahmal had come to the spot and he saw the accused stabbing Ved Prakash with knives and thereafter they went to lodge the report. He stated that they shouted at the accused then the accused threatened them that whatever had happened to the deceased would happen to them and threatened them with knives and thereafter, all the accused fled away in motor bike and car. The PW3 stated that he along with Ved Pal, Shah Mal and Chet Ram gone to the police station where they had lodged the report.

28. In his cross-examination, the PW3 stated that his occupation is selling dairy milk. He collects the milk from his village and sells them in Noida and Greater Noida. He named the places where he distributes

milk. He stated that he leaves his house at 5:30 in the evening to distribute the milk. His village is one kilometer away from the underpass and from this underpass the site of the incident would be about 20 to 30 steps away. He stated that after distributing the milk he returned via the underpass and not over it. He stated that he had seen the incident after crossing the underpass. He stated that his statement was recorded by the Investigating Officer on 15.12.2012. He stated that the deceased Ved Prakash as well as Ved Pal were like brothers to him. At the time of writing the report he came to know that he would be called as witness. He stated that he had gone on his motor bike to the police station and Ved Pal has gone to the police station on his car along with Devendra, Shah Mal and Chet Ram. He stated that the site of the incident was four to five Kilometers away from the police station and the report had been written sitting outside the police station. To write the complaint, paper from the car was taken. He further stated that the complaint was written in the park within the boundary of the police station. He stated that he had first seen the accused from a distance of 10 to 15 steps and at that time he had crossed the underpass. The accused had surrounded the deceased. The PW3 stated that after the accused had left, he did not go to see the deceased that whether he had died or alive, it was Ved Pal who had gone to see the deceased who had shaken the body of the deceased. He denied the suggestion that the deceased was taken to the hospital in an injured state. He stated that it was he who had first seen the accused stabbing the deceased and Ved Pal and others had come later. He stated that Ved Pal and others had come from the side of the village. He stated that the Ved Pal and others were standing on the side of the village around 20 to 25 steps away. He stated that when he and Ved

Pal and others tried to save the deceased, the accused threatened them with knives. He stated that the electric lights were on the highway. The weather was cold but there was no fog. He denied the suggestion that the incident had not taken place in front of him and he also denied that he was giving a false statement.

29. When the cross-examination of the PW3 was again held on 15.10.2015, that is, after more than one year and nine months from the date of his first initial testimony, he turned hostile. He stated that dispute between the deceased and the accused was not so big due to which someone could murder somebody else. He stated that near the grocery shop of the Ved Prakash, Bengalis, Biharis and Nigerians used to stay. These people used to purchase items from the shop of the deceased. He stated that the deceased used to sell country liquor from his shop which used to be purchased by the aforesaid people. This shop used to remain open till 11 PM at night. People used to drink liquor at the shop itself. He stated that near the shop there is a small boundary wall having iron grille which look like knives. There used to be fights at the shop on drinking liquor. People used to drink liquor in the open space which was objected by the deceased and then they used to fight with him. The PW3 along with Chet Ram and Shahmal used to come after selling milk and stop for sometime at the shop and the deceased had informed them that there used to be fights between him and Bengalis and Biharis over drinking and information was given to the police on several occasions. The police used to catch them and take them to the police station. He stated that near the shop of the deceased, mostly Nigerians used to stay in apartments. He stated on the basis of hearsay that the Nigerian people had earlier

taken away an auto driver and stabbed him to death. He further stated that there was a Government liquor shop in his village but these people did not purchase liquor from there as it was expensive and therefore they used to purchase liquor from the shop of Ved Prakash. He stated that there was once a fight and many people including the PW3 were called to the place by Ved Prakash, the deceased, and they had beaten the people who were creating nuisance. This incident had taken place about 8 to 10 days prior to 16.11.2012. The PW3 stated that the deceased had told him that the people with whom they had fought, used to move around his shop. He stated that when he reached the site of the incident, Ved Prakash was lying dead. He stated that this testimony is correct and the testimony that he has given earlier was under pressure. He stated that his first testimony was dictated to him by Advocate and thereafter he had given testimony. He stated that he had not seen the accused stabbing the deceased. In the cross-examination of PW3 done by the ADGC (Criminal), the PW3 admitted that his testimony was recorded on 9.1.2014 in which he had also been cross-examined by the accused. He denied the suggestion that he was giving his testimony in view of the settlement before the Panchayat only in order to save the accused who were of the same caste. He also denied any pressure or threat or any inducement.

30. The PW4 was Dr. Sant Ram Verma, Senior Physician, District Hospital Gautam Budh Nagar who had performed the postmortem examination of the deceased. He proved the postmortem report and stated that during the postmortem examination six incised wounds were found on the deceased. He stated that the injuries was possibly caused by a sharp weapon which could also be a knife.

In his cross examination, he denied suggestion that as far as wound no.1 is concerned, he had not written lacerated wound. He further stated that he had not mentioned the state of the edges of any of the wounds. On the suggestion being put to him, he admitted that the deceased did not have any injuries caused by stab wounds.

31. The testimony of another eye witness Chet Ram, who was the PW5 was recorded on 24.2.2015 who turned hostile. He stated that on the date of the incident he and Mahendra had returned after distributing milk. He had not seen the accused at the site nor he had heard the shouts or seen anything. He stated that he had not seen accused running away on a Swift car or on motor bike. In his cross-examination by ADGC, the PW5 stated that he returned by 7 to 7:30 PM after supplying milk. He admitted Ved Pal's brother Ved Prakash was murdered. However, he denied having seen the accused beating or stabbing the deceased and that he had heard the shouts. He further admitted that the accused Veerpal is referred by him as uncle, being resident of the same village.

32. The PW6, Anang Pal Singh, was Sub-Inspector of police who proved, inter alia, the inquest report and the recovery memo. He stated that after the written complaint of Ved Pal (complainant) was registered, he visited the spot of the incident along with the SHO, Shyam Kant Tripathi. The SHO had sent the corpse of the deceased to Kailash Hospital and had directed him to prepare the inquest. The proceedings for inquest was started at Kailash Hospital. He stated that the inquest proceedings started at 11:30 at night and concluded at 2 AM on 17.12.2012. He also proved the letter sent to the Chief Medical Officer in Form No. 13, the photographs of

the corpse and sample seal. He stated that on 19.12.2012, the accused Veerpal and Kalu were arrested by the SHO who questioned them. After questioning, the two accused were taken to Chuahadpur underpass on the official vehicle and Veerpal pointed out the knife which was recovered from behind the shop. Another knife was recovered on the pointing out by Kalu from the bushes on the other side of the shop. The accused admitted that they had murdered the deceased Ved Prakash using those knives. Both the knives were taken in possession and sealed. The memo was written by the PW6 on the dictation by the SHO. The police team and the accused were read out the memo and they were asked to sign on that. The accused were also given a copy of the same.

It was further stated that on 20.11.2012, the PW6 along with the SHO had arrested the accused Pammi from Kasna Bus Stand. On questioning he informed that the deceased Ved Prakash used to tease girls and he was warned many times. Pammi stated that on 16.11.2012 after it was dark, he and his cousin Om along with his father Veerpal and others went to a building under construction near Chuahadpur and there we murdered Ved Prakash by stabbing him with knives and escaped on vehicles. He said that he buried his knife near a tube-well room. Witness from the public was sought but was not found. Thereafter, Pammi asked the vehicle to be stopped at the location and walked to the rear side of the room of the tube-well and dug the soil with his hands and took out a knife which was stained with blood. The recovered knife was taken in possession and duly sealed. On the dictation of the SHO, the memo was prepared by the PW6 and thereafter it was read out to the accused Pammi and police

personnel signed it. This recovery memo Ka-9 was proved by him. A copy of the recovery memo was given to the accused Pammi and he signed on it.

The PW6 further stated that on 2.12.2012 he and the SHO got information about a murder accused being near a temple in Kasna and around 10:15 AM, he was surrounded and apprehended. The accused identified himself as Om Kumar @ Omi. The accused admitted that he along with Pammi, Bhura, Veerpal and Kalu murdered Ved Prakash with knives and after murdering him they ran away. On his pointing out a knife was recovered from bushes in the underpass towards Chuhadpur ATS. The knife was caked with soil and blood and on the dictation of the SHO, the PW6 wrote the memo. The PW6 proved the recovery memo and it was exhibited as Ka-10. The accused was given a copy of the recovery memo and he signed on it.

During testimony of PW-6, one sealed package bearing stamp containing the recovered items was opened with the permission of the court, on which a slip of the Legal Forensic Laboratory, Uttar Pradesh was affixed. The PW6 identified the five knives which were recovered on the pointing out of the accused. All the recovered items were proved and exhibited.

In his cross examination, the PW6 stated that the investigation was given to Shri Shyama Kant Tripathi (SHO). The PW6 was called shortly after lodging of the FIR. They left the police station after 10 to 11 minutes alongwith Vedpal, brother of the deceased. He could not remember whether there were other persons alongwith Vedpal. When they reached the site of incident by 11-11:15 P.M., there was a crowd of people at the site, whom he could

not name. The items recovered from the body of the deceased was sealed by him. The places from where the weapons of murder were recovered were thoroughfares. He had asked persons who were passing that place to bear witness but they declined and did not give their names and addresses. He did not recollect whether before recovery of murder weapons they had frisked each other or not. He thereafter said that frisking was done. The weapons were sealed at the spot itself. He denied that the recovery memo and inquest report were not prepared at the spot but were prepared at the Police Station. He denied that the weapons of murder were not recovered from the accused and were from the Police Station, and that he had not prepared the memo at the site. Due to a crowd of people and being dark and for want of adequate light, the SHO got the corpse of the deceased sent from the site to Kailash Hospital Greater Noida where the inquest was prepared. He admitted that due to crowd and less light (darkness) the inquest proceedings could not be done at the site. The witnesses of the inquest reached the hospital directly from the village. Several people from the village had reached Kailash Hospital. He denied that the recovery of murder weapons and the inquest report and other proceedings were not done at the site but at the Police Station, and that they were wrongly done. He denied the suggestion that the recovery memos were not made by SHO but made by him.

33. On 10.3.2015, the testimony of PW7 Devendra s/o Buddhan Singh (eye witness) was also recorded who turned hostile. He identified the accused who were stated to be residents of his village. The complainant Vedpal was stated to be resident of same village. Deceased Ved

Prakash was his cousin. He admitted having reached near Chuhadpur underpass on the date and time of the incident. He denied hearing Kalu's (alias of the deceased) shouts for help. Many people had congregated there. He denied having seen Veerpal, Kalu, Pammi alias Ram Autar, Bhura alias Sumit, or any other persons murder Ved Prakash with knives and belt on the vacant land near the shop.

He denied that there was any altercation in the village between the accused and the deceased. He, however, admitted having seen the dead body of the Ved Prakash covered in blood lying on the open land near Chuhadpur underpass.

In his cross-examination by the ADGC, the PW7 admitted that the deceased Ved Prakash is the son of his uncle (Chacha). He stated that the Veerpal and others (the accused) being members of the village were like brothers to him but they were separate from his family. He denied that while returning from his office he had stopped near Chuhadpur underpass on hearing shouts for help from Ved Prakash, and that the accused were stabbing Ved Prakash and beating him with belt. He denied that they killed Ved Prakash and ran away. He admitted having seen Ved Prakash covered with blood. He denied that on 15.11.2012 there was an altercation in the village between Ved Prakash and the sons of Veerpal. He stated that Mahendra (brother of complainant) is the son of his uncle. He denied having seen and recognized the accused persons in electric light. He admitted that the police personal had questioned him regarding the incident. With respect to the statement made under Section 161 Cr.P.C. before the police, the PW7 stated that he had not told the Investigating Officer that on the date of the

incident he had seen accused assaulting the deceased Ved Prakash with knives and belt. He denied the suggestion of any covert agreement with the family members of the accused Veerpal and others. He further denied that he was afraid of Veerpal and others and therefore, he is not telling the truth. In his cross-examination by counsel for the accused, the PW7 stated that when he reached the site many people were present over there. He stated that he did not know the names of the other persons. He admitted that when he reached the site, it was quite dark.

34. On 14.12.2015, the PW8, Shahmal son of Bachan Singh, whose occupation was stated to be welding material work, testified that he knew Ved Prakash. He was murdered on 16.11.2012. He knew the accused who were residents of Chuhadpur. On 15.11.2012 there was no altercation between the deceased and the accused. On 16.11.2012 at night around 8:30 he had not heard the shouts of Ved Prakash. He denied having seen the accused assaulting the deceased with knives and belt and running away from the vacant land near the shop.

He was cross-examined by ADGC (Criminal). The statement under Section 161 Cr.P.C. was read out to the witness. He said that neither police took his statement nor did he give it. He denied the suggestion that on 16.11.2012 at 8:30 at night when Ved Prakash was murdered, he was present there. It is denied that he reached the site on hearing the cries for help from Ved Prakash. He denied having seen the accused assaulting Ved Prakash with knives and belt. He denied that at the site of the incident there were electricity lights and that in that light he had seen the accused present in court assault the deceased Ved

Prakash with knives and belt and they ran away after committing the crime. He admitted having gone with Vedpal to the police station to lodge a report and the report was lodged in his presence. He admitted that the accused and he are of the same caste and village. He denied that the accused are of the same brotherhood, neighbours and under pressure of the panchayat held in the village, he was defending the accused. He admitted that the accused Veerpal and others were like brothers to him, being of the same village. It was denied that due to fear, pressure and allurement by the accused he was not telling the true facts.

In cross-examination by counsel of the accused, the PW8 stated that he has work of 'building material', his office is near Amrapali building from where he carries on business. His office is around 300 meters away from the incident site. The deceased Ved Prakash had a grocery shop where he sold country made liquor of Haryana. He also used to sell eggs, etc. Some Nigerians, Biharis and Bengalis used to live near the shop of the deceased Ved Prakash, and used to drink liquor at his shop which used to remain open till 11-12 at night. Ved Prakash used to have fights with them over liquor etc. About 4-5 days prior to the incident, there was a fight with Nigerians, Biharis and Bengalis in which 15-20 persons were called from the village of Ved Prakash to beat them up. At the time of that incident, the police had come to the shop. In that fight there was a lot of altercation between the police and Veerpal, Pammi and Balraj, who prevented Ved Prakash (the deceased) from being taken away by the police to the police station. 2-3 days after that incident Ved Prakash had told him that ever since the day of the fight, the Nigerians, Bengalis and Biharis were on the look-out to kill him and used to keep

standing near to his shop till late. He stated that at the time of the incident, he reached the spot first. The deceased Ved Prakash was hanging from the top of the 2-3 feet high knife-like grille that was fixed in the open land near his shop and the knife-like grille was embedded in his side and arms. Then with the help of the people there, he had taken down the deceased from the railing and laid him down. By then Ved Prakash had died and there was no light at the spot. He stated that he had given information of the incident to Chetram, Mahendra, Devendra and Ved Pal. They reached the spot half an hour after the information. Thereafter, they informed the police. He stated that they had asked that the FIR be written against unknown persons but the police forced them to name Veerpal and others in the report because 2-3 days prior to the incident there was a lot of altercation between Veerpal and the police. They had told the police about the fight incident 3-4 days ago with Nigerians and others. However, they were told that these people are foreigners from outside so the case would be spoiled and therefore their names were not written and names of the villagers were written. He said that they were so horrified by the incident that they did not have mental balance. He stated that he had spoken to Ved Pal who had given the first testimony and had asked him how had he given such a testimony. Ved Pal said that under pressure from the police, he had given false testimony and if the court calls him again, he would tell the truth.

35. On 11.2.2016 the testimony of PW9, Shyama Kant Tripathi (Investigating Officer), took place who testified that on 16.11.2012 he was posted as Inspector Incharge P.S. Kasna.

An FIR was registered on that very night at 10:30 p.m. and after recording the

statement of Vedpal, he reached the site of the murder alongwith police force. On 17.11.2012, the S.I. Anang Pal Singh was sent to Kailash Hospital for carrying out inquest of the body of the deceased. The statement of the eye-witnesses Devendra and Shahmal were recorded and thereafter a copy of the inquest report and the incident site were inspected. After copying the memo of recovery of blood-stained soil and plain soil, the accused were searched for and on 20.11.2012, the accused Pammi @ Ram Autar was arrested from near the bus stand Kasna. He was questioned and his statement was recorded in which he voluntarily confessed to the crime and, on whose pointing out, a murder weapon was recovered behind a water tank which was blood stained and which was taken in possession and a plan was prepared at the site. The recovery memo of the murder weapon was prepared at the site which is Exhibit Ka-9. He also proved the site plan of the murder which was in his own hand and signature and on which Exhibit Ka-11 was put. He also proved the site plan of the recovery of the murder weapon on the pointing out of Pammi as Exhibit Ka-12. He stated that the statement of the witness Chetram was recorded on 26.11.2012. On 02.12.2012, on information received from an informant, the accused Omi was arrested around 10:15 a.m. from near Kasna Bridge, who confessed his crime and also pointed out the murder weapon which was recovered from bushes in the green belt adjoining ATS near Chuhadpur underpass. The recovery memo was dictated to S.I. Anang Pal Singh. The murder weapon was sealed and the memo was proved as Exhibit Ka-10. The site plan of the recovery was proved as Exhibit Ka-13. The P.W.-9 further stated that the statement of another eye-witness Mahendra Singh was recorded on 05.12.2012 whereafter the statements of

the witnesses to the inquest report were recorded alongwith the statement of witnesses to the memo. On 07.12.2012, surrender of accused Veerpal, Kalu @ Balraj took place. On 12.12.2012, the accused Bhura @ Sumit was arrested. The statements of the accused Veerpal, Kalu @ Balraj and Bhura @ Sumit were recorded in the District Jail, Ghazipur on 13.12.2012 after obtaining the permission of the court. On 19.12.2012, a murder weapon was recovered on the pointing out of the accused Veerpal from near a tyre puncture shop which was taken possession of and sealed. On the pointing out of the accused Kalu @ Balraj, another murder weapon was recovered. Both weapons of murder were taken possession of and the memo was dictated to the S.I. Anang Pal Singh. The accompanying police personnel signed on the memo as witnesses whereafter the accused were given a copy thereof and made to sign. The P.W.-9 also proved the recovery of knife on the pointing out of the accused Sumit @ Bhura on 23.12.2012 and the memo of recovery was dictated to the S.I. Anang Pal, a copy of which was given to the accused Sumit after obtaining his signature. The site plan of the recovery was also prepared which was proved and marked as Exhibit Ka-16. The statements of the witnesses and the recovery memo were also taken and a charge-sheet was filed against the accused on 30.12.2012. He stated that the recovered murder weapons and blood stained soil and ordinary soil were sent through a constable to the Forensic Laboratory, Agra which, as per the report dated 30.01.2014 made on the back side of the document 30Kha/2, was not received till then.

In his cross-examination, he denied having knowledge of the persons who had gone alongwith Vedpal to the police station to give information on 16.11.2012. The

report was written in police station at 10:30 p.m. He stated that with regard to the incident on 15.11.2012 regarding an altercation, no complaint or information was given. From the police station, he left for the incident site at 11:00 p.m. and reached there at 11:30 p.m. which site was at a distance of 4 to 5 kms. from the police station. He had gone to the site in the government vehicle alongwith 4 to 5 people including the Sub-Inspector Anang Pal and Sub-Inspector Veer Singh. He stated that Vedpal and others had gone alongwith him in their own vehicle. He stated that when he reached the incident site, Ved Prakash had already died. He could not remember what all things were present at the site. He admitted that at the site of the incident, several people were present. He could not name any person present. He stated that at that point of time, there was a light from high-mast of the expressway and when he reached the site none of the shops nearby were open. He could not recollect in which direction the corpse of the deceased was aligned. He could not recollect that at the time of the incident, whether the dead body was lying facing up or down. He stated that at the site he met Shahmal and others. He had sent the dead body from the site to Kailash Hospital. Alongwith the corpse, the other police personnel had also gone. He further stated that when he reached the site of the incident, the shop of Ved Prakash was closed. The inquest was not done at the site but at the Hospital. The memo was prepared at the Hospital and not at the site. He stated that to maintain law and order, the corpse of the deceased was sent to the Hospital. Therefore, the inquest was prepared in the Hospital. He further stated that the eye-witnesses of the incident namely Vedpal, Devendra, Mahendra and others were also present. He denied having

knowledge of names of people residing near the site of the incident. He admitted that many people stayed there. During the period of his posting in the area of Police Station, there were many incidents of murder. He denied having memory of any incident prior to the incident in question involving Nigerians, Bengalis, Biharis and others. When questioned about the motorcycle and the Swift car mentioned in the FIR, the P.W.-9 stated that he would have to look into the Case Diary in respect of their registration numbers. He denied the suggestion that the recovery made by him from the accused was made in a wrong manner and in the police station. He also denied the suggestion that the death of the deceased Ved Prakash occurred in the fight with Nigerians and others and that since they were foreigners, the P.W.-9 had set up a false case. He further denied the suggestion that the deceased Ved Prakash had a fight with Nigerians, Biharis and Bengalis 2-3 days prior to the incident and that he had knowledge of the incident. He also denied the suggestion that he did not take information at the site or from the people nearby. He further denied the suggestion that the wounds on the body of the deceased Ved Prakash occurred from the knifed shaped grille at the site.

36. In the statement made by the accused Veerpal under Section 313 Cr.P.C. on 20.05.2016, he denied having murdered the deceased and alleged that a false FIR was lodged against him and that a false testimony has given against him due to party politics and enmity in the village. The statement under Section 313 Cr.P.C. was also given by Pammi @ Ram Autar on 20.05.2015 on the same lines, and also by Om Kumar @ Omi and Kalu @ Balraj.

37. The P.W.-1, the brother of the deceased, testified on 20.11.2013 and again

on 17.01.2014, when he was recalled on an application filed by the defence. He has stated that all the people and his brothers had gone to the police station to lodge the FIR which took about one hour. The P.W.-1, who is the complainant and eye-witness of the alleged incident, has remained largely consistent in his testimony regarding the place and time of the incident and the participation of the accused. His presence near the site of the incident at the stated time, at first blush, appears to be natural as he states himself to be engaged in the business of supply of building material and he had gone to the office concerned in his car 'A-Star' to talk to the person in the office of the building under construction. However, the P.W.-3, Mahendra, in his testimony, held on 09.01.2014, though has supported the prosecution, but in his cross-examination, he states that it was he who had first seen the accused attacking the deceased and the complainant Vedpal and others had come later and he further states that Vedpal and others had come from the side of the village and that they were standing at a distance of 20-25 steps towards the village of the deceased. Thus, there is glaring inconsistency in the statement made by the P.W.-1 and P.W.-3 regarding who witnessed the incident first and the location of the P.W.-1 at the time of the incident.

On 15.10.2015 the P.W.-3 turned hostile and said that there were serious altercations and fights between the deceased and Bengalis, Biharis and Nigerians.

There is another aspect of the matter. The conduct of the PW 1 does not seem to be natural, but rather, awkward. In that FIR lodged by him, he states that the accused persons came and attacked his brother with

knives and belts because of which his brother fell at the site. However, in his testimony before the court, he states that his brother died at the site in agony and thereafter he had gone to the police station to lodge a report. He further stated that he did not take his brother to the hospital because he was already dead and that he had no hopes left for his survival but neither he nor his brothers touched or held him thereafter. Subsequently, the PW-1 states that he touched his brother to see whether he was breathing but he was not breathing. He further states that there was a servant with him whom he sent home to inform about the incident then he and his brothers and others went to the police station to lodge a report. He states that nearly one hour was spent in the police station in writing the report. Under the circumstances, the unnatural conduct of the P.W.-1 is reflected in the fact that:

(a) In the FIR, he does not mention about the death of his brother despite the fact that quite some time was spent by him at the site of the incident and he gave orders to the servant to go home and inform the others and thereafter he went along with the brothers and others to the police station where he waited for an hour to lodge the report.

(b) Further, the fact that he left no one at the site, that is not even his servant, when evidently there were several people around that place is unnatural.

(c) The fact that he did not think of taking his brother to the hospital with the help of others despite having a car at his disposal is unnatural.

Recently, a three Judge Bench of the Supreme Court in the case of Narendrasinh Keshubhai Zala vs. State of Gujarat⁷ on the issue of unnatural conduct and unexplained circumstances being a ground for

disbelieving the witness, observed as follows:-

'8. It is a settled principle of law that doubt cannot replace proof. Suspicion, howsoever great it may be, is no substitute of proof in criminal jurisprudence [Jagga Singh v. State of Punjab, 1994 Supp (3) SCC 463]. Only such evidence is admissible and acceptable as is permissible in accordance with law. In the case of a sole eye witness, the witness has to be reliable, trustworthy, his testimony worthy of credence and the case proven beyond reasonable doubt. Unnatural conduct and unexplained circumstances can be a ground for disbelieving the witness. This Court in the case of Anil Phukan v. State of Assam, (1993) 3 SCC 282 has held that:

“3. ... So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eyewitness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eyewitness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect...”

In that case, the Supreme Court further observed as follows:-

“11. Further, his credit stands impeached in the cross-examination part of his testimony. The witness is an adult, mature and worldly wise. He is aged 24 years and runs a grocery shop. He is not

illiterate, yet he chose to not take any action, even to save the life of his friend. His explanation that he went home and slept is uninspiring in confidence for the incident took place in his presence and in close proximity of habitation, more specifically at a short distance i.e. just 3-4 minutes of walking distance from the Police Headquarters where constables are posted around the clock. He left his friend profusely bleeding on the spot but did not seek any help and immediately did not report the incident to the family members of the deceased whose house he visited only the following day at around 8:00 – 9:00AM. His conduct of going off to sleep, having seen his friend being murdered right before his eyes and then not visiting the hospital forthwith is quite unnatural. Also he did not inform the incident to his parents. It was only when the police interrogated him that he named the accused. His testimony is not free from embellishments, nor is not corroborated by any other evidence. Also, he admits not to have any information of any monetary transactions between the accused and the deceased.

12. This Court on multiple occasions has held that it is not the quantity but the quality of witnesses and evidence that can either make or break the case of the prosecution. It is the duty of the prosecution to prove that the testimonies of the witnesses that it seeks to rely upon are of sterling quality, i.e. fully trustworthy and absolutely free from any kind of blemish. [Prahlaad v. State of M.P. (supra); Amrik Singh v. State of Punjab, (2022) 9 SCC 402; Pramila v. State of U.P., (2021) 12 SCC 550; Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130]”

38. On 25.02.2015, Chetram, the brother of the P.W.-1, who testified as

P.W.-5 turned hostile. However, he admits that Ved Prakash was murdered. No other details regarding any altercations with Nigerians, etc. have been disclosed by him.

39. In his testimony on 10.03.2015, the eye-witness, Devendra (P.W.-7) turned hostile but he admits that the deceased Ved Prakash was seen by him lying in the open land near Chuhadpur underpass covered with blood. He denied the suggestion in his cross-examination by the ADGC (Criminal) that he is not stating the correct facts, and that he was persuaded by some incentive offered on behalf of the accused. The P.W.-7 also did not disclose any previous altercation of the deceased with Nigerians and others.

40. As far as P.W.-8, Shahmal, is concerned, in his testimony on 14.12.2015, he turned hostile. In the cross-examination by the ADGC (Criminal), he however admitted that when he reached near the deceased, the deceased had already died and was covered with blood. He denied the suggestion that the accused being of the same village and brotherhood and neighbours, he is defending them due to pressure exerted by the Panchayat held in the village. He further denied the suggestion that he was giving his testimony out of fear, pressure or some incentive.

In his cross-examination on behalf of the defence, he refers to Bengalis, Biharis and Nigerians drinking liquor at the shop of the deceased Ved Prakash and the occasional altercation with the deceased. He stated that 4-5 days earlier, there was a serious fight in which several persons from his village were called, and that police had come and they had prevented the police from taking Ved Prakash (the deceased) to the police station and since then the

Nigerians, Bengalis and Biharis were on the lookout for murdering the deceased. He claims to have reached the site of the incident first and that he had found the deceased hanging from the railing (grille) that was 2-3 feet high on which the knife-like railings had pierced a side of his body. He further states that with the help of others, he had removed the body of the deceased Ved Prakash from the railing and laid him down but till then Ved Prakash had died and thereafter he informed the complainant and Chetram, Mahendra and Devendra who reached the site after half an hour of the incident. He blamed the police for not naming the foreigners in the FIR.

41. It is important to note here that in his cross examination, the PW-4, who was the doctor who conducted the postmortem, denied the suggestion that he had not mentioned lacerated wound as far as the injury no.1 is concerned. He further admitted that the injuries of the deceased were not stab wounds. Therefore, this testimony of PW-4 in conjunction with the testimony of PW-8, who had stated that he had found the deceased hanging from the railing (grille), on which knife shape railing pierced a side of his body, does create a doubt as to the cause of injuries/wounds on the deceased.

42. It is pertinent to note that in the cross examination of the PW-1 on his recall, he stated that when he had gone to the office of Durga Green, he had seen his brother in his shop and one or two customers were standing in his shop. However, in his cross examination, the PW-9 who was the I.O. has stated that when he reached the site of the incident after lodging of the FIR, the shop of the deceased was closed. The time of the

incident is 8.30 pm and the shop of the deceased was stated to remain open till 11 pm. Therefore, it cannot be denied that after the alleged time of the incident, the place around the site was apparently not untouched till the police arrived.

43. It is important to mention here that the Investigating Officer PW-9, Shyama Kant Tripathi testified that when he reached the site of incident after the FIR was lodged, the deceased Ved Prakash had already died. He admits that at the site of incident, there was a crowd of people present and there was some light from the high-mast on the expressway. He stated that keeping in view the law and order situation, the body of the deceased was sent to the Hospital where inquest report was made. As far as the alleged vehicle used by the accused, PW-9 stated that he could inform their registration numbers after seeing the case diary. However, there is no recovery memo of the two vehicles, that is a Swift car and a motor cycle, allegedly used by the accused for reaching and leaving the site of the crime. Further, there is no recovery shown of the belt and knife allegedly used for murder of the deceased near the site of the incident, which as stated by the PW-1, had fallen at the site of the incident as the accused were running away. Thus there is glaring inconsistency in the testimonies in this regard made by the PW-1 and the PW-9. PW-9 denied the suggestion that death of the deceased took place as a result of fight with Bengalis, Nigerians or Beharis and that they being foreigners, he had written a false case. He further denied the suggestion that 2-3 days prior to the incident, the deceased Ved Prakash had fight with the Nigerians, Bengalis or Beharis and that he had knowledge of the incident. He denied the suggestion that he did not make inquiry

from the people nearby the incident. He further denied that the deceased died due to injuries caused as a result of knife shape grille present at the site.

44. With regard to the judgement cited by the learned counsel for the appellants regarding recovery of alleged weapons of murder on the pointing out of the accused are concerned, Section 27 of the Indian Evidence Act has been considered at length by the Supreme Court in the case of **Ramanand @ Nandlal Bharti (supra)**, in which the Supreme Court observed as follows:

“53. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead t the place where he had hidden the weapon of offence along with his blood stained clothes **then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a**

particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.

.....

56. The requirement of law that needs to be fulfilled before accepting the evidence of discovery is that by proving the contents of the panchnama. The investigating officer in his deposition is obliged in law to prove the contents of the panchnama and it is only if the investigating officer has successfully proved the contents of the discovery panchnama in accordance with law, then in that case the prosecution may be justified in relying upon such evidence and the trial court may also accept the evidence. In the present case, what we have noticed from the oral evidence of the investigating officer, PW-7, Yogendra Singh is that he has not proved the contents of the discovery panchnama and all that he has deposed is that as the accused expressed his

willingness to point out the weapon of offence the same was discovered under a panchnama. We have minutely gone through this part of the evidence of the investigating officer and are convinced that by no stretch of imagination it could be said that the investigating officer has proved the contents of the discovery of panchnama (Exh.5). There is a reason why we are laying emphasis on proving the contents of the panchnama at the end of the investigating officer, more particularly when the independent panch witnesses though examined yet have not said a word about such discovery or turned hostile and have not supported the prosecution. **In order to enable the Court to safely rely upon the evidence of the investigating officer, it is necessary that the exact words attributed to an accused, as statement made by him be brought on record and for this purpose the investigating officer is obliged to depose in his evidence the exact statement and not by merely saying that a discovery panchnama of weapon of offence was drawn as the accused was willing to take it out from a particular place.”**

(emphasis supplied)

45. A perusal of the testimony of PW-9 and Anang Pal Singh PW-6 reveal that mandate of the Supreme Court in the aforesaid case of **Ramanand alias Nandlal Bharti** has not been complied with. No independent witnesses were called to the police station by the Investigating Officer prior to setting out of recovery of alleged weapons of murder. Moreover, in the testimony of PW-9, the words spoken by the accused leading to the recovery of weapon of murder have not been stated.

46. There are four recovery memos pertaining to alleged recovery of knives

allegedly used for murder of the deceased. They are Exhibits Ka-8, Ka-9, Ka-10 and Ka-15. The Exhibit Ka-8 is the recovery memo dated 19.12.2012, which narrates that the SHO alongwith a Sub-Inspector, a Head Constable and three other Constables, went on the government vehicle to recover two murder weapons on the pointing out of the accused Veerpal and Kalu @ Balraj. The recovered knives were stated to be taken possession at 6:25 a.m. and 6: 30 a.m. which were sealed separately.

Exhibit Ka-9 is the recovery memo dated 20.11.2012, which reflects that the SHO alongwith a Sub-Inspector and three Constables, departed the police station at 5:45 a.m. for investigation during which they received information that one accused, namely, Pammi was preparing to leave and was standing in Kasna Bus Stand. On pointing out of the police informant, Pammi was arrested at 11:30 a.m.. On being questioned, he allegedly admitted his crime and said that he can recover the knife used for the murder. The memo records that members of the public were asked to witness the recovery but no one was prepared and thereafter on the pointing out of the accused the police went to the spot and the accused removed the soil with his hands at the spot and recovered a knife which was covered with blood and soil and the accused told that this was the knife used to kill Ved Prakash.

Exhibit Ka-10 is the recovery memo dated 02.12.2012 which reflects that the SHO alongwith a Senior Sub-Inspector of Police and a Sub-Inspector and two other Constables with a driver, departed on the police vehicle from the Police Station at 7:25 a.m. and they received information from a police informant that the accused Omi is standing near a temple near a small bridge in Kasna, who was arrested at 10:15

a.m. The accused Omi allegedly admitted his crime and stated that he could point out the place where the murder weapon had been thrown. It is recorded that the police asked the members of the public to witness the recovery but no one was prepared and, therefore, they went with the accused to the placed pointed out. The accused went ahead and allegedly recovered a knife which was taken possession of at 12:10 p.m.

Exhibit Ka-15 is the recovery memo dated 23.12.2012 which reflects that the SHO alongwith a Sub-Inspector and three other Constables, went in the police vehicle alongwith the accused Sumit @ Bhura from the police station at 13:05 hours. The accused got the vehicle stopped near Chuahadpur underpass and went ahead and allegedly recovered a knife from behind the bushes and said that this was the murder weapon. The knife was stated to be taken possession of at 13:30 hours and sealed.

Thus, it is evident that no independent witnesses accompanied the police and the accused for recovery of the alleged murder weapons.

47. It is pertinent to note that Exhibit Ka-11 is the site plan with Index prepared by the P.W.-9, the SHO, on 17.11.2012 which reflects the site of the incident and the alleged location of the eye witnesses as well as the site of murder and the direction in which the accused had fled after committing the crime. Exhibit Ka-12 is the site plan regarding the alleged recovery of the murder weapon on the pointing out of the accused Pammi that corresponds to Exhibit Ka-9, recovery memo.

Exhibit Ka-13 is the site plan of the recovery of the murder weapon on the pointing out of the accused Om Kumar @

Omi that corresponds to recovery memo, Exhibit Ka-10.

The site plan, Exhibit Ka-14, corresponds to the recovery memo, Exhibit Ka-8, which reflects the site of recovery of the alleged murder weapons on the pointing out of the accused Veerpal and Kalu @ Balraj.

Exhibit Ka-16, which is the site plan prepared by the P.W.-9, allegedly showing the site from which the murder weapon on the pointing out of the accused Sumit @ Bhura was recovered and this corresponds to Exhibit Ka-15, which is the recovery memo.

It is pertinent to mention here that Exhibits Ka-13, Ka-14 and Ka-16 reflect the sites of recovery of the alleged murder weapons from near Chuhadpur underpass.

The Chuhadpur underpass has been shown in the site plan, Exhibit Ka-11, as 72 steps south-east of the site of the murder. Thus, the recovery of knives are reflected in site plans Exhibits Ka-13, Ka-14 and Ka-16 from places near the site of murder, whereas the alleged escaped route of the accused being in the diagonally opposite direction renders the aforesaid three recoveries of weapons suspect. The above facts, coupled with the fact that the provisions of Section 27, as interpreted by the Supreme Court in its judgment in **Ramanand** (supra) have not been complied with, the recoveries of the alleged murder weapons are not proved.

48. As already referred to above, other than the testimony of the P.W.-1, all the other witnesses have turned hostile. One of the eye witnesses who has turned hostile is the brother (Chetram) of the P.W.-1 and the deceased. In their statement made under Section 313 Cr.P.C., the accused have stated that they have been

falsely implicated due to village enmity. Therefore, the P.W.-1 could also be an interested witness.

49. At the site of the incident, even the Investigating Officer has admitted, there was a crowd of people. Yet, surprisingly, no independent witness has been examined. The P.W.-6, who is the Sub-Inspector of Police and the Investigating Officer, P.W.-9, have both testified that for conducting the inquest, the corpse of the deceased was taken to a hospital in order to maintain law and order. The PW-6 has stated that there was lack of adequate light at the site of the incident. The mandate of Section 174 Cr.P.C. read with Rule 132 of Chapter XII of the Police Regulation, is that the police is to conduct the inquest at the site. This is not supported by the site plan. However, the fact that there was inadequate light at the site of the incident is proved.

50. The place from where the P.W.-1 is stated to have witnessed the murder is shown in the site plan Ka-11 as 67 steps away to the south-west of the site of the incident. The accused persons are shown in that site plan to have fled north-west from the site of murder on foot to their parked vehicles and then northwards in their vehicles. The Investigating Officer, who went about proving the recovery of the murder weapons and other items and the entire investigation conducted by him with arrests, has failed to conduct any investigation with regard to the alleged vehicles used by the accused for reaching and leaving the site of the crime. In their entire testimony, neither the P.W.-6 nor the P.W.-9 have mentioned about the recovery of the vehicles used by the accused to reach and leave the site of the alleged incident. The P.W.-9 in his cross-examination could

not recall that in which direction was the corpse of the deceased lying. He could not say whether the corpse was lying face up or face down.

51. Though, it may not have any bearing on the present case, it may be mentioned that in respect of one accused, namely Sunny @ Bhura, his trial was conducted separately by the juvenile court where the Case No. 6 of 2013 was registered. The P.W.-1 had also appeared in Case No. 6 of 2013 as P.W.-1 and his testimony was recorded on 10.6.2015 in which he turned hostile. (Paper No.55Kha/26)

52. Be that as it may, the law with regard to the hostile witnesses is that it is for the Court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. It is well within the powers of the court to make an assessment in respect of the testimony of a hostile witness and come to the correct conclusion. The evidence of a hostile witness cannot be discredited as whole and the relevant part thereof which are admissible in law can be used by the prosecution or by the defence.

53. Under the circumstances, the testimony of P.W.-1 has to be viewed in light of the testimony of the other eyewitness, P.W.-3 as well as all the other eyewitnesses, including the brother of the P.W.-1 (that is, the P.W.-5) who all negated the case of the prosecution regarding the guilt of the accused. Though leading questions were put to the hostile witnesses regarding their testimony against the prosecution to the effect that due to threat or a compromise they were giving such a

testimony, the witnesses denied the same. Chetram (P.W.-5), the witness who turned hostile, was the real brother of the deceased and no such circumstance or motive has been demonstrated as proved by the prosecution that would lead to a finding that his testimony is unbelievable. The testimony made by the P.W.-3 and P.W.-8 as hostile witnesses that the deceased was found impaled on the knife like grille behind the shape of the deceased has not been explored by the trial court. The admission made by the doctor conducting the postmortem examination (PW-4) that the injuries of the deceased were not stab wounds do create a doubt as to the cause of the injuries on the deceased that are reflected in the postmortem report. Given, on one hand, the nature of the wounds primarily on one side of the body, while on the other hand, the fact that the P.W.-1 had testified that the deceased was being choked by a belt and held by two of the accused while the others were stabbing the deceased, creates a doubt as to the manner in which the wounds came to be inflicted on the deceased. Evidently, neither the P.W.-1 nor the P.W.-3 nor the P.W.-8 were present at the site when the accused allegedly reached the site of the incident on their vehicles. It were only the independent witnesses who could have testified the factum of the accused reaching the site and advancing towards the deceased. The location of the P.W.-1 at the time of the incident is itself under cloud in view of the testimonies of P.W.-3 and P.W.-8. The P.W.-8 has testified the reason for the police directing their investigation against the accused that the police were angered by the behaviour of the accused towards them during an incident some days prior to the death of the deceased. It was also mentioned that the police had stated that since foreigners were involved, the case

would be difficult to be proved. In this regard, a suggestion was also made to the P.W.-9 who denied the same. There is an important element with regard to lack of adequate lighting at the site and so it is doubtful that the P.W.-1 could have actually seen the faces of the accused from a distance of 67 steps on a winter night. As narrated above, the conduct of the PW-1, after the incident, is itself unnatural. Given the entire facts the circumstances, as narrated above, the accused persons are entitled to benefit of doubt. The case of the prosecution has not been proved beyond reasonable doubt.

54. Under the circumstances, the present criminal appeal is **allowed** and the accused are acquitted giving them the benefit of doubt. The accused shall be released from jail as per law if their incarceration is not required in any other case after compliance of Section 437-A of the Cr.P.C.. Let a copy of this judgment be sent to the trial court forthwith.

(2023) 5 ILRA 1004
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.05.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
 THAKER, J.**
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 6870 of 2007
 with
 Criminal Appeal No. 6869 of 2007

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

Counsel for the Appellant:

Sri R.K. Sharma, Sri Anoop Trivedi, Sri Awadh Sharma, Sri D. N. Wali, Sri Dhiresh Kumar, Sri

Lav Srivastava, Sri Noor Mohammad, Sri Shivakant, Sucheta Pathak, Sri Sudeep Kumar Pathak, Sri V.C. Mishra, Sri Irshad Mohammad

Counsel for the Respondent:

Govt. Advocate, Sri Ashok Kumar Pandey, Sri Murlidhar, Sri Rahul Raghav, Sri S.P.S. Raghav

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Sections 302, 307, 147, 148 & 149 - Challenge to-Conviction-accused/appellants committed offence on a spur of moment and in the heat of passion upon sudden quarrel between them which is evident from the testimony of PW-2 and PW-3-accused persons were already irrigating their field with the help of farming equipment like axe, spades, sickles etc when the deceased asked them to give water because it was his turn all the accused got annoyed and hit their spade on the neck of the deceased-Prosecution has succeeded to prove the guilt of the accused but the trial court is not justified in convicting and sentencing the accused as the incident occurred without premeditation or planning of attack, therefore, it would fall within Exception 4 to Section 300 IPC and the conviction of the accused would fall u/s 304 Part -I IPC and not under Section 302 IPC-The issue relating to quantum of sentence u/s 304 IPC depends on background facts of the case, antecedents of the accused, whether the assault was premeditated and pre-planned or not, etc.(Para 1 to 53)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Mekala Sivaiah Vs St. of A.P. (2022) SCC Online SC 887
2. Pulicherla Nagaraju Vs St. of A.P. (2006) 11 SCC 444: (2007) 1 SCC (Cri) 500]
3. Arjun & anr. Etc. Etc. Vs State of Chhattishgarh 2017 0 Supreme (SC) 152,

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. These two criminal appeals have been preferred by the accused-appellants-Raghunath, Satendra, Pappan, Narendra and Pappi challenging the judgment and order dated 25th September, 2007 passed by the Special Judge (E.C. Act), Meerut in Sessions Trial No. 862 of 2002 (State Vs. Narendra & Others), arising out of Case Crime No. 135 of 2002, under Sections 147, 148, 307, 302 and 506 I.P.C., Police Station-Jani, District-Meerut, whereby the accused-appellants, namely, Narendra and Pappi have been convicted under Sections 302, 147, 148 and 149 I.P.C., whereas accused-appellants, namely, Raghunath, Satendra and Pappan have been convicted under Sections 307, 147, 148, 149 I.P.C. and sentenced (i) the accused-appellants, namely, Narendra and Pappi to undergo life imprisonment under Section 302 read with Section 149 I.P.C. with fine of Rs. 10,000/- and further to undergo one year rigorous imprisonment under Sections 147 and 148 I.P.C.; (ii) accused-appellants namely, Raghunath, Satendra and Pappan to undergo seven years rigorous imprisonment under Sections 307 read with Section 149 I.P.C. with fine of Rs.5,000/- and further to undergo one year rigorous imprisonment under Sections 147 and 148 I.P.C. with an observations that all sentences were to run concurrently and in default of payment of fine, all the accused-appellants are to further undergo one months additional imprisonment.

2. We have heard Mr. Noor Mohammad and Mr. Irshad Mohammad, learned counsel for the accused-appellants and Mr. N.K. Srivastava, learned A.G.A. for the State as also perused the material available on record.

3. Since the basic facts and legal question of issues are same in both these

appeals, they have been clubbed and heard together and are being decided by means of this common judgment treating the Criminal Appeal No. 6870 of 2007 (Narendra & Another VS. State of U.P.) to be the leading case.

4. Records of the present criminal appeals reveal that on the written report (Exhibit-ka/4) dated 18th May, 2002 of the informant-P.W.-4, namely, Krishna Pal Singh, a first information report (Exhibit-ka/9) was registered as Case Crime No. 135 of 2002 under Sections 147, 148, 307, 302 and 506 I.P.C. on 18th May, 2002 at 12:30 p.m. against five accused persons, namely, Narendra @ Kallan, Satendra @ Billu, Pappi, Raghunath and Pappan alleging therein that his brothers Ravindra Kumar and Vinod went to their field on tractor at about 6:00 am. in the morning as it was their turn for irrigation. However, when they arrived at their field, they saw that Narendra @ Kallan, Satendra @ Billu, Pappi, Raghunath and Pappan resident of village Bafar, P.S.Jani, District Meerut, were already watering their field. Ravindra asked the accused-appellants to give water because it was his turn on which all accused persons got annoyed and exhorted to finish him as he often disputed for water for the purpose of irrigating his field. The accused-appellants Narendra @ Kallan and Pappi hit the neck of Ravindra Kumar with spades resulting into his instant death. The accused-appellants Raghunath and Satendra caught hold of another brother of the informant, namely, Vinod and the accused-appellant Pappan inflicted one spade injury on the neck of Vinod. This incident was seen by Sheeshpal and Brijpal, who were working on their fields along with other people, who were coming and going from there. This incident took place on 18/5/2002 at about 11:30 a.m.. The dead

body of brother of the informant, namely, Ravindra was lying on the spot.

5. After lodging of the said first information report, the inquest (panchayatnama) (Exhibit-Ka/2) of the deceased Ravindra was conducted by P.W.-5 Sub-Inspector Sanjeev Singh Rathaur. In the opinion of the Panch (Inquest) witnesses, the death of the deceased was on account of injuries caused to the deceased on his body. Thereafter the dead body of the deceased was sealed and sent to Mortuary for post-mortem.

6. Dr. Ashok Kumar Dua (P.W.-1) conducted the post-mortem of the dead body of the deceased Ravindra on 19th May, 2002 at 02:30 p.m. and his report is on record as Exhibit-Ka-1 as per which the death of deceased was due to shock and hemorrhage as a result of following ante-mortem injuries:

“1. Incised wound 4 cm x 1 cm x muscle deep on front of left side of neck 2 cm above left clavicle.

2. Incised wound 5 cm x 2 cm x bone deep on the back of neck 4th cervical vertebrae cut spinal cord lacerated.”

7. Dr. Raj Kumar (P.W.-6) has conducted the medical examination of injured Vinod Kumar (P.W.-2) on 18th May, 2002 at 06:20 p.m. P.W.-6 has found following injuries on the persons of P.W.-2:

“1. Incised wound 6.0 cm x 0.7 cm x muscle on back of left side chest 6.5 cm behind and below of left ear lobule updown.

2. Abrasion 1.2 cm x 0.2 cm on right side neck, middle part.

3. Reddish contusion 2 cm x 1 cm on back of left side abdomen.

4. Complaint of pain in right side chest.

5. Complaint of pain in right upper arm.”

In medical examination report of P.W.-2, P.W.6 has opined that the injuries are fresh and simple in nature and injury no.1 was caused by sharp edged object, injury no.2 by friction and injury no.3 by blunt and hard object.

8. Investigation proceeded and P.W.-8/Investigating Officer, namely, Sub-Inspector R.N. Singh Yadav has recorded the statements of eye witness Sheeshpal and informant Krishna Pal Singh (P.W.-4). He inspected the place of occurrence along with the informant, he also prepared the site plan which was marked as Exhibit-ka-11 and again recorded the statements of the witnesses at the place of occurrence. He also collected the blood stained earth and plain earth and prepared recovery memo of them, whereafter upon conclusion of statutory investigation under Chapter XII Cr.P.C., charge-sheet came to be submitted against the accused appellants, namely, Raghunath, Satendra, Narendra, Pappi and Pappan under Sections 147, 148, 307, 302 and 506 I.P.C. by the Investigating Officer on 26th May, 2002.

9. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 13th September, 2002, the concerned Court framed charges under Sections 147, 307, 149 I.P.C. against the accused Raghunath and Satendra; under Sections 148, 302, 149 I.P.C. against the accused Narendra and Pappi; under Sections 148, 307, 302/149 I.P.C. against the accused Pappan. On 29th May, 2003,

the concerned Court framed supplementary charges, under Sections 147, 307, 149 I.P.C. against the accused Narendra and Pappi; and under Sections 148, 302/149 I.P.C. against the accused Raghunath and Satendra and under Section 147 I.P.C. against the accused Pappan.

10. The charges were read out and explained in Hindi to the accused-appellant, who denied the accusation and demanded trial.

11. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

“Exhibit-ka/1- Post Mortem report of deceased Ravindra Kumar;

Exhibit-ka/2- Panchayatnam of the body of deceased Ravindra Kumar;

Exhibit-ka/3 - Opinion of inquest witnesses qua deceased Ravindra Kumar;

Exhibit-ka/4 -Written Report given by the informant/P.W.4 Krishna Pal Singh;

Exhibit-ka/4A-Photo Lash;

Exhibit-ka/5- Police Form No. 13;

Exhibit-ka/6- Letter of Sanjiv Singh Rathor, S.I.P, S, Jani, address to R.I.Police Lines, for conducting Post-mortem of deceased;

Exhibit-ka/7-letter to Chief Medical Superintendent of P.L. Sharma Hospital, Meerut;

Exhibit-ka/8- Injury report of Vinod Kumar (P.W.-2);

Exhibit-ka/9- Chik FIR;

Exhibit-ka/10- copy of G.D. of P. S. Jani dt. 18/5/02;

Exhibit-ka/11- Site plan of place of the incident;

Exhibit-ka/12- Recovery memo regarding blood stained earth and plain earth;

Exhibit-ka/13-Recovery memo of spade;

Exhibit-ka/14-Site plan regarding recovery of Spade; and

Exhibit-ka/16-Charge sheet.”

12. The prosecution has also adduced oral testimony of following witnesses:-

“P.W.1- Dr. Ashok Kumar Dua, who conducted the post-mortem of the body of the deceased Ravindra Kumar;

P.W.2 Vinod Kumar, brother of the informant/P.W.4 and deceased Ravindra Kumar, who claimed to be an injured and eyewitness of the incident;

P.W.3- Brijpal, who claims to be independent eye-witness of the incident;

P.W.4-Krishnapal Singh, informant, who happens to be the brother of the deceased Ravindra and injured Vinod Kumar (P.W.-2);

P.W.-5- Sub-Inspector Sanjeev Singh Rathor, who prepared the inquest (panchayatnama) of the deceased Ravindra Kumar;

P.W.6- Dr. Raj Kumar, who medically examined the injured Vinod Kumar (P.W.-2);

P.W.7 Constable-1198 Ranvir Singh, who prepared the chik FIR and proved the same; and

P.W.8 Sub-Inspector R.N. Singh Yadav, who has conducted the investigation and submitted the charge-sheet.”

13. After recording of the prosecution evidence, the incriminating evidence were put to the accused for recording his statement under section 313 Cr.PC. In their statements recorded U/s 313 Cr.P.C. the accused-appellants denied his involvement

in the crime. Accused appellants specifically stated before the trial court that they have been falsely implicated in this case. They further stated that the present criminal case was instituted due to enmity between them. False report has been lodged and false charge sheet has been submitted against them. The alleged injured Vinod Kumar (P.W.-2) being the elder brother of deceased Ravindra, also is giving false evidence against them. Accused Raghunath has stated in his statement that he has purchased the land of Shodan son of Solhu and Vijalpal, who is the brother of Brijpal (P.W.-3). The informant Krishnapal Singh (P.W.-4) wanted to purchase the said land, due to which he harboured enmity. The informant (P.W.-4) has purchased the land of Brijpal (P.W.-3), which is adjacent to the land of accused persons but there is no road (Rasta). The complainant/informant wanted road (Rasta) through the said land but the same is chak road of accused persons which they had refused to give due to which the informant/P.W.-4 harboured enmity. They have developed a false case of watering the field on account of which a quarrel had taken place. It is further stated that the drain is private drain of the accused persons and there is no turn on this drain. The deceased Ravindra was of criminal nature. He was involved in several heinous offences like murder etc. He was fond of gambling and he had several other companions. He often used to enter into scuffle with his family members and he used to assault his wife also. P.W.-2 Vinod and the deceased Ravindra entered into conflict on the relevant date and both attacked on each other and incidently Ravindra had died in that attack. The informant/P.W.-1 Krishna Pal Singh is a teacher by profession. He has lodged false report against accused persons for the purposes of saving his own brother Vinod

Kumar. The defence did not examine any witness from its side.

14. On the basis of above evidence adduced during the course of trial, the court below has found the accused-appellants, namely, Narendra and Pappi guilty under Sections 302, 147, 148 and 149 I.P.C., whereas accused-appellants, namely, Raghunath, Satendra and Pappan have been found guilty under Sections 307, 147, 148, 149 I.P.C. beyond reasonable doubt after recording finding that the prosecution has produced clear, cogent and convincing evidence and proved that the accused Narendra and Pappi have caused the death of Ravindra through spades, hence the offence punishable under Section 302 read with Section 149 I.P.C. is made out against the accused Narendra and Pappi. The court below has further recorded that in the present case, the prosecution has proved that the accused Raghunath, Satendra, Narendra, Pappi and Pappan have formed an unlawful assembly in pursuance of common object which was to commit the offence like murder and attempt to commit murder. The accused persons arrived at the place of occurrence and the accused Narendra and Pappi have inflicted spades on the neck of victim Ravindra and caused his death. The accused Raghunath, Satendra caught hold of Vinod (P.W.-2) and Pappan inflicted one spade injury on his neck. They were the members of unlawful assembly, hence the offence under Section 147 I.P.C. is proved against them. They were armed with deadly weapons and used those weapons for commission of offence, hence they are found guilty under section 148 I.P.C.

15. In the impugned judgment of conviction, the trial court has recorded that the defence has stated in the statement u/s

313 Cr.P.C. that the victim Ravindra and injured Vinod grappled with each other. They caused injuries to each other and in the course of that quarrel Ravindra had died, but this entire statement of defence appears to be false and unbelievable. The defence has produced no witness in support of their defence version.

16. After recording aforesaid finding the trial court has come to the conclusion that the prosecution has well proved the guilt of accused persons Narendra and Pappi for causing the death of Ravindra through spades, hence the offence under section 302 read with Section 149 I.P.C. have been fully proved against accused Narendra and Pappi. The prosecution has produced clear, cogent and convincing evidence to prove that accused persons Raghunath, Satendra and Pappan have inflicted injuries on the neck of injured Vinod (P.W.-2) through spades with intention to cause the death of Vinod, hence the offence under Sections 307/149/147/148 I.P.C. is made out against these accused persons, namely, Raghunath, Satendra and Pappan.

17. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellant has preferred the present jail appeal.

18. The submission of the learned counsel for the accused-appellants is that the accused-appellants are innocent and have been falsely implicated. Next submission is that the prosecution has not produced any independent eye witness. P.W.-2 Vinod Kumar and P.W.4 Krishna Pal Singh are the brothers of the deceased Ravindra. Their evidence cannot be relied upon. In the Panchayatnama of the

deceased Ravindra, there is no mention of any injury of Vinod having been caused by spade. Post Mortem was conducted with delay of one day, which cast doubt in the prosecution story. There is great variance between the ocular testimony and medical evidence, which makes entire prosecution case doubtful. There is contradiction regarding the place of occurrence and the place where the dead body of Ravindra was found. No blood stained soil was collected from the place of occurrence. There is strong contradiction in their statements. The prosecution has suppressed the genesis of case. It is not proved as to how Vinod received injuries. There is no explanation of injuries having been caused to Vinod by blunt weapon. The injuries sustained by Vinod are simple in nature, which are not fatal, hence the case of Section 307 IPC is not made out. There is nothing on record which could show that there is Chak Road near the place of incident. The Investigating Officer has not seized/taken the tractor in his custody, which also renders prosecution case doubtful. Recovery of spade cannot not be taken as relevant because it was not sent for chemical examination. The accused persons are innocent and they are liable to be acquitted of the all the charges levelled against them.

19. The argument is that the accused-appellant has no criminal antecedents to his credit except the present one. Next submission is that looking to the oral as well as documentary evidence brought on record, the sentence awarded to the accused-appellants Narendra and Pappi under Section 302 I.P.C., is highly excessive. The maximum punishment which could be imposed upon the accused-appellants Narendra and Pappi is 10 years under Section 304 Part II I.P.C. The learned

counsel for the accused-appellants lastly submits that since the incident in question occurred on a spur of moment and in the heat of passion upon sudden quarrel, the same would be covered under the 4th Exception to Section 300 I.P.C., which reads as under:

“Exception 4. —Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.”

20. In support of his plea, learned counsel for the accused-appellants placed reliance upon following judgments of Apex Court:

(I) Arjun & Another etc. etc. VS. State of Chhatisgarh reported in 2017 0 Supreme (SC) 152; and

(ii) Jandel Singh Vs. State of Madhya Pradesh dated 16th December, 2022 passed in Criminal Appeal NO. 2314 of 2022 [arising out of SLP (CRL.) No. 6633 of 2022].

On the cumulative strength of the aforesaid, learned counsel appearing for the appellants submits that the sentence is excessive and ought not be sustained and the order of sentence must be modified taking lenient view in the matter.

21. Per contra, Mr. N.K. Sharma, learned A.G.A. for the State, supporting the judgment and order of conviction, submits that the first information report has been lodged promptly naming the accused person; there is clinching evidence to support the prosecution’s case; the incident in which the deceased is alleged to have

been murdered by the accused-appellants Narendra and Pappi occurred at about 11:30 a.m. i.e. in broad day light; there are three eye witnesses of the alleged incident; the place of occurrence has not been disputed by the defence; and the accused-appellants have strong motive or intention and the same has also been explained by the evidence of prosecution. Therefore, the prosecution has proved the charge levelled against the accused-appellants beyond reasonable doubt.

22. To bolster the aforesaid submissions, learned A.G.A. has invited the attention of the Court to the latest judgment of the Apex Court in the case of *Mekala Sivaiah vs. State of Andhara Pradesh reported in 2022 SCC Online SC 887*, whereby the Apex Court in *paragraph nos.25 and 26* has held as follows:

“25. The facts and evidence in present case has been squarely analyzed by both Trial Court as well the High Court and the same can be summarized as follows:

i. The prosecution has discharged its duties in proving the guilt of the appellant for the offence under Section 302 I.P.C. beyond reasonable doubt.

ii. When there is ample ocular evidence corroborated by medical evidence, mere non-recovery of weapon from the appellant would not materially affect the case of the prosecution.

iii. If the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony.

iv. The deceased has been attacked by the appellant in broad daylight and there is direct evidence available to prove the

same and the motive behind the attack is also apparent considering there was previous enmity between the appellant and PW-1.

26. *Having considered the aforesaid facts of the present case in juxtaposition with the judgments referred to above and upon appreciation of evidence of the eyewitnesses and other material adduced by the prosecution, the Trial Court as well as the High Court were right in convicting the appellant for the offence under Section 302 I.P.C. Therefore, we do not find any ground warranting interference with the findings of the Trial Court and the High Court.”* (Emphasis added)

Mr. N.K. Sharma, learned A.G.A. for the State has also placed reliance upon the following judgments of the Apex Court and Patna High Court:

(a) Ram Kumar Madhusudan Pathak vs. State of Gujarat reported in 1998 0 Supreme (SC) 836;

(b) Arulvelu & Anr. Vs. State Rep. By the Public Prosecutor & Anr. Reported in 2009 0 Supreme (SC) 1628; and

(c) Ram Nath Nonia vs. State of Bihar reported in 1999 0 Supreme (Pat) 778.

On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct evidence, the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present jail appeal filed by the accused appellants who committed heinous crime by murdering the deceased is liable to be dismissed.

23. We have considered the submissions made by the learned counsel

for the parties and have carefully examined the original records of the case as well as the impugned judgment and order of conviction challenged before us.

24. It is in the context of above submissions and materials placed on record before the Court that this Court is required to consider as to whether the prosecution has established the guilt of accused-appellants on the basis of above evidence beyond reasonable doubt?. For examining the same, it is important for us to record statements of the prosecution witnesses in brief.

25. P. W. 1/Autopsy Surgeon, Dr. Ashok Kumar Dua, who has conducted the post-mortem of the deceased Ravindra has stated in his examination-in-chief that death of the deceased was caused due to shock and haemorrhage as a result of ante-mortem injuries and it was caused before one day approximately.

26. This witness has also been cross-examined by the defence but no contradiction is found in his entire evidence. He has clearly stated in his cross-examination that two injuries found on the deceased were caused by sharp edged weapon, which could be spade. He has also opined that it could be any cutting weapon was like Gandasa, Pharsa, Kulhari and Sword. He has clearly opined that injury no.1 was fatal and due to this injury the injured could have died immediately and injury no.2 is also fatal and it could cause instant death also. In his cross-examination he has stated that injury no.1 could have been caused when the injured had fallen on the ground. It was quite natural that two accused persons Narendra and Pappi have caused the death of Ravindra through spade and in scuffle they have caused injury no.1

while the injured was lying on the ground and by single stroke they have caused injuries on his neck through spade resultantly he had done to death.

27. P.W.-2 Vinod Kumar, who is alleged to be injured and star eye witness of the incident in question, happens to be the real brother of deceased Ravindra. He has stated in his examination-in-chief that incident took place on 18th May, 2002. Since it was Saturday, they had turn for watering their field on that day. They were supposed to irrigate their field on 18th May, 2002 from 6 a.m. (morning) to next day i.e. 19th May, 2002 and they wanted to take water through the drain (Nali) by means of operating their tractor. On the date of incident, both brothers namely, P.W.-2 himself and the deceased Ravindra went to their field on tractor. The deceased Ravindra cleared the drain (Nali). Accused persons belong to the same village Bafar and were irrigating their field. In the trial court, P.W.-2 has fully identified the accused persons. This witness has further stated that at about 11 a.m. the deceased Ravindra had asked accused persons to put off the tube-well so that they could take water through the said drain (Nali). The accused persons made the plan to finish Ravindra saying that he often raised the controversy about irrigation of field. On this exhortation, the accused Narendra inflicted one spade injury on neck of Ravindra and accused Virendra, who was known as Pappi, also inflicted one spade injury on the neck of Ravindra, which resulted into his instant death. The accused Satandra and Raghunath pounced upon Vinod Kumar (P.W.2.) and caught hold of him, thereupon the accused Pappan inflicted one spade on him but he survived and raised alarm on which witnesses arrived there. Sheeshpal and Brijpal (P.W.-

3) also came there and they saw the incident. Thereafter he along with his brothers Manoj and Munesh proceeded to lodge the report to Police Station Jani and when they reached near Cooperative Bank, Jani, Krishnapal (informant/P.W.-4) met them on the way, who enquired about the incident on which P.W.-2 narrated the entire story to him. P.W.-4 Krishnapal had written the report on a paper and the same was given to Police Station-Jani. This witness has further stated that at Police Station Jani Krishnapal, Brijpal and Munesh were present. After that P.W.2 proceeded to Primary Health Centre, Jani for his medical examination, but Doctor was not present there. The Home- Guard, who accompanied him came to the place of the incident. The police was present there. Several persons of the village were also present there. Station House Officer, Police Station Jani has recorded the statements and inquest of deceased were prepared on which he signed and he has identified his signatures. This witness further stated that he was referred to P. L. Sharma Hospital, Meerut, where his injuries were medically examined by the Doctor. P.W.2 Vinod has clearly stated that Narendra was also known as Kallan, Satendra was also known as Billa and Virendra was known as Pappi.

28. This witness has been cross-examined by the defence at length but no major contradiction in his testimony was found. He has fully supported the prosecution case.

29. P.W.-3 Brijpal, who is alleged to be star independent eye witness, belonged to the same village where the accused and prosecution side resided. P.W.-3 knows accused persons Raghunath, Satendra, Narendra, Papi and Pappan. This witness has further stated that the incident in

question occurred on 18th May, 2002 and at that time he was working in his field. Sheeshpal (not produced) was also present there. He had taken the field of Sheeshpal on Batai (rent). At about 11:00 a.m. the deceased Ravindra and P.W.-2 Vinod were present on their Tube-well. The deceased Ravindra asked accused persons to put of their Tube-well as accused were taking water to their field through the tractor. The deceased Ravindra asked that he had turn for irrigating his field on that day. Accused did not put off their Tube-well, which resulted in some altercation between them. Accused persons exhorted to each other that Ravindra always created controversy in irrigating the field, so he should have been finished, thereupon the accused Pappi and Kallan inflicted spade on the neck of Ravindra and he sustained serious injuries and died immediately. The accused Raghunath and Billu caught hold of Vinod (P.W.-2) and the accused Pappan inflicted one spade on his neck. This witness had seen the entire incident from 10 to 15 steps. He immediately reached there. After that the accused persons left the place and went to their house. P.W.-3 immediately went to call Krishnapal. Vinod and Sheeshpal advised him to inform Krishnapal Master, who was teaching in Shival High School, Sival Khas, Meerut. He immediately went to Krishnapal and informed him about the incident. Thereafter he and Krishnapal went to police station and in the mid way, Vinod and several persons of the village met them near Cooperative Bank, Jani. P.W.2 Vinod also narrated the entire incident to Krishnapal on which he had written the report, which was submitted to P. S. Jani.

30. P.W.-3 has also been cross-examined by the defence at length but no contradiction has been found in his testimony. In his cross-examination, this

witness has clearly stated that the accused Raghunath and Billu had caught hold of Vinod (P.W.-2), thereupon the accused Pappan had inflicted one spade injury to Vinod and when he reached near the accused persons, they fled from there. This witness Brijpal is an independent eye-witness and he has fully proved the prosecution case.

31. Krishnapal i.e. informant, who happens to be the brother of the deceased Ravindra and injured Vinod Kumar (P.W.-2) has been produced as P.W.4. He has not claimed that he is the eye-witness of the incident. In his testimony, this witness has fairly stated that he has not seen the incident with his own eyes because at the time of incident, he was teaching in High School, Shival Khas, Meerut. and the information regarding this incident was given to him by Brijpal (P.W.-3). He has proved the written report (Exhibit-ka/4) which he has submitted before the Police Station-Jani.

32. Prosecution has produced Sub-Inspector Sanjeev Singh Rathor as P.W.5. In his examination-in-chief, he has stated that he has prepared/conducted the inquest of the body of the deceased Ravindra in the presence of Munesh, Vijai Pal, Brijpal, Vinod and Dharmendra, who were appointed as inquest witnesses according to them the death of Ravindra was caused due to the injuries sustained in criminal transaction. This witness has been cross-examined by defence counsel at length. He has proved all the papers like 'Panchayatnama, letter to R. I., Copy of Chik FIR, letter to C.M. S., specimen seal, Photo Lash and Challan Lash. There is no contradiction in his testimony.

33. Emergency Medical Officer P.L. Sharma has been produced as P.W.- 6, who

has medically examined the injured Vinod Kumar (P.W.-2). In his examination-in-chief, this witness has stated that he found 5 injuries on the person of P.W.-2. He has opined that all injuries sustained by P.W.-2 were simple in nature and injury no.1 is incised wound and it was caused by some sharp edged weapon like spade and injuries no.2 and 3 were caused by hard and blunt weapon. He has proved the injury report, which was marked as Exhibit-ka/8. This witness has also been cross-examined by the defence and no contradiction has been found in his entire cross-examination.

34. Constable-1198 Ranvir Singh has been produced as P.W.-7. In his examination-in-chief he has stated that the FIR has been written by him in his own handwriting which was marked as Exhibit-Ka/9. He has proved the chik FIR.

35. P.W.-8 Sub-Inspector R.N. Singh Yadav, has conducted the investigation. In his examination-in-chief this witness has stated that he had conducted the investigation of the case himself, which was started at 12:40 p.m. on 18th May, 2002. He also recorded the statements of the informant Krishnapal and Sheeshpal, who was the eye witness of the case. He has prepared the site plan in his writing. He had collected blood stained earth and plain earth from the place of the occurrence where the dead body of Ravindra was lying. In his cross-examination this witness has stated that he had not sent the blood stained earth and spades for chemical examination on account of the fact that he was transferred, but he has submitted the charge sheet in this case. This witness has also been cross-examined by the defence but no contradiction or inconsistency or improvement has been found in his testimony. He has fully supported the prosecution case.

36. On deeper scrutiny and evaluation of the prosecution witnesses and other evidence, we find that there is two prosecution witnesses of fact, namely, P.W.2 Vinod Kumar, who happens to be the brother of the deceased but is an injured witness and Brijpal (P.W.-3), who is an independent eye witness. In their testimony, they have fully supported the prosecution case and these testimony are the direct evidence against the accused-appellants for commissioning of the offence of murder of the deceased Ravindra and causing injuries to the injured P.W.-2. Apart from the above, the medical evidence both the post-mortem report of the deceased Ravindra as well as medical examination report of injured Vinod Kumar (P.W.-2) as also the police papers have also fully supported the prosecution case.

37. We have examined the judgment and order of conviction passed by the trial court. While passing the impugned judgment the trial court has carefully noticed the prosecution version and other evidence led during the course of trial and has held that the prosecution has established guilt of the accused-appellants based on prosecution evidence. We have noticed hereinabove that there are minor material contradictions, inconsistencies and discrepancies in the statements of the prosecution witnesses specially in star prosecution witnesses i.e. P.W.-2 and P.W.-3, who are alleged to be eye-witnesses of the incident in question. Though the P.W.-2 is an interested witness but is an injured witness also, whereas P.W.-3 is an independent witness and both the witnesses of fact have been cross-examined by the defence at great length. Therefore, their testimony cannot be ruled out as there is some minor contradictions therein.

38. It is settled law that in all criminal cases, normal discrepancies are bound to

occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

39. In various judgments, the Apex Court has held that the evidence of interested or inimical witnesses is to be scrutinized with care but can not be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in relying on the said evidence. It is well settled that interested evidence is not necessarily unreliable evidence. All that is necessary is the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

40. In view of the above discussions and deliberations, we find that the trial court is justified in holding that the

prosecution has succeeded to prove the guilt of the accused-appellants, namely, Narendra and Pappi for commissioning the offence of murder of the deceased Ravindra the guilt of accused-appellants, namely, Raghunath, Satendra, Pappan, in commission of offence by causing injuries to P.W.-2 Vinod Kumar, is proved beyond reasonable doubt. However, the trial court is not justified in convicting and sentencing accused-appellants Narendra and Pappi under Section 302 I.P.C. We find substance in the submission made by the learned counsel for the accused-appellants that the incident in question occurred on the spur of moment and in the heat of passion and without premeditation or planning of attack, therefore, it would fall within Exception-4 to Section 300 I.P.C. and the conviction of the accused-appellants Narendra and Pappi would fall under Section 304 Part-I I.P.C. and not under Section 302 I.P.C.

41. As per the testimony of prosecution witnesses, at the time and place of incident, the accused-persons were already irrigating their field with the help of farming equipment like Axe, Spades, Sickles etc and when the deceased Ravindra and Vinod Kumar P.W.-2 reached there and Ravindra protested and asked them to give water because it was his turn on which all accused persons got annoyed and exhorted to finish him as he always objected in taking water on which accused-appellants Narendra @ Kallan and Pappi hit their spade on the neck of Ravindra Kumar resulting into his instant death. The accused-appellants Raghunath and Satendra caught hold of another brother of the informant, namely, Vinod and the accused-appellant Pappan inflicted one spade injury on the neck of Vinod. From the said facts, it is apparently clear that the incident

occurred on the spur of the moment without any premeditation as the accused-appellants were not the aggressor having weapons in their hands with an intention to commit such offence, when as a matter of fact, they were irrigating their fields with the help of farming equipment before the deceased and injured (P.W.-2) reached there, as such the accused-appellants, Narendra and Pappi could at best be punished under Section 304 I.P.C.

42. In **Pulicherla Nagaraju [Pulicherla Nagaraju v. State of A.P., reported in (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500]**, the Apex had an occasion to consider the case of culpable homicide not amounting to murder and the intention to cause death. It was observed and held by this Court that the intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances:

- (i) *nature of the weapon used;*
- (ii) *whether the weapon was carried by the accused or was picked up from the spot;***
- (iii) *whether the blow is aimed at a vital part of the body;*
- (iv) *the amount of force employed in causing injury;*
- (v) *whether the act was in the course of sudden quarrel or sudden fight or free-for-all fight;***
- (vi) *whether the incident occurs by chance or whether there was any premeditation;*
- (vii) *whether there was any prior enmity or whether the deceased was a stranger;*
- (viii) *whether there was any grave and sudden provocation, and if so, the cause for such provocation;***

(ix) *whether it was in the heat of passion;*

(x) *whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;*

(xi) *whether the accused dealt a single blow or several blows."*

43. On examination of the aforesaid judgment of the Apex Court we find that the circumstances nos. (ii), (v) and (viii) given the aforesaid judgment of the Apex Court would apply in the present case.

44. In paragraph-29 in the case of **Pulicherla Nagaraju @ Nagaraja Reddy (Supra)**, the Apex Court has opined that the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part 1 or 304 Part II. In many petty or insignificant matters, plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not covered into offences punishable under Section 304 Part-I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302.

45. On going through the entire evidence on record, we find that the necessary ingredients to attract 4th Exception to section 300 IPC are clearly present in the facts of the present case inasmuch as death is caused; there existed no pre-meditation; it was a sudden fight; the offender has not taken undue advantage or acted in a cruel or unusual manner, therefore, the case in hand clearly falls under fourth exception to section 300 IPC.

46. The issue relating to quantum of sentence under Section 304 I.P.C. depends on background facts of the case, antecedents of the accused, whether the assault was premeditated and pre-planned or not, etc. There are no straight jacket formulae for the determination of the same in law.

47. In the case of **Arjun & Another Etc. Etc. Vs. State of Chhattishgarh** reported in 2017 0 Supreme (SC) 152, heavily relied upon by the learned counsel for the accused-appellants, the Apex Court has held that injures/incised wound caused on head i.e. right parietal region and right temporal region and also occipital region, injuries indicate that the appellants had intention of knowledge to cause injuries and thus it would be case falling under Section 304 Part-I I.P.C. therefore, conviction of appellants under Section 302 read with Section 34 I.P.C. is modified under Section 304 Part-I I.P.C.

48. The relevant paragraphs of the judgment of the Apex Court in the case of **Arjun & Another Etc.Etc. (Supra)** are quoted herein under:

“19. The point falling for consideration is whether the conviction of the appellants under Section 302 IPC is

sustainable. As discussed earlier, the evidence clearly establishes that while Ayodhya Prasad and other witnesses were cutting the trees, there was exchange of words which resulted in altercation and during the said altercation, the appellants attacked the deceased. Thus, the incident occurred due to a sudden fight which, in our view, falls under exception (4) of Section 300 IPC.

20. To invoke this exception (4), the requirements that are to be fulfilled have been laid down by this Court in Surinder Kumar Vs. Union Territory of Chandigarh (1989) 2 SCC 217, it has been explained as under:-

“7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.....”

21. Further in the case of Arumugam VS. State, Represented by Inspector of Police, Tamil Nadu, (2008) 15 SCC 590, in support of the proposition of law that under what circumstances exception (4) to Section

300 IPC can be invoked if death is caused, it has been explained as under:-

“9.“18. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender’s having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the ‘fight’ occurring in Exception 4 to Section 300 IPC is not defined in Indian Penal Code, 1860. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression ‘undue advantage’ as used in the provision means ‘unfair advantage’.”

22. The accused, as per the version of PW-6 and eye witness account of other witnesses, had weapons in their hands, but the sequence of events that have been narrated by the witnesses only show that the weapons were used during altercation in a sudden fight and there was no premeditation. Injuries as reflected in the post-mortem report also suggest that appellants have not taken “undue advantage” or

acted in a cruel manner. Therefore, in the fact situation, exception (4) under Section 300 IPC is attracted. The incident took place in a sudden fight as such the appellants are entitled to the benefit under Section 300 exception (4) IPC.

23. When and if there is intent and knowledge, then the same would be a case of Section 304 Part I IPC and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II IPC. Injuries/incised wound caused on the head i.e. right parietal region and right temporal region and also occipital region, the injuries indicate that the appellants had intention and knowledge to cause the injuries and thus it would be a case falling under Section 304 Part I IPC. The conviction of the appellants under Section 302 read with Section 34 IPC is modified under Section 304 Part I IPC. As per the Jail Custody Certificates on record, the appellants have served 9 years 3 months and 13 days as on 2nd March, 2016, which means as on date the appellants have served 9 years 11 months. Taking into account the facts and circumstances in which the offence has been committed, for the modified conviction under Section 304 Part I IPC, the sentence is modified to that of the period already undergone.”

49. In the facts of the present case, the accused-appellants Narendra and Pappi caused injuries on the neck of the deceased by spades due to which he had done to death on the place of occurrence, these injuries indicates that both the accused-appellants had knowledge and intention to cause injuries, and thus it would be case falling under Section 304 Part-I I.P.C.

50. In view of the above discussions and deliberations, we are of the considered opinion that the said offence has been committed by the accused-appellants, namely, Narendra and Pappi on a spur of moment and in the heat of passion upon sudden quarrel between them and the deceased and P.W.-2, as is evident from the testimony of prosecution witnesses including the witnesses of fact i.e. P.W.-2 and P.W.-3. Seeing the aforesaid circumstances we are of the view that the quantum of sentence of the accused-appellants Narendra and Pappi to life imprisonment under Section 302 I.P.C. as awarded under the impugned order of sentence is too harsh in the facts of the present case. Attention of the Court has been invited to the fact that the accused-appellants are in jail since 25th September, 2007 and they have actually undergone nearly 16 years of incarceration without remission (15 years, 10 months and 17 days on 19th April, 2023 as per the custody certificate issued by the Senior Superintendent, Central Jail, Agra dated 19th April, 2023 and 20 years, 9 months and six days with remission).

51. Accordingly, conviction of the accused-appellants, namely, Narendra and Pappi under Section 302 I.P.C. is modified as conviction under Section 304 Part-I I.P.C. and the sentence is reduced to the period already undergone by them. Since the accused-appellants, Narendra and Pappi have undergone more than 15 years of incarceration without remission, the fine of Rs.10,000/- imposed upon the accused-appellants, namely, Narendra and Pappi each under Section 302 read with Section 149 I.P.C. under the impugned judgment is also discharged.

52. So far as the conviction of the accused-appellants, namely, Raghunath

(who is reported to be died) by Mr. Noor Mohd. Learned counsel for the accused-appellant), Satendra and Pappan under Section 307 I.P.C. is concerned, we may record that the first injury was certainly on a vital part of the injured Vinod Kumar (P.W.-2) and taking into account the injuries sustained by him on various parts of his body by accused-appellant Pappan, whereas the accused-appellants, namely, Raghunath (now died) and Satendra were assigned the role of catching hold of injured Vinod Kumar (P.W.-2), Section 307 I.P.C. has rightly been invoked by the trial court while passing the impugned judgment. However, taking into account the fact that the altercation took place between the accused-appellants and the deceased along with injured P.W.-2 at the time of watering field and there was no premeditation or planning of the attack, as well as considering the medical examination report of the injured P.W.-2 and the testimony of P.W.-6 who has medically examined him that though P.W.-6 has found 5 injuries on the person of P.W.-2 but he has also opined that all injuries sustained by P.W.-2 were simple in nature, meaning thereby that the blow of spade from which the injury no.1 i.e. Incised wound 6.0 cm x 0.7 cm x muscle on back of left side chest 6.5 cm behind and below of left ear lobule updown, was inflicted was not severe in nature but was on vital part i.e. neck of the Vinod Kumar, injured/P.W.-2, the custodial sentence undergone by the accused-appellants, namely Satendra and Pappan i.e. four and six months respectively would meet the ends of justice. It is ordered accordingly. The fine of Rs.5,000/- imposed upon the accused-appellants, namely, Satendra and Pappan each under Sections 307 read with Section 149 I.P.C. under the impugned judgment is also discharged

Judge/Fast Track Court, Court No. 3, Mainpuri, in Sessions Trial No.159 of 2006 (State Vs. Shishupal Singh) arising out of Case Crime No. 118 of 2006 under Sections 498-A, 304B I.P.C. and Sections 34 D.P. Act Police Station-Bewar, District-Mainpuri, whereby the learned Additional Sessions Judge/Fast Track Court, Court No. 3, Mainpuri has convicted the accused-appellant, Shishupal Singh for commission of offence under Section 302 of Indian Penal Code, 1860 (for short 'IPC') and sentenced him to undergo imprisonment for life with fine of Rs.5,000/- and in default thereof, to further undergo six months additional imprisonment.

2. Heard Sri Shashi Shekhar Mishra, learned Amicus Curiae for the accused-appellant and learned A.G.A. for the State.

3. Brief facts of the case is that the informant/P.W.1 Vidya Devi has given a written report (Exhibit-ka/1) on 4th March, 2006 to the Police Station-Bewar, District-Mainpuri alleging therein that the marriage of her daughter, namely, Laxmi Devi was solemnised with the accused-appellant Shishupal four years ago by giving a lot of dowry. Just after the marriage, the husband of her daughter Laxmi Devi i.e. the accused-appellant, her mother-in-law Gangadevi, father-in-law Subedar Singh and elder-brother-in-law (Jeth) used to harass, torture and beat her for additional demand of dowry, due to which the informant/P.W.-1 did not send her to her in-laws' place and she kept her at her place. It is further alleged that in-laws of her daughter wanted to solemnize the marriage of Shishupal at another place after killing her daughter. Nandoi of daughter of the informant (husband of her sister-in-law), namely, Grish Chandra along with Kishanpal came to her place 20 days ago,

to take her daughter along with them to the place of her in-laws and both of them gave an assurance that nothing wrong would happen in future with her daughter and guaranteed her that if anything happens now, it would be their responsibility. On the said persuasion, the informant/P.W.-1 sent her daughter Laxmi Devi with them. Lakshmi herself was a student of B.A. and Lakshmi's husband used to work in P.A.C. On 03.03.2006 at around 8:00 a.m., neighbour of the informant, namely, Ram Kishan informed her that Lakshmi's health is bad, at that time she was at her second daughter Triveni's in-laws house. Neighbour of the informant, namely, Lal Ram and son of her brother-in-law (Jeth) along with his family went to the place of occurrence i.e. Bewar. When they came to know that the daughter of the informant i.e. Laxmi had gone to Government Hospital, Mainpuri, they went to Mainpuri. On reaching Mainpuri they saw the daughter of the informant in dead condition at Mortuary. At mortuary, apart from the neighbour of the informant, namely, Lal Ram and son of her brother-in-law (Jeth) along with his family, only the father-in-law of Laxmi was present from the side of her in-laws. After the post-mortem, neighbour of the informant, namely, Lal Ram and son of her brother-in-law (Jeth) along with his family requested the father-in-law of Laxmi to cremate her body after her mother would come but he refused to do the same. After some time, other people came from the side of Laxmi in-laws, who forcefully took her daughter's dead body by a Tempo. Thereafter the family members of the informant came directly to her village and after coming there, they called her from her second daughter in-laws' place and disclosed the entire incident to her. Then the informant has come to lodge the report. It is further alleged that the in-laws

of her daughter Laxmi have not even allowed her to see her daughter's dead body. All the people of the daughter in-laws have locked their house and fled. The informant has also come to know that the statement of her daughter Laxmi was recorded in the hospital. After the daughter's marriage, it was revealed that the accused-appellant Shishupal had secretly married with another girl. In the murder of her daughter, all the above accused have conspired and killed her for the sake of dowry. It is further alleged that since the informant/P.W. -1 was helpless, she could not fulfil the demand of motorcycle of her in-laws and that's why all of them have burnt her daughter to death. On reaching the spot, the informant was informed by the neighbours of her daughter's in-laws that all the above accused were beating her daughter and after holding her by the other accused, the accused-appellant Shishupala had poured kerosene oil and set her on fire. 25 years ago the husband of the informant had died and thereafter somehow she solemnized the marriage of their daughters after giving dowries.

4. On the basis of the written report of informant/P.W.-1, F.I.R. was lodged at Police Station Bewar, District Mainpuri on the same day i.e. 3rd March, 2006 at 15:30 o'clock against the accused persons, namely, accused-appellant Shishupal, Ganga Devi, Gyanpal, Subedar, Grish Chandra and Kishanpal and the investigation was carried out. On investigation being put into motion, the Police recorded the statements of the witnesses and completed necessary formalities. On 3rd March, 2006, P.W.-7 the then Tehsildar Asha Ram under the order of the Sub-Divisional Magistrate Mainpuri, got the inquest of the body of the deceased Laxmi conducted at District Hospital,

Mainpuri by the Police and also got the inquest report prepared (Exhibit-ka/8). He also appointed inquest witnesses. He also got the necessary papers prepared like police papers, letter to R.I., letter to C.M.O., Photo lash, chalan lash (Exhibit-ka/9 to Exhibit-ka/12). P.W.-7 also got the body of the deceased sealed and sent for post-mortem.

5. The post-mortem of the dead body of deceased Laxmi was conducted by Dr. K.C. Bhardwaj (P.W.-2), the then Medical Officer at District Hospital, Mainpuri on 3rd March, 2006 at 03:45 p.m. The postmortem report Exh. Ka-2 was prepared and in the opinion of the Autopsy Surgeon (P.W.-2), the death of the deceased Laxmi was due to shock as a result of following ante-mortem superficial burn deep injuries:-

“1. Superficial to deep burn all over the body except ante side abdomen and perineum and top of head, skin pulled off places, whole body blackening present and smell of kerosene oil present at places, line of redness present at places. ”

6. After sustaining burn injuries, the deceased was admitted District Hospital, Mainpuri where Doctor U.C. Chaturvedi (P.W.-8) medically treated the deceased Laxmi. During her treatment, on 2nd March, 2006 at 02:05 p.m. the dying declaration of the deceased Laxmi (Exhibit-ka/5) was recorded by the Naib Tehsildar, Mainpuri (P.W.-5) after taking fitness certificate from the Doctor of E.M.O. District Hospital, Mainpuri i.e. (P.W.-8). The dying declaration of the deceased Laxmi is extracted herein-below:

"प्रमाणित किया जाता है कि श्रीमती लक्ष्मी देवी W/o श्री शिशुपाल सिंह निवासी भारती विद्या मन्दिर बेवर अपना ध्यान दे ! लिये आपने पूरे होश में है।

हस्ताक्षर

2.3.06

2-05 PM

मृत्यु पूर्व ब्यान

आज दिनांक 2-3-06 को समय 2:05 PM पर लक्ष्मी देवी W/o श्री शिशुपाल सिंह निवासी भारती विद्या मन्दिर बेवर थाना बेवर उम्र लगभग 25 वर्ष ने ब्यान किया कि मैं उपरोक्त पते की निवासी हूँ मुझे आज सुबह तीन . चार बजे मुझे मारा था तथा मेरे ऊपर पउआ में रखा मिट्टी तेल डाल दिया और माचिस से आग लगा दी। आग से मेरा पूरा शरीर जगह — जगह जला है। मेरी शादी चार साल पूर्व हुई थी, मेरे कोई बच्चा नहीं है। दूसरी लड़की (पत्नी) के पीछे मुझे जलाया है। और किसी व्यक्ति ने मुझे नहीं जलाया है। इस घटना में केवल मेरे पति का हाथ है। मेरे सास.सुसर हैं। इन्होंने ही अस्पताल में भर्ती कराया है। मेरा पति रात को ही भाग गया। वह साथ नहीं आये मेरे जेठ, नन्दोई और ससुर अस्पताल में आये हैं। इनमें से किसी का कोई दोष नहीं है। यह कारनामा मेरे पति का ही है। मैंने होश में ब्यान दिया है। मुझे और कुछ नहीं कहना। आग मैंने खुद नहीं लगायी है। ब्यान सुनकर तस्दीक किया।

नि0अ0 लक्ष्मी देवी

हस्ताक्षर

02.3.06

ना0 तहसीलदार मैनपुरी

2:20 PM

प्रमाणित किया जाता है कि श्रीमती लक्ष्मी देवी W/o श्री शिशुपाल सिंह अपना ब्यान देने के बाद तक पुरे होश में रही

हस्ताक्षर

2-3-06

2:23 PM

E.M.O.

D.H. Mainpuri

7. Initially, the investigation was conducted by Circle Officer, Karhal, namely, Ram Chandra Guha (not produced) and thereafter the investigation has been conducted by Circle Officer Shrawan Kumar Singh (P.W.-6). After perusal of the investigation conducted by Ram Chandra Guha, he made entry in G.D. of inquest and thereafter recorded the

statements of P.W.-2 Dr. K.C. Bhardwaj and P.W.-8 Dr.U.C. Chaturvedi. After that P.W.-6 has recorded the statements of witnesses and made entry in G.D. of dying declaration of the deceased Laxmi after obtaining permission from the C.J.M. On 23rd March, 2006 he recorded the statements of informant Vidya Devi and other witnesses. After conclusion of the statutory investigation under Chapter-XII Cr.P.C. P.W.-6 has submitted the charge-sheet against the accused-appellant Shishupal under Section 498-A, 304-B I.P.C. and Sections 3/4 D.P. Act, exonerating the other accused named in the F.I.R. before the Court of concerned Magistrate, who took cognizance thereon and the case was committed to the court of Sessions as the offence alleged to have been committed were triable by the Sessions Court. Initially on 17th July, 2007 the accused-appellant has been charged under Sections 498-A, 304 B I.P.C. and Section 4 D.P. Act but subsequently on 18th June, 2007, he has been charged under Sections 498-A I.P.C. 304-B and 302 I.P.C. and Section 4 D.P. Act.

8. The charges were read out to the accused-appellant, who denied the accusation and demanded trial.

9. The trial started and the prosecution has examined seven witnesses, who are as follows:-

1	Vidya Devi, informant/the complainant, mother of the deceased.	PW1
2	Dr. K.C. Bhardwaj, who conducted the autopsy of the body of the deceased	PW2
3	Ramendra Singh, Constable Clerk, who prepared the chik	PW3

	FIR and proved the same	
4	Amar Singh, cousin brother of the deceased	PW4
5	Laxmi Narain, then Naib Tehsildar, who recorded the dying declaration of the deceased Laxmi at District Hospital, Mainpuri (Investigating Officer)	PW5
6	Circle Officer Shravan Kumar Singh, Investigating Officer	PW6
7	Asha Ram, the then Tehsildar, who got conducted the inquest of the body of the deceased at District Hospital, Mainpuri	PW7
8	Dr. U.C. Chaturvedi, who medically treated the deceased at District Hospital, Mainpuri and gave medical fitness certificate of the deceased before recording her dying declaration	PW8

10. The defence has also adduced Subedar Singh, father-in-law of the deceased as D.W.-1 and also named in the FIR but subsequently, his name was exonerated by the Investigating Officer in the charge-sheet. This witness has also informed the Police about the incident of burning occurred with her daughter-in-law i.e. the deceased .

11. The prosecution in order to establish the charges leveled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	First Information Report	Ex.Ka

	dated 4th March, 2003	.-3
2	Written report dated 4th March, 2003	Ex.Ka .-1
3	Memo of dying declaration of the deceased dated 2nd March, 2003	Ex. Ka.-5
4	Application of Budear Singh (D.W.-1)	Ex.Kh a.-1
5	Post-mortem report of the deceased dated 3rd March, 2003	Ex.Ka .-2
6	Site plan with index dated 4th March, 2003	Ex. Ka.-7
7	Charge-sheet	Ex. Ka.-6

12. The accused in his statement recorded under Section 313 Cr.P.C. has denied to have committed the alleged offence. Though he has accepted his marriage with the deceased 4 years ago but he has denied that he had demanded any motorcycle as dowry and because of non-fulfilment of said demand, he has beaten and tortured her. He has also denied that he killed the deceased by pouring kerosene oil and set her on fire. He has also stated that false report has been lodged at Police Station against him and after preparing false site plan, charge-sheet was submitted before the court concerned against him. He has further stated that the witnesses have given false statements against him. He has again stated that in P.A.C. Etah, a departmental proceedings were going on against him to having second wife apart from first wife and the statement given by the deceased Laxmi Devi against him in the said proceedings was altered by the people of his department due to which she was annoyed and she committed suicide by setting her on fire. He has also stated that at

the time of incident, he was at his home for which he had to give evidence later.

13. The trial court on the basis of evidence so led by the prosecution has found the guilt of the accused-appellant to have been proved beyond reasonable doubt. The trial Court has found the witnesses to be reliable and the dying declaration has also been found credible and reliable which formed the basis for conviction of the accused. Accordingly, the trial court has held that, accused-appellant Shishupal Singh is liable to be acquitted for the offence under Sections 498A, 304B IPC and Section 3/4 Dowry Prohibition Act and is liable to be convicted/punished under Section 302 I.P.C. It is against this judgment that the present appeal has been preferred by the accused-appellant Shishupal.

14. The submission made by the counsel for the accused appellant is that the informant is the mother of the deceased and was inimical to the accused. In the statement recorded under Section 313 Cr.P.C., the accused-appellant has stated that he has not committed any offence. It is further submitted that in the statement under Section 313 Cr.P.C. the accused-appellant has stated that in P.A.C. Etah, a departmental proceedings were going on against him to having second wife apart from first wife and the statement given by the deceased Laxmi Devi against him in the said proceedings, got altered by the people of his department due to which she was annoyed and she committed suicide by setting her on fire. He further submits that the dying declaration is not reliable in the facts of the present case since the deceased was not in a position to give any statement. He next submits that no satisfaction is recorded by the Doctor about the deceased

being in a fit mental state to give her statement. He also submits that the condition of the victim was critical and her trachea was blocked for which operation was proposed and, therefore, the victim otherwise was not in a position to speak or to get her dying declaration recorded.

15. Learned counsel, therefore, submits that this is a case of suicide not homicidal, as the deceased being a shot temper lady and she had not borne any child for four years during the marital life, she committed suicide by pouring kerosene oil on herself and set her on fire and the family members of the deceased have taken advantage of it to falsely implicate the accused and thereby settle their goal in garbing money from the accused-appellant. It is urged that the evidence on record has not been examined in correct perspective by the trial Court. It is also urged on behalf of the accused-appellant that the FIR is delay of two days which was lodged, as an after-thought for falsely implicating the accused-appellants on the basis of which the accused-appellant have been convicted.

16. Learned counsel for the State has submitted that there is no reason for false implication of the accused and the complainant had no motive to falsely implicate the accused. There is clinching evidence to support the prosecution's case; there is dying declaration of the deceased and the statements given by the deceased therein have been supported by the prosecution witnesses including P.W.-1, P.W.4, independent prosecution witness P.W.3; the prosecution version has also been supported by the medical evidence; the place of occurrence has not been disputed by the defence; and the accused-appellant has strong motive or intention as he had second wife and the same has also

been explained by the evidence of prosecution. Therefore, the prosecution has proved the charge levelled against the accused-appellant beyond reasonable doubt. Evidence of prosecution witnesses will not permit this Court to show any leniency in the matter.

17. On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct evidence, the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present jail appeal filed by the accused appellants who committed heinous crime by murdering the deceased is liable to be dismissed.

18. We have considered the submissions made by the learned counsel for the parties and have carefully examined the original records of the case as well as the impugned judgment and order of conviction challenged before us.

19. We are in full agreement with the findings recorded by the trial court after relying upon the statements of P.W.-5, P.W.-8 and the dying declaration of the deceased itself that the circumstances in which the dying declaration of the deceased Lakshmidēvi has been recorded by P.W.5 is quite natural, which makes it clear that the deceased Lakshmidēvi was in her senses and in full consciousness while making the dying declaration. The dying declaration has been made of her own free will. He has further recorded that there was no scope for any pressure and manipulation because the dying declaration was made by Lakshmidēvi before her death, wherein she has only taken the name of her husband i.e. accused-appellant Shishupal Singh and she has told that her husband had beaten her

first at 3 to 4 o'clock in the night, then poured kerosene oil on her and set her on fire with matches. The trial court has also recorded that in the dying declaration the deceased Lakshmidēvi has stated that her whole body was burnt due to fire at several places. Her marriage was solemnized 4 years ago of the incident. She did not have any child. Due to his second wife, the accused-appellant Shishupal had set the deceased on fire and no other in-laws has set her on fire. The deceased has further stated in her dying declaration that in this incident her husband is only responsible. Her mother-in-law and father-in-law were there, who admitted her to the hospital. Her husband escaped in the night itself. He didn't come along with them. She has also stated that her brother-in-law (Jeth), Nandoi, father-in-law had come to the hospital. There is no fault of anyone in this incident. This feat is of her husband only. The deceased made her statement in her senses. Apart from the above, she had nothing to tell. She has also stated that she did not set herself on fire.

20. On the basis of the aforesaid statement of the deceased in her dying declaration, the trial court has opined that on seriously reviewing the said dying declaration of deceased Lakshmidēvi, it is found to be creditworthy that if the deceased wanted, she could have taken the name of all family members of in-laws in her dying declaration as well, but she has told the name of her husband, who poured kerosene oil on her and set her on fire with matches. Apart from this, it is also very important that the dying declaration made by the deceased Lakshmidēvi was not given due to any pressure or any other reason because when the deceased Laxmidēvi was admitted to the District Hospital in a burnt condition, at that point

of time no member of her family i.e. her mother and any other person were present and those who were present there in the hospital to take care of her was her in-laws only. Under these circumstances, the trial court has opined that there is valid reason to consider the verbal declaration of death made by the deceased. The trial court has also recorded that it is also clear from the dying declaration of Lakshmidevi that her husband Shishupal Singh was married to another woman and had a child from the said wedlock. This fact is undisputed because the defence witness (D.W.-1) i.e. her father-in-law has himself accepted this fact in his testimony. This statement of the deceased that her husband was already married has also been supported by her widow mother i.e. P.W.1/informant and her cousin brother (P.W.-4) in their testimony. Thus, on the basis of dying declaration of the deceased and statements of the prosecution witnesses i.e. P.W.-1, P.W.4, P.W.-5 and P.W.-8 and the evidence on record, the trial court has come to the conclusion that the prosecution has succeeded to prove the guilt of the accused-appellant that due to his second wife the accused-appellant used to beat and harass the deceased before the incident and after that he poured kerosene oil on her and set her on fire and the said criminal act of accused Shishupal Singh comes under the category of murder. On the basis of such finding, the trial court has come to the conclusion that this is not a case of murder of dowry, but is a direct murder case, which the prosecution has successfully proved.

21. While considering the evidence of P.W.1 to P.W.8 in cumulative nature, the death can be said to be homicidal death. Postmortem report goes to show that the superficial deep burn injuries on the body of the deceased would be the cause of death

and that it was homicidal death. There is also dying declaration which was given by the deceased in her senses and not under any pressure as is evident from the statements of independent prosecution witnesses i.e. P.W.-5, who recorded the dying declaration after taking medical fitness certificate from P.W.-8, who was medically treating the deceased when she was admitted in the hospital and was alive. It is settled law that the dying declaration made by a person on the verge of his/her death has a special sanctity as at that solemn moment a person is unlikely to make any untrue statement.

22. In the case of **Bijoy Das Versus State of West Bengal reported in (2008) 4 SCC 511**, wherein in paragraph-11, the Apex Court has held as follows:

“11. As observed by this Court in Narain Singh v. State of Haryana AIR vide para 7: (SCC p. 267, para 7) A dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death is by itself guarantee of the truth of the statement of the deceased regarding the circumstances leading to his death. But at the same time the dying declaration like any other evidence has to be tested on the touchstone of credibility to be acceptable. It is more so, as the accused does not get an opportunity of questioning veracity of the statement by cross-examination. The dying declaration if found reliable can form the base of conviction.

8. In *Babulal v. State of M.P. (2003 (12) SCC 490)* this Court observed vide in para 7 of the said decision as under: (SCC p.

494) *A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on t as she had not borne any child for four years during the marital life he verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is a man will not meet his Maker with a lie in his mouth (nemo moriturus praesumitur mentiri). Mathew Arnold said, truth sits on the lips of a dying man. The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.*

9. In *Ravi v. State of T.N.* ((2004 (10) SCC 776) this Court observed that: (SCC p. 777, para 3) ***If the truthfulness of the dying declaration cannot be doubted, the same alone can form the basis of conviction of an accused and the same does not require any corroboration, whatsoever, in law.***

(Emphasis supplied by us)

23. The death occurred because of the ante-mortem burn injuries. Learned counsel for the appellant has not been able to establish that the dying declaration is not natural dying declaration we concur with the learned Judge that the deceased died out

of ante-mortem burn injuries. The contours for accepting the dying declaration are fulfilled in the facts of the case, therefore, we conclude that it was a homicidal death. The next question is whether the accused was the sole perpetrator of the offence. The dying declaration, which we have held to be fulfilled on contours of dying declaration goes to show that the deceased was in a full consciousness and has named only her husband and no other in-laws have been named in the dying declaration. The cause of the incident was that as she had not borne any child for four years during the marital life and that the appellant had some illicit relations prior to the marriage that was the cause behind killing the deceased by the accused-appellant.

24. Therefore, on totality of the facts and circumstances and the oral testimony of the prosecution witnesses specifically the dying declaration of the deceased coupled with the medical evidence, we find that the judgment and order impugned passed by the trial court in convicting the accused-appellant under Section 302 I.P.C. and sentenced him to life imprisonment with fine of Rs, 5,000/- cannot be said to be illegal or perverse.

25. However, considering the total period of incarceration undergone by the accused-appellant i.e. more than 15 years is just and proper. In the case of **Vikash Yadav Vs. State of Uttar Pradesh & Others** reported in (2016) 9 SCC 541, the Apex Court has opined that there was lack of uniformity in award of death sentences and life convicts got released after 14 years due to remission provisions mentioned in the Code of Criminal Procedure. Fixed term non-remittable imprisonment beyond 14 years barred the statutory remission (not constitutional remission under Articles 71

and 161. Fixed term non-remittable sentence came to rescue of court when death sentence fell short of rare-rest of rare category and court felt reluctant to endorse death sentence. Therefore, there is no bar to fix non-remittable term beyond the minimum of 14 years up to the end of one's life.

26. The relevant portion of the judgment of the Apex Court in the case of Vikash Yadav is read as under:

“To elaborate, though the power exercised under Article 71 and Article 161 of the Constitution is amenable to judicial review in a limited sense, yet the Court cannot exercise such power. As far as the statutory power under Section 433-A is concerned, it can be curtailed when the Court is of the considered opinion that the fact situation deserves a sentence of incarceration which be for a fixed term so that power of remission is not exercised. There are many an authority to support that there is imposition of fixed term sentence to curtail the power of remission and scuttle the application for consideration of remission by the convict. It is because in a particular fact situation, it becomes a penological necessity which is permissible within the concept of maximum and the minimum. There is no dispute over the maximum, that is, death sentence. However, as far as minimum is concerned the submission of the learned counsel for the appellants is courts can say “imprisonment for life” and nothing else. It cannot be kept in such a strait-jacket formula. The court, as in the case at hand, when dealing with an appeal for enhancement of sentence from imprisonment of life to death, can definitely say that the convict shall suffer actual incarceration for a specific period.

It is within the domain of judiciary and such an interpretation is permissible. Be it noted, the Court cannot grant a lesser punishment than the minimum but can impose a punishment which is lesser than the maximum. It is within the domain of sentencing and constitutionally permissible.”

27. The accused has been in jail for more than 15 years, he has already undergone sufficient incarceration for the incident occurred in 02.03.2006. We therefore, apply the fix term sentencing policy of 14 years at par with the judgment of the Apex Court in the case of Vikas Yadav (Supra). Accordingly, accused-appellant is liable to be released from jail.

28. The accused-appellant, namely, Sheeshu Pal Singh, who is reported to be in jail since 2007 shall be released on compliance of Section 437-A Cr.P.C., unless he is wanted in any other case forthwith.

29. This appeal stands disposed off subject to the observations/directions made herein above.

30. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Mainpuri henceforth, who shall transmit the same to the concerned Jail Superintendent for release of the accused-appellants in terms of this judgment.

31. Sri Shashi Shekhar Mishra, learned Amicus Curiae for the sole appellant has ably assisted this Court and would be entitled to his fee for a sum of Rs. 15,000/- from the High Court Legal Services Authority.

3. Learned counsel for the revisionist submitted that the revisionist conflict with law is juvenile. In this matter, the alleged date of mentioned in the FIR as 26.2.2018. The Juvenile Justice Board arrived at a conclusion that as per the educational certificate of Class V marks sheet, scholar register and transfer certificate form, the date of birth of the revisionist is 6.3.2003. Thus the age of the revisionist on the

alleged date of incident was 14 years 11 months and 20 days.

4. *It is further submitted that the Juvenile Justice Board during inquiry CW-1 Amita Rana who is the sister of the revisionist was examined and CW-2 Sushila Rani who is the Head Master of Nehru Shishu Mandir Vidyalaya Gulam Alipura, Bahraich and she clearly stated that on the basis of scholar register the date of birth of the revisionist is 6.3.2003.*

5. *Learned counsel for the revisionist further submitted that on behalf of the first informant, PW-1 Laxman Prasad Gupta was examined who clearly stated that as per scholar register date of birth of the revisionist was mentioned as 16.7.2000. He further stated that this student has got admission in class III. At the time of admission, the father of the revisionist furnished the T.C. of Gaytri Shishu Mandir, Bahraich. On the basis of said T.C., date of birth of the revisionist was registered in the scholar register of Class IV passed by the student in his school.*

6. *On perusal of the judgement of the trial court as well as the revisional court, it reveals that PW-2 Usha Patak, Principal of Gaytri Shishu Mandir, Bahraich was also examined before the Juvenile Justice Board, but the statement of PW-2 Usha Patak has not been annexed by the revisionist's counsel. However, the conclusion of the trial court as well as revisional court is totally based on the statement of PW-2 Usha Pathak but the same is not annexed with this file. Therefore, without the statement of PW-2 Usha Pathak, the instant revision could not be decided. During course of dictation, this fact came into light.*

7. *Since for just decision of the case, statement of PW-2 Usha Pathak is inevitable, consequently, the learned*

counsel for the revisionist is directed to file statement of PW-2 Usha Pathak.

8. *List on 16.5.2023 for further hearing."*

2. In pursuance of earlier order dated 11.5.2023, the learned counsel for the revisionist filed the statement of the PW-2 Usha Pathak by way of supplementary affidavit which is taken on record.

3. In the statement of PW-2, Usha Pathak who is the Principal of the Gaytri Shishu Mandir, Bahraich, she clearly stated that Aman Gautam (revisionist) is never the student of her school. In her cross examination, she clearly stated that although there are two branches of the school. Another branch is looked after by the Assistant Principal. She further stated that the S.R. register of both the branches is same but attendance register is separate. She further stated that all the documents are kept in main branch.

4. On the basis of above statement of PW-2, Usha Pathak, the learned counsel for the revisionist submitted that learned Juvenile Justice Board has rightly arrived at a conclusion that the revisionist conflict with law is never the student of Gaytri Shishu Mandir. So, the statement of PW-1, Laxman Prasad Gupta is factually incorrect and thus, the revisionist is never the student of his school.

5. The main grievance of the learned counsel for the revisionist is that the appellate court quashed the order passed by the trial court on 6.3.2019 and arrived at a conclusion that since the birth certificate of the revisionist was issued on 4.7.2018 i.e. after 15 years of birth. So the appellate court doubted the date of birth of the revisionist i.e. 6.3.2003 and on this basis,

the learned appellate court arrived at a conclusion that date of birth which is fixed by the Juvenile Justice Board is doubtful. The appellate court directed to get medical examination of the revisionist and determining the age by way of radiological age as per provision of section 94 of the Juvenile Justice (Care & Protection of Children) Act, 2015 (hereinafter referred to as "the Act").

6. In support of his submissions, the learned counsel for the revisionist has relied on the judgement of the Apex Court in the case of **Ashwani Kumar Saxena vs. State of Madhya Pradesh (2012) 9 SCC 750**. The relevant paragraphs of which are being reproduced hereunder:

"34. Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.

35. We have come across several cases in which the trial courts have examined a large number of witnesses on either side

including the conduct of ossification test and calling for odontology report, even in cases, where matriculation or equivalent certificate, the date of birth certificate from the school last or first attended, the birth certificate given by a corporation or a municipal authority or a panchayat are made available. We have also come across cases where even the courts in the large number of cases express doubts over certificates produced and carry on detailed probe which is totally unwarranted.

43. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility."

7. I have heard Shri Rakesh Kumar Tripathi, learned counsel for the revisionist, learned AGA for the State and perused the record.

8. Section 94 of the Act reads as under:

"94. Presumption and determination of age.-(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36,

as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

9. Considering the entire facts and circumstances of the case and the law laid down by the apex court, I am of the view that the learned appellate court arrived at a conclusion that there is dispute in regard to date of birth of the revisionist. The conclusion of the Juvenile Justice Board is based on the family register which is annexed as Annexure-4 as well as the statement of PW-2 Usha Pathak in which she clearly denied stating that the revisionist never got admission in Gaytri Shishu Mandir. The statement of PW-1

Laxman Prasad Gupta is totally based on the basis of the T.C. of Gaytri Shishu Mandir, but this fact is established that the revisionist never studied in the Gaytri Shishu Mandir School. So the findings arrived by the learned appellate court that there is dispute in respect of date of birth of the revisionist. In the statement of CW-1 and CW-2 Sushila Rani, Head Master of Nehru Shishu Mandir Gulam Alipura, Bahraich, it is clearly established that the date of birth of the revisionist is 6.3.2003. Submission of the CW-1 and CW-2 is also supported with family register in which date of birth of the revisionist is mentioned as 6.3.2003.

10. Though no any mechanism developed to determine the radiological age of the juvenile at this stage. The juvenility as per radiological age is determinable only when the revisionist at the verge of majority. As per birth certificate and family register of the revisionist and statement of CW-1 and CW-2, presently revisionist conflict with law has already attained the majority i.e aged about 19-20 years. The radiological age could be determined on the basis of fusion of epiphysis generally which is started from age of 16 years and almost completed in age of 18 years. Further, if the finding of the appellate court is accepted as true, when any conflict arises regarding the age of the juvenile or child and on the basis of oral statement it could not be possible to determine the correct date of birth and age of the juvenile, then the medical opinion will be sought from the duly constituted medical board which will declare the age of the juvenile or child. In this case, the appellate court categorically arrived at a conclusion that there is conflict in the date of birth of the revisionist and directed the revisionist for radiological age.

11. Now the moot question arises in this matter whether after attaining majority the exact age could be determined or not. In this context, the Apex Court in the case of **Mukarrab Etc vs State Of U.P [decided on 30 November, 2016 in Criminal Appeal Nos. 1119-1120 of 2016]**, has held as under:

"17. As already noted, by an order dated 18.02.2016, this Court had directed the concerned District and Sessions Judge to conduct an inquiry and submit a report as to the age of the appellants (Mukarrab and Arshad). As per the report submitted by the VIIIth Additional District and Sessions Judge, Moradabad both the appellants (Mukarrab and Arshad) were major on the date of the incident. After perusing the report of the District Judge, by order dated 06.04.2016, this Court has directed medical examination of the appellants (Mukarrab and Arshad) to be conducted by a duly constituted Medical Board of the AIIMS, New Delhi. Accordingly, the doctors of AIIMS have examined the appellants (Mukarrab and Arshad) and given their opinion as under:-

"Alleged history in Brief: On perusal of the documents submitted to AIIMS, it was revealed that the year of commission of crime was 1994 i.e. 22 years before today i.e. 02.05.2016.

The said accused Mukarrab alleged his date of birth to be 1st July, 1978.

The said accused Arshad has submitted the documentary proof of his age stating date of Birth as 5th February, 1979.

Examination Proceedings: Both the accused were examined after taking due informed consent along with signature and left thumb impression.

.....

Their physical, dental and radiological examinations were carried

out. X- ray examination of Skull (AP and lateral view), Sternum (AP and lateral view) and Sacrum (lateral view) were advised and performed. There was no indication for Dental X-rays since both accused were much beyond 25 years of age in any case.

Physical and Dental Examination: In both cases, general physical examination findings are consistent with findings of normal adult male. Dental examination shows presence of complete 8 sets of permanent teeth in all 4 quadrants.

Report of Radiological Examination-

Mukarrab Medical end of clavicle fused-age>more than 22 years Xiphoid process not fused with sternal body-age<40 years Manubrium not fused with sternal body-age<50 years Complete fusion of sacral bodies-age>32 years Saggital suture obliterated in posterior 1/3rd and coronal suture obliterated in lower ½-age<40 years.

Arshad Medical end of clavicle fused-age>more than 22 years Xiphoid process not fused with sternal body-age<40 years Manubrium not fused with sternal body-age<50 years Complete fusion of sacral bodies-age>32 years Saggital suture obliterated in posterior 1/3rd and coronal suture intact- age<40 years.

Opinion: Both accused have been brought for examination at AIIMS on 02.05.2016, 22 years after the alleged date of incidence. After going through the various findings of physical, dental and radiological examinations; medical board is of considered opinion that the age of accused viz. Mukarrab s/o Mr. Mulla Zafar as well as Arshad s/o Rashid is between 35-40 years on the date of examination i.e. 02.05.2016.

18. The question falling for consideration is whether the opinion of the Medical Board of AIIMS determining the

age of the appellants between 35-40 years, can be accepted or not.

19. Learned Senior Counsel for the appellants contended that the general rule about age determination is that the age determined by the Medical Board vary plus or minus two years but the Medical Board in this case had fixed the age of the appellants at 35-40 years and going by the general rule, the age of the appellants is to be estimated as 38 years on the date of medical examination and giving additional benefit of one year in lowering the age in terms of Rule 12(3)(b), age of the appellants is to be determined as 37 years as on the date of medical examination on 02.05.2016. It was, therefore, submitted that taking the age of the appellants as 37 years as on 02.05.2016 which means that at the time of commission of the offence in 1994, the appellants would have been only aged about 15 years and, therefore, the benefit of Juvenile Justice Act to be extended to the appellants. Contending that the benefit of benevolent provisions of Juvenile Justice Act and the Rules must be extended to the appellants herein, learned Senior Counsel for the appellant relied upon *Darga Ram alias Gunga v. State of Rajasthan* (2015) 2 SCC 775 wherein it has been held as under:-

“16. The medical opinion given by the duly constituted Board comprising Professors of Anatomy, Radio diagnosis and Forensic Medicine has determined his age to be “about” 33 years on the date of the examination. The Board has not been able to give the exact age of the appellant on medical examination, no matter the advances made in that field. That being so, in terms of Rule 12(3)(b) the appellant may even be entitled to the benefit of fixing his age on the lower side within a margin of one year in case the Court considers it necessary to do so in the facts and

circumstances of the case. The need for any such statutory concession may not however arise because even if the estimated age as determined by the Medical Board is taken as the correct/true age of the appellant he was just about 17 years and 2 months old on the date of the occurrence and thus a juvenile within the meaning of that expression as used in the Act aforementioned. Having said that we cannot help observing that we have not felt very comfortable with the Medical Board estimating the age of the appellant in a range of 30 to 36 years as on the date of the medical examination.

17. The general rule about age determination is that the age as determined can vary plus minus two years but the Board has in the case at hand spread over a period of six years and taken a mean to fix the age of the appellant at 33 years. We are not sure whether that is the correct way of estimating the age of the appellant. What reassures us about the estimate of age is the fact that the same is determined by a Medical Board comprising Professors of Anatomy, Radiodiagnosis and Forensic Medicine whose opinion must get the respect it deserves. That apart, even if the age of the appellant was determined by the upper extremity limit i.e. 36 years the same would have been subject to variation of plus minus 2 years meaning thereby that he could as well be 34 years on the date of the examination. Taking his age as 34 years on the date of the examination he would have been 18 years, 2 months and 7 days on the date of the occurrence but such an estimate would be only an estimate and the appellant may be entitled to additional benefit of one year in terms of lowering his age by one year in terms of Rule 12(3)(b) (*supra*) which would then bring him to be 17 years and 2 months old, therefore, a juvenile.”

22. *It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.*

27. *The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue.” [Emphasis added] From the above decision, it is clear that the purpose of Juvenile Justice Act, 2000 is not to give shelter to the accused of grave and heinous offences.”*

12. Since in this matter the proper inquiry has been done by the Juvenile Justice Board and the Juvenile Justice Board has rightly concluded that the date of birth of the revisionist is 6.3.2003. Presently as per conclusion of the Juvenile Justice Board, age of the revisionist is more than 20 years. If the statement of PW-1 is accepted as true, then the age of the revisionist is 23 years.

13. Keeping in view the above ruling of the Apex Court in *Mukarrab Etc (supra)*

that when the revisionist has attained majority, then at this stage exact age could not be determined. So the learned Juvenile Justice Board determined the age considering the material facts and circumstances. Even at this stage, the medical board could not determine the exact age of the revisionist conflict with law. So in this matter, there is no reason to disbelieve the conclusion arrived by the Juvenile Justice Board. Thus, the conclusion arrived by the appellate court is erroneous.

14. Consequently, the present revision is hereby **allowed** and the impugned order dated 31.7.2019 passed by the appellate court is hereby set aside.

(2023) 5 ILRA 1036
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.03.2023

BEFORE

THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Crl. Misc. Transfer Appl. No. 286 of 2022

Manju Bansal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
 Sri Prateek Kumar Srivastava, Sri Ritukar Gupta,
 Sri V.P. Srivastava(Sr. Advocate)

Counsel for the Respondents:
 G.A., Sri Raj Kumar Kesari

A. Criminal Law - Criminal Procedure Code, 1973 - Section 407 - Indian Penal Code, 1860-Sections 498-A, 323, 504, 506, 307, 120-B - Section 3/4 Dowry Prohibition Act –the marriage of applicant and opposite party was solemnized two years ago and the allegations are that the

applicant used to beat the opposite party for money- the dispute is of between husband and wife-The opposite party along with her daughter had gone to her parents' house and was living there.-She had given a written letter stating therein that she was not being physically hurt that is why she did not go for her medical examination, therefore, it appears that neither applicant nor opposite party received any injury- Thus, the applicant failed to show any sufficient cause for transferring the Sessions Trial- mere allegations that there is apprehension that justice will not be done in a given case does not suffice- Mere suspicion by the party that he will not get justice would not justify transfer.-There must be a reasonable apprehension to that effect- A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case-Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another-It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise.(Para 1 to 16)

B. For a transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether apprehension alleged is a reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension. Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes

necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice. (Para 13)

The transfer application is rejected. (E-6)

List of Cases cited:

1. Gurcharan Dass Chadha Vs St. of Raj.(1966) AIR SC 1418
2. Vijay Pal & Ors Vs St. of Har. & anr. (1999) 9 SCC 67
3. Anjali Ashok Sadhwani Vs Ashok Kishinchand Sadhwani (2009) AIR SC 1374
4. Fatema Vs Jafri Syed Husain @ Syed Parvez Jafferi (2009) AIR SC 1773
5. Maneka Sanjay Gandhi Vs Rani Jethmalani (1979) 4 SCC 167
6. Abdul Nazar Madani Vs St. of T.N. (2000) 6 SCC 204
7. K.P. Tiwari Vs St. of M.P. (1994) SCC (Cri) 712
8. K. Anbazhagan Vs S.P. (2004) 3 SCC 767
9. Zahira Habibulla H. Sheikh Vs St. of Guj. (2004) 4 SCC 158
10. Captain Amarinder Singh Vs Parkash Singh Badal & ors. (2009) 6 SCC 260
11. Nahar Singh Yadav & anr. Vs U.O.I. & ors. JT (2010) 12 641
12. Lalu Prasad Vs St. of Jharkhand (2013) 8 SCC 593
13. Amit Agarwal Vs Atul Gupta (2014) 11 ADJ 414 (All.)
14. Usmangani Adambhai Vahora Vs St. of Guj. & anr. (2016) 3 SCC 370

(Delivered by Hon'ble Mohd. Azhar
Husain Idrisi, J.)

1. Heard Sri V.P. Srivastava, learned Senior Counsel assisted by Sri Ritukar Gupta, learned counsel for the applicant, learned A.G.A. for the State as well as Sri Raj Kumar Kesari, learned counsel for the opposite party no.2 and perused the record.

2. The present application has been moved by the accused-applicant Sahib Bansal (husband) under Section 407 of the Code of Criminal Procedure, 1973 seeking transfer of entire proceedings of Sessions Trial No.19 of 2020 (State Vs. Manju Bansal and others), arising out of Case Crime No.567 of 2018, under Sections 498A, 504, 506, 307, 120B I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station- Pilakhuva, District Hapur, pending in the court of Additional District & Sessions Judge/Fast Track Court, Court No.1, Hapur to any other court of competent jurisdiction of another District.

3. Succinctly, the applicant's case is that the opposite party no.2- Shivangi Bansal has lodged an F.I.R. against the applicant and his family members registered as Case Crime No.567 of 2018, under Sections 498A, 504, 506, 307, 120B I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station- Pilakhuva, District Hapur, which is registered as Sessions Trial No.19 of 2020 (State Vs. Manju Bansal and others).

4. It is submitted by learned Senior Counsel that the marriage of the applicant Sahib Bansal was solemnized with opposite party no.2- Shivangi Bansal on 5.12.215 without demand of any dowry and after sometime the dispute arose between husband and wife. It is further submitted that the parents of the applicant got the applicant and opposite party no.2 separated from them and shifted them in a rented

house in New Delhi. It is further submitted that the disputes between applicant and opposite party no.2 could not be cured and under some misconception, a false and frivolous F.I.R. was lodged by opposite party no.2 against the applicant and his family members on 22.10.2018 for the offences punishable under Sections 498A, 323, 504, 506, 307, 376, 511, 120B, 377, 313, 342 I.P.C. and Section 3/4 of Dowry Prohibition Act, which was registered as Case Crime No.567 of 2018 at Police Station Pilakhuva, District Hapur.

5. It is further submitted that as a matter of fact before lodging the aforesaid F.I.R., the opposite party no.2 has made a call to the police of Police Station Subhas Place, North West, Delhi on 4.10.2018 in the morning from the house where she was living with her husband at New Delhi with the allegation that her husband was beating her. It is further submitted that the aforesaid complaint was inquired into and it was found that the marriage of applicant and opposite party no.2 was solemnized two years ago and the allegations are that the applicant used to beat the opposite party no.2 for money. It is further submitted that the applicant and opposite party no.2 were examined and it was found that the dispute is of between husband and wife. The opposite party no.2 along with her daughter had gone to her parents' house and was living there. She had given a written letter stating therein that she was not being physically hurt that is why she did not go for her medical examination, therefore, it appears that neither applicant nor opposite party no.2 received any injury. It is further submitted that the first information report was lodged against Mukesh Bansal (father-in-law), Manju Bansal (mother-in-law), Sahib Bansal (husband), Chirag Bansal (Devar) and Shipra Jain (sister-in-law), but

during investigation it was found that Chirag Bansal and Shipra Jain were falsely been implicated in the case and the charge-sheet against the applicant was submitted for offences punishable under Sections 498A, 323, 504, 506, 307 I.P.C. and Section 3/4 of D.P. Act. It is further submitted that against the aforesaid F.I.R., a Criminal Misc. Writ Petition No.31131 of 2018 was filed before this Court, whereby the arrest of accused Chirag Bansal and Shipra Jain was stayed till submission of charge-sheet and the remaining accused were directed to appear before the court below and apply for their bail. It is further submitted that against the order of this Court dated 2.11.2018 passed in Criminal Misc. Writ Petition No.31131 of 2018, the applicant preferred S.L.P. No.9714 of 2018 before Hon'ble the Supreme Court, whereby an order was passed on 15.11.2018 directing that no coercive measure will be taken against the applicants and the notice was issued to the opposite party no.2.

6. It is further submitted that vide order dated 4.1.2019, Hon'ble Supreme Court has directed the parties to explore the possibility of settlement and on 21.1.2019 it was apprised to the Hon'ble Supreme Court that there is no chance of any settlement between the parties, and therefore, the matter was proceeded further and the aforesaid S.L.P. was dismissed with a direction to the applicant to appear before the court below. It is further submitted that the father-in-law of the opposite party no.2 had applied for his bail before the court below, but the same was rejected and thereafter, he approached this Court by way of Criminal Misc. Bail Application No.42691 of 2019 and was granted bail vide order dated 24.10.2019. It is next submitted that after submission of charge-

sheet, it was challenged before this Court by moving Criminal Misc. Application No.4270 of 2020 and this Court by order dated 17.2.2020 referred the matter for mediation. It is further submitted that the applicant has also approached this Court by way of Criminal Misc. Application No.7475 of 2020, whereby the matter was referred for mediation by connecting it with Criminal Misc. Application No.4270 of 2020. It is further submitted that opposite party no.2 has initiated the proceedings of Complaint Case No.248 of 2019 (Shivangi Bansal Vs. Sahib Bansal and others), under Section 12 of the Protection of Women from Domestic Violence Act. Thereafter, the applicant has also approached this Court by filing Criminal Misc. Application No.16418 of 2020 and this case was also clubbed with Criminal Misc. Application No.7475 of 2020 and interim order was continued. It is further submitted that the opposite party no.2 has also lodged a Complaint Case No.3692 of 2020 under Section 406 I.P.C., which was rejected by the court of learned Magistrate vide order dated 21.1.2021 against all the accused except the accused Sahib Bansal. It is further submitted that against the order of learned Magistrate dated 21.1.2021, the opposite party no.2 has filed a revision in the court of Sessions Judge, Hapur, which too was dismissed vide order dated 2.8.2021. It is further submitted that the opposite party no.2 has challenged the order of Sessions Judge dated 2.8.2021 before this Court by filing petition under Article 227 of the Constitution of India, which is still pending. It is further submitted that when the mother-in-law of opposite party no.2 was exonerated from the offence punishable under Section 307 I.P.C., the opposite party no.2 moved an application under Section 319 Cr.P.C. on 10.1.2020, which was also dismissed vide order dated 27.2.2020.

7. It is further submitted that on 4.10.2018, the opposite party no.2 made a call to the applicant (husband) and demanded Rs.5 crores. It is further submitted that as per allegations of opposite party no.2, Rs.7 crores were incurred in their marriage by her father, which is false because neither she nor her father was in a position to incur such huge amount in the marriage. It is further submitted that on 24.8.2021, the applicant and his parents moved an application seeking their discharge under Section 227 Cr.P.C., which was rejected by learned Additional District & Sessions Judge/Fast Track Court No.1, Hapur vide order dated 24.8.2021.

8. It is further submitted that the applicant is resident of Pitampura, Delhi and the proceedings of the case is going on before the court of Additional District & Sessions Judge/Fast Track Court No.1 at Hapur and whenever the applicant goes to do pairvi in the case at Hapur, the opposite party no.2 along with her associates gives threat to life. It is next submitted that whenever the matter is taken up in the court, not only the opposite party no.2 but also as many as five advocates engaged by her creates hue and cry for being passed adverse orders against the applicant. It is further submitted that on 9.8.2019, the applicant and his parents were assaulted by Rajesh Goel, Gaurav Goel, Ankur Goel, Subhas and one another person regarding which an F.I.R. was lodged, which was registered as Case Crime No.402 of 2019, under Sections 323, 504, 506, 294 I.P.C. at Police Station Pilakhuva, District Hapur. It is further submitted that on 25.11.2019, the applicant moved an application to the Superintendent of Police, Hapur regarding apprehension of threat to life at the behest of family members of opposite party no.2.

It is further submitted that on 3.3.2022, the applicant no.2 moved an application stating therein that one Advocate of Sessions Division, Hapur namely Satish Chandra @ Satish Kumar Mittal has taken entire fee, but he is not attending his case and also gives threat to the applicant not to pursue the case. It is further submitted that aforesaid advocate managed to lodge an application under Section 156(3) Cr.P.C. through his colleague Vijay Pal Singh Gautam, Advocate, which was directed to be registered as complaint case vide order dated 19.8.2020. Thereafter, the aforesaid complaint was dismissed for want of prosecution vide order dated 11.12.2020 passed by Additional District Judge/Special Judge (SC/ST Act), Hapur. It is further submitted that the aforesaid Advocate namely Satish Chandra has again lodged a first information report against the applicant and his parents, which was registered as Case Crime No.18 of 2022, under Sections 420, 406, 467, 468, 506, 120B I.P.C., Police Station- Hapur Nagar, Hapur. It is next submitted that in the aforesaid facts and circumstances, the applicant has no hope of justice from the present court and if the aforesaid case is permitted to be continued in the court of Additional District & Sessions Judge/Fast Track Court No.1, Hapur, the applicant shall suffer irreparable loss.

9. Learned A.G.A. for the State as well as learned counsel for the opposite party no.2 have opposed the application and have submitted that the present application has been moved with ulterior motive to delay the trial. It is further submitted that the present application has been moved on the basis of wrong facts. It is further submitted that the opposite party no.2 is a lady and is living along with her daughter at Hapur and if the case is

transferred to any other district, it will cause undue hardship to her, therefore, the application seeking transfer of the aforesaid case deserves to be rejected.

10. The applicant is originally resident of 44 Kapil Vihar, Pitampura, North West, Delhi.

11. The instant transfer application has been moved by applicant Sahib Bansal under Section 407 Cr.P.C., which deals with transfer of criminal cases by High Court from one district to other district or from one court to another court in the same district. A resume of Section 407 Cr.P.C. may be mentioned as under:-

12. Here it is apposite to mention that in view of sub-section (1) of Section 407 Cr.P.C. a case can be transferred, whenever it is made to appear to High Court-

407. Power of High Court to transfer cases and appeals.

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

It may order-

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred

from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(v) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative: Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub- section (1) shall be made by motion, which shall, except when the applicant is the Advocate- General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub- section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with copy of the grounds on which it is made; and no order shall be made on of the merits of the application unless at least twenty- four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending

the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose: Provided that such stay shall not affect the subordinate Court's power of remand under section 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197.

13. There is plethora of cases wherein the Apex court has on several occasions considered the issue of transfer of cases, in different circumstances and after elaborate discussion with reference to the circumstances of each case laid down guidelines in this behalf, which are cited as under:-

(i) *Gurcharan Dass Chadha Vs. State of Rajasthan* AIR 1966 SC 1418, (ii) *Vijay Pal and others Vs. State of Haryana and another*, 1999 (9) SCC 67, (iii) *Anjali Ashok Sadhwani Vs. Ashok Kishinchand Sadhwani*, AIR 2009 SC 1374, (iv) *Fatema Vs. Jafri Syed Husain @ Syed Parvez Jaffer*, AIR 2009 SC 1773, (iv) *Maneka Sanjay Gandhi Vs. Rani Jethmalani*

(1979) 4 SCC 167, (vi) *Abdul Nazar Madani Vs. State of Tamil Nadu* (2000) 6 SCC 204, (vii) *K.P. Tiwari Vs. State of M.P.* 1994 SCC (Cri) 712, (viii) *K. Anbazhagan Vs. Superintendent of Police* (2004) 3 SCC 767, (ix) *Zahira Habibulla H. Sheikh Vs. State of Gujarat* (2004) 4 SCC 158, (x) *Captain Amarinder Singh Vs. Parkash Singh Badal and others* (2009) 6 SCC 260, (xi) *Nahar Singh Yadav and another Vs. Union of India and others* JT 2010 (12) 641, (xii) *Lalu Prasad Vs. State of Jharkhand* (2013) 8 SCC 593, (xiii) *Amit Agarwal Vs. Atul Gupta* 2014 (11) ADJ 414 (All.) and (xiv) *Usmangani Adambhai Vahora Vs. State of Gujarat and another* (2016) 3 SCC 370.

(i) In *Maneka Sanjay Gandhi (Supra)*, the Apex Court has observed as under:-

"2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

(ii) In the case of **Vijay Pal and others (Supra)**, the Apex Court has held that in absence of any justified reason, it is not proper and legal to exercise power under Section 407 Cr.P.C.

(iii) In the cases of **Anjali Ashok Sadhwani (Supra) and Fatema Vs. Jafri Syed Husain @ Syed Parvez Jafferri (Supra)**, it is held in matrimonial cases the convenience of wife and in particular that she has no one in her family escort her to undertake a long journey, is a good ground for transfer of cases.

(iv) In **Gurcharan Dass Chadha (Supra)**, the Apex Court held:-

"13. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge the reasonableness of the apprehension the State of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."

(v) In **Abdul Nazar Madani (Supra)**, the Apex Court observed as follows:-

"7. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 of the Cr.P.C. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any Court on even at any place, the appropriate Court may transfer the case to another Court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the Court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."

(vi) In **K.P. Tiwari (Supra)** Apex court has held :-

"4....It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more

correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive."

(vii) In **K. Anbazhagan (Supra)**, the Apex Court had held as follows:-

"30. Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."

(viii) In **Zahira Habibulla H. Sheikh (Supra)**, the Apex court propounded that fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.

(ix) In the case of **Captain Amarinder Singh (Supra)**, the Apex Court while dealing with two transfer applications preferred under section 406 of the Code, on the ground that with the change in State Government, the trial was suffering setback due to the influence of the new Chief Minister as also the lack of interest by the Public Prosecutor, has observed in paras 18, 19 and 20 as follows:-

"18. For a transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether apprehension alleged is a reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension."

19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 Cr.P.C."

20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the Court to be a reasonable one."

(x) In the case of **Nahar Singh Yadav and another (Supra)**, the Apex Court has observed as follows:-

"Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406

of the Cr.P.C. should be exercised, it is manifest from a bare reading of sub-sections (2) and (3) of the said Section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:-

(i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;

(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;

(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State Exchequer in making payment of travelling and other expenses of the official and non-official witnesses;

(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and

(v) existence of some material from which it can be inferred that the some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice."

*(xi) In **Lalu Prasad (Supra)**, Apex court has observed as under:-*"20. Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-a-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be conducted in a fair manner and the administration of justice would be fair and independent."

*(xii) This Court in case of **Amit Agarwal (Supra)**, considering the scope of transfer in such a matter has held that:-*

*"24. Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. (**Rajkot Cancer Society vs. Municipal Corporation, Rajkot, AIR 1988 Gujarat 63; Pasupala Fakruddin and Anr. vs. Jamia Masque and***

Anr., AIR 2003 AP 448; and, Nandini Chatterjee vs. Arup Hari Chatterjee, AIR 2001 Calcutta 26)

25. *Where a transfer is sought making allegations regarding integrity or influence etc. in respect of the Presiding Officer of the Court, this Court has to be very careful before passing any order of transfer.*

26. *In the matters where reckless false allegations are attempted to be made to seek some favourable order, either in a transfer application, or otherwise, the approach of Court must be strict and cautious to find out whether the allegations are bona fide, and, if treated to be true on their face, in the entirety of circumstances, can be believed to be correct, by any person of ordinary prudence in those circumstances. If the allegations are apparently false, strict approach is the call of the day so as to maintain not only discipline in the courts of law but also to protect judicial officers and maintain their self esteem, confidence and above all the majesty of institution of justice."*

(xiii) The Apex Court in case of **Usmangani Adambhai Vahora (Supra)**, considering the previous judgments of the Supreme Court has held:-

"Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice."

14. On the basis of the law enunciated and guidelines laid down by the Apex Court in

various decisions, the legal scenario emerges may be summarized as under:- A free and fair trial sine qua non of Article 21 of the Constitution. It is also established principle of law in dispensation of justice is that justice should not only be done but it should be seen to have been done. If criminal trial is not free and fair, criminal justice system would be at stake shaking the confidence of the public in the system and rule of law. A fair trial means a trial before an impartial judge, a fair prosecutor and atmosphere of the judicial calm. Fair trial also means in which bias or prejudice for or against the party or witness.

15. Upon hearing learned counsel for the parties and perusal of record, I find that the applicant has failed to show any sufficient cause for transferring the Sessions Trial No.19 of 2020 (State Vs. Manju Bansal and others), arising out of Case Crime No.567 of 2018, under Sections 498A, 504, 506, 307, 120B I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station- Pilakhuva, District Hapur, pending in the court of Additional District & Sessions Judge/Fast Track Court, Court No.1, Hapur. The application is frivolous, vexatious and deserves to be rejected.

16. The present transfer application is accordingly, **rejected**.

(2023) 5 ILRA 1046
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.04.2023

BEFORE

THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Crl. Misc. Transfer Appl. No. 620 of 2022

Sonam Rai		...Applicant
	Versus	
State of U.P. & Anr.		...Respondents

Counsel for the Applicant:

Kusum Lata

Counsel for the Respondents:

G.A., Sri Chandra Kumar Rai

A. Criminal Law - Criminal Procedure Code, 1973-Sections 407, 125 & 128- The applicant has filed an application under Section 125 Cr.P.C. against the opposite party no. 2 for providing Rs. 25,000/- per month to her and her minor daughter as maintenance allowance-applicant sought the transfer of proceedings from Family court Azamgarh to the Family court Mau citing safety concerns and financial hardship-The family court Azamgarh awarded her Rs. 4000 per month-due to non-payment, she filed for recovery-the applicant claimed threats and harassment from her husband during court appearance in Azamgarh-she also expressed financial hardship, inability to travel alone with her minor child and her father's inability to accompany her due to old age- Resultantly, the transfer application is allowed. (Para 1 to 16)

b. Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice. (Para 10)

The application is allowed. (E-6)**List of Cases cited:**

1. Gurcharan Dass Chadha Vs St. of Raj. (1966) AIR SC 1418
2. Vijay Pal & ors Vs St. of Har. & anr. (1999) 9 SCC 67
3. Anjali Ashok Sadhwani Vs Ashok Kishinchand Sadhwani (2009) AIR SC 1374
4. Fatema Vs Jafri Syed Husain @ Syed Parvez Jafferri (2009) AIR SC 1773
5. Maneka Sanjay Gandhi Vs Rani Jethmalani (1979) 4 SCC 167
6. Abdul Nazar Madani Vs St. of T. N. (2000) 6 SCC 204
7. K.P. Tiwari Vs St. of M.P. (1994) SCC (Cri) 712
8. K. Anbazhagan Vs S.P. (2004) 3 SCC 767
9. Zahira Habibulla H. Sheikh Vs St. of Guj. (2004) 4 SCC 158
10. Captain Amarinder Singh Vs Parkash Singh Badal & ors (2009) 6 SCC 260
11. Nahar Singh Yadav & anr. Vs UOI & Ors JT (2010) 12 641
12. Lalu Prasad Vs St. of Jhar. (2013) 8 SCC 593
13. Amit Agarwal Vs Atul Gupta (2014) 11 ADJ 414 All
14. Usmangani Adambhai Vahora Vs St. of Guj. & anr. (2016) 3 SCC 370

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard learned counsel for the revisionist and learned A.G.A. for the State.

2. As per office report dated 16.01.2023, notice issued by this Court vide order dated 13.12.2022 has been served upon opposite party no. 2 but despite service of notice, no one has appeared on his behalf. Therefore, the Court is proceeding to decide the case on merits.

3. The present transfer application has been moved under Section 407 Cr.P.C. against the opposite party no. 2 Rakesh Rai with prayer to transfer the entire proceedings of Case No. 173 of 2020 (Sonam Rai Vs. Rakesh Rai), under Section 128 Cr.P.C., Police Station Tahabarpur, District Azamgarh, pending before the learned Principal Judge, Family Court, Azamgarh to the court of competent jurisdiction at District Mau.

4. Succinctly, the applicant case is that applicant has filed an application under Section 125 Cr.P.C. against the opposite party no. 2 for providing Rs. 25,000/- per month to her and her minor daughter Ruchi as maintenance allowance. This application is registered as Case. No. 442 of 2019 (Sonam Rai and others Vs. Rakesh Rai) in the court of Principal Judge, Family Court, Azamgarh.

5. Notices were issued to opposite party but none appeared in the trial court to file objection in the aforesaid proceedings. Ultimately, after considering all the material evidence available on record, learned Principal Judge, Family Court, Azamgarh has allowed the aforesaid application exparte vide order dated 09.12.2020, directing the opposite party to pay Rs. 4,000/- per month to the applicant from the date of institution of application. In compliance of the aforesaid order dated 09.12.2020, the opposite party no. 2 has not

paid any maintenance allowance till December, 2020 and total amount of Rs. 74,000/- is remained to be paid. Thereafter, the applicant filed an application under Section 128 Cr.P.C. on 16.12.2020 before the court concerned for recovery of balance amount of Rs.74,000/- from the opposite party no. 2, which is still pending. After filing the aforesaid application under Section 128 Cr.P.C., the same was registered as Case No. 173 of 2020 in which the objections of opposite party no. 2 were invited. Later on, recovery warrant has been issued on 17.03.2021. In compliance of the impugned order dated 17.03.2021, the opposite party no. 2 has paid an amount of Rs.25,000/- in the account of the applicant, therefore, recovery warrant was cancelled by learned trial court vide its order dated 18.03.2021. Thereafter the opposite party no. 2 (husband) prayed to pay remaining amount till date. Again recovery warrant was issued against the opposite party no. 2 on 05.08.2022. The applicant is poor lady and she has no source of income and depends upon the income of her father, who also bears the liability of other family members. The applicant has one minor daughter aged about 4 years with her and she cannot attend the court proceedings at District Azamgarh on each and every date so she wants to transfer the entire proceedings at District Mau. Father of the applicant is an old person, who is unable to attend the court on every date with the applicant and in absence of him, the opposite party no. 2 was regularly threatened her when she goes to attend the court proceeding alone. In that circumstances, the life of the applicant is not safe seeing the previous conduct of the opposite party no. 2. She is ready to face trial if the case is transferred to any court at District Mau. Due to fear of the opposite party no. 2 as well as his family members,

she do not want to face the trial at District Azamgarh. The opposite party no. 2 has good relation with the anti social elements and he is waiting an occasion to take revenge from the applicant if she goes to Azamgarh for doing pairvi of the case in question. The applicant has no source of income and she is not in a position to bear the expenses for doing pairvi of the case pending before the learned Principal Judge, Family Court, Azamgarh. In these circumstances, the entire proceedings of the case pending in the court of Principal Judge, Family Court, Azamgarh may be transferred to the competent court at District Mau for fair trial.

6. The applicant is originally resident of village Kothiyar, Police Station Tahabarpur, District Azamgarh. Presently she is resident of Hakikatpura, Police Station Dakshin Tola, Tehsil Maunath Bhanjan, District Mau while the opposite party no. 2 (husband) is resident of village Kothiyar, Police Station Tahabarpur, District Azamgarh.

7. Learned A.G.A. vehemently opposed the submissions made by learned counsel for the applicant, but could not dispute the aforesaid facts.

8. The instant transfer application has been moved by applicant Sonam Rai under Section 407 Cr.P.C., which deals with transfer of criminal cases by High Court from one district to other district or from one court to another court in the same district. A resume of Section 407 Cr.P.C. may be mentioned as under:-

9. Here it is apposite to mention that in view of sub-section (1) of Section 407 Cr.P.C. a case can be transferred, whenever it is made to appear to High Court-

407. Power of High Court to transfer cases and appeals.

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

It may order-

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative: Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate- General of the

State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with copy of the grounds on which it is made; and no order shall be made on of the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose: Provided that such stay shall not affect the subordinate Court's power of remand under section 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have

observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197.

10. There is plethora of cases wherein the Apex court has on several occasions considered the issue of transfer of cases, in different circumstances and after elaborate discussion with reference to the circumstances of each case laid down guidelines in this behalf, which are cited as under:-

(i) *Gurcharan Dass Chadha Vs. State of Rajasthan* AIR 1966 SC 1418, (ii) *Vijay Pal and others Vs. State of Haryana and another*, 1999 (9) SCC 67, (iii) *Anjali Ashok Sadhwani Vs. Ashok Kishinchand Sadhwani*, AIR 2009 SC 1374, (iv) *Fatema Vs. Jafri Syed Husain @ Syed Parvez Jafferi*, AIR 2009 SC 1773, (iv) *Maneka Sanjay Gandhi Vs. Rani Jethmalani* (1979) 4 SCC 167, (vi) *Abdul Nazar Madani Vs. State of Tamil Nadu* (2000) 6 SCC 204, (vii) *K.P. Tiwari Vs. State of M.P.* 1994 SCC (Cri) 712, (viii) *K. Anbazhagan Vs. Superintendent of Police* (2004) 3 SCC 767, (ix) *Zahira Habibulla H. Sheikh Vs. State of Gujarat* (2004) 4 SCC 158, (x) *Captain Amarinder Singh Vs. Parkash Singh Badal and others* (2009) 6 SCC 260, (xi) *Nahar Singh Yadav and another Vs. Union of India and others* JT 2010 (12) 641, (xii) *Lalu Prasad Vs. State of Jharkhand* (2013) 8 SCC 593, (xiii) *Amit Agarwal Vs. Atul Gupta* 2014 (11) ADJ 414 (All.) and (xiv) *Usmangani Adambhai Vahora Vs. State of Gujarat and another* (2016) 3 SCC 370.

(i) In *Maneka Sanjay Gandhi* (Supra), the Apex Court has observed as under:-

"2. Assurance of a fair trial is the first imperative of the dispensation of justice

and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

(ii) In the case of *Vijay Pal and others (Supra)*, the Apex Court has held that in absence of any justified reason, it is not proper and legal to exercise power under Section 407 Cr.P.C.

(iii) In the cases of *Anjali Ashok Sadhwani (Supra)* and *Fatema Vs. Jafri Syed Husain @ Syed Parvez Jafferi (Supra)*, it is held in matrimonial cases the convenience of wife and in particular that she has no one in her family escort her to undertake a long journey, is a good ground for transfer of cases.

(iv) In *Gurcharan Dass Chadha (Supra)*, the Apex Court held:-

"13. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that

it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge the reasonableness of the apprehension the State of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."

(v) In ***Abdul Nazar Madani (Supra)***, the Apex Court observed as follows:-

"7. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 of the Cr.P.C. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any Court or even at any place, the appropriate Court may transfer the case to another Court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is

also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the Court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."

(vi) In **K.P. Tiwari (Supra)** Apex court has held :-

"4....It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive."

(vii) In **K. Anbazhagan (Supra)**, the Apex Court had held as follows:-

"30. Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."

(viii) In **Zahira Habibulla H. Sheikh (Supra)**, the Apex court propounded that fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.

(ix) In the case of **Captain Amarinder Singh (Supra)**, the Apex Court while dealing with two transfer applications preferred under section 406 of the Code, on the ground that with the change in State Government, the trial was suffering setback due to the influence of the new Chief Minister as also the lack of interest by the Public Prosecutor, has observed in paras 18, 19 and 20 as follows:-

"18. For a transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether apprehension alleged is a reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.

19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State

under Section 407 and anywhere in the country under Section 406 Cr.P.C.

20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the Court to be a reasonable one."

(x) In the case of **Nahar Singh Yadav and another (Supra)**, the Apex Court has observed as follows:-

"Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 of the Cr.P.C. should be exercised, it is manifest from a bare reading of sub-sections (2) and (3) of the said Section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:-

(i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;

(ii) when there is material to show that the accused may influence the prosecution

witnesses or cause physical harm to the complainant;

(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State Exchequer in making payment of travelling and other expenses of the official and non-official witnesses;

(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and

(v) existence of some material from which it can be inferred that some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice."

(xi) In **Lalu Prasad (Supra)**, Apex court has observed as under:-

"20. Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-a-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be

conducted in a fair manner and the administration of justice would be fair and independent."

(xii) This Court in case of **Amit Agarwal (Supra)**, considering the scope of transfer in such a matter has held that:-

"24. Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. (Rajkot Cancer Society vs. Municipal Corporation, Rajkot, AIR 1988 Gujarat 63; Pasupala Fakruddin and Anr. vs. Jamia Masque and Anr., AIR 2003 AP 448; and, Nandini Chatterjee vs. Arup Hari Chatterjee, AIR 2001 Calcutta 26)

25. Where a transfer is sought making allegations regarding integrity or influence etc. in respect of the Presiding Officer of the Court, this Court has to be very careful before passing any order of transfer.

26. In the matters where reckless false allegations are attempted to be made to seek some favourable order, either in a transfer application, or otherwise, the approach of Court must be strict and cautious to find out whether the allegations are bona fide, and, if treated to be true on their face, in the entirety of circumstances, can be believed to be correct, by any person of ordinary prudence in those circumstances. If the allegations are apparently false, strict approach is the call of the day so as to maintain not only

discipline in the courts of law but also to protect judicial officers and maintain their self esteem, confidence and above all the majesty of institution of justice."

(xiii) The Apex Court in case of **Usmangani Adambhai Vahora (Supra)**, considering the previous judgments of the Supreme Court has held:-

"Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice."

11. On the basis of the law enunciated and guidelines laid down by the Apex Court in various decisions, the legal scenario emerges may be summarized as under:- A free and fair trial sine qua non of Article 21 of the Constitution. It is also established principle of law in dispensation of justice is that justice should not only be done but it should be seen to have been done. If criminal trial is not free and fair, criminal justice system would be at stake shaking the confidence of the public in the system and rule of law. A fair trial means a trial before an impartial judge, a fair prosecutor and atmosphere of the judicial calm. Fair trial also means in which bias or prejudice for or against the party or witness.

12. Under Section 407 Cr.P.C. when it is shown that public confidence in the fairness of the trial would be undermined any party can seek transfer of the case

within the State. Thus, the court may transfer the case to another court where it feels that fair and proper trial is conducive for deciding a transfer petition, the court has also to see convenience of the parties and witnesses to be adduced at trial if also relevant consideration. The convenience of the parties is a misconceived motion of apprehension where the convenience of not only of prosecution, the accused and witness in the larger interest of the society. The apprehension that the applicant will not meet the ends of justice and convenience and availability of legal services, the court may exercise its power of transfer. This is cardinal principle of jurisprudence that although circumstances may be myriad and may vary case to case. The court has to test petitioner's ground for transfer on the touchstone bearing in the mind the rule that normally complainant has right to choose any court having jurisdiction even so the process of justice should not harass the parties and from that angle the court may weigh. The apprehension not receiving justice must be reasonable apprehension based on strong material and not hypothetical merely making vague allegation that there is apprehension in the mind of the applicant that justice will not be given in a given case and not lame excuse or for delaying tactics.

13. To analyse the grounds, facts and circumstances, submissions of learned counsel for the parties and guidelines laid down by the Apex Court, it emerges that at present the applicant is residing in District Mau while the opposite party no. 2 (husband) is resident of District Azamgarh. It is not disputed that both the cases, filed by applicant are pending in the District Azamgarh.

14. Learned counsel for the applicant submits that she is a poor lady having no

source of income and depends upon the income of her father, who also bears the liability of other family members. The applicant herself has a minor daughter aged about four years. The father of the applicant is an old person who is unable to attend the court on every date with the applicant and in absence of him, the opposite party no. 2 regularly threatened her, when she goes to attend the court alone. Thus, life of the applicant is not safe in view of the previous conduct of the opposite party no. 2. Due to fear of opposite party no. 2 as well as his family members, she could not face the trial in District Azamgarh. In these circumstances, there is apprehension to her life keeping in view the previous conduct of opposite party no. 2. The opposite party no. 2 has good relation with anti social elements and he is waiting the occasion to take revenge from the applicant if she goes to Azamgarh for doing pairvi of the case in question. She is also not able to bear the expenses of pairvi of the case and opposite party is not paying the awarded maintenance allowance to her.

15. Considering the facts and circumstances of the case and submissions of learned counsel for the parties in the light of guidelines laid down by the Apex court, I find that applicant has filed a maintenance petitioner before the Principal Judge, Family Court, Azamgarh wherein she was granted maintenance allowance. Now she has instituted an application under Section 128 Cr.P.C. for recovery of maintenance allowance. Applicant has no source of income independently. She has a baby of four years who is also dependent upon her. She is totally dependent in all respect on her father who is living presently at District Mau. Although she did not disclose the income of her father nevertheless it is the duty of the opposite

party no. 2 maintain the applicant and her child. It has been argued that opposite party no. 2 has paid only Rs. 25,000/- and Rs. 74,000/- is still in arrears towards maintenance. In these circumstances, it is clear that the applicant has no sufficient income to maintain herself, her minor daughter and meet expenses of the litigation. It is axiomatic that in the present days of high inflammation, it is difficult to lead a life without sufficient income. There is another case which has been instituted at District Azamgarh by the applicant under Sections 498-A, 323, 504, 506, 120-B IPC and Section 3/4 Dowry Prohibition Act. Thus, she is living in her parental home due to this matrimonial dispute between both the parties. She has to attend the proceedings at Azamgarh in both the cases. It has been submitted that the father is to look her and her daughter after only. It is also submitted that he is an old man and unable to company her on the each and every date fixed at Azamgarh. This compels the applicant to go the court at Azamgarh. Seizing the opportunity of her loneliness in the court, the opposite party no. 2 may mishandle and cause injuries and he even intimidate her life. Although there is no any other proof to substantiate these grounds nevertheless in the affidavit filed in support of transfer application confirm these allegations. Moreover, District Mau and Azamgarh are situated nearby each other. So the cases may conveniently be attended at Mau. Thus, in the opinion of this court apprehension expressed by the applicant is reasonable. In view of the above facts and legal scenario, I am of the view that it is in the interest of justice that the instant transfer application should be allowed.

16. Resultantly, the transfer application is allowed. Let the Case No.

173 of 2020 (Sonam Rai Vs. Rakesh Rai), under Section 128 Cr.P.C., Police Station Tahabarpur, District Azamgarh, pending before the learned Principal Judge, Family Court, Azamgarh be transferred to the Principal Judge, Family Court, Mau for disposal in accordance with law within three months.

17. Let the copy of the order be sent to the Principal Judge, Family Court, Mau for necessary action and compliance.

(2023) 5 ILRA 1056
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.04.2023

BEFORE

THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Crl. Misc. Transfer Appl. No. 644 of 2022

Sonam Rai	...Applicant
	Versus
State of U.P. & Anr.	...Respondents

Counsel for the Applicant:
 Kusum Lata

Counsel for the Respondents:
 G.A., Sri Chandra Kumar Rai

A. Criminal Law - Criminal Procedure Code, 1973 - Section 407 - Indian Penal Code, 1860-Sections 498-A, 323, 504, 506 & 120-B - Section 3/4 Dowry Prohibition Act-applicant has filed a complaint and she has also instituted an application under Section 128 Cr.P.C. for recovery of maintenance allowance-the applicant has no sufficient income to maintain herself, her minor daughter and meet expenses of the litigation-she is living in her parental home due to this matrimonial dispute between both the parties-She has to attend the proceedings at Azamgarh in both the cases-Her father is an old man

and unable to company her on each and every date fixed at Azamgarh-Seizing the opportunity of her loneliness in the court, the opposite party may mishandle and cause injuries and he even intimidate her life-the apprehension expressed by the applicant in her affidavit is reasonable- In view of the these facts and legal scenario the instant transfer application is allowed.(Para 1 to 16)

B. Under Section 407 Cr.P.C. when it is shown that public confidence in the fairness of the trial would be undermined any party can seek transfer of the case within the State. Thus, the court may transfer the case to another court where it feels that fair and proper trial is conducive for deciding a transfer petition, the court has also to see convenience of the parties and witnesses to be adduced at trial if also relevant consideration. The convenience of the parties is a misconceived motion of apprehension where the convenience of not only of prosecution, the accused and witness in the larger interest of the society. The apprehension that the applicant will not meet the ends of justice and convenience and availability of legal services, the court may exercise its power of transfer. This is cardinal principle of jurisprudence that although circumstances may be myriad and may vary case to case. The court has to test petitioner's ground for transfer on the touchstone bearing in the mind the rule that normally complainant has right to choose any court having jurisdiction even so the process of justice should not harass the parties and from that angle the court may weigh. The apprehension not receiving justice must be reasonable apprehension based on strong material and not hypothetical merely making vague allegation that there is apprehension oin the mind of the applicant that justice will not be given in a given case and not lame excuse or for delaying tactics.(Para 12)

The transfer application is allowed. (E-6)

List of Cases cited:

1. Gurcharan Dass Chadha Vs St. of Raj.(1966) AIR SC 1418
2. Vijay Pal & ors. Vs St. of Hary. & anr. (1999) 9 SCC 67
3. Anjali Ashok Sadhwani Vs Ashok Kishinchand Sadhwani (2009) AIR SC 1374
4. Fatema Vs Jafri Syed Husain @ Syed Parvez Jafferri (2009) AIR SC 1773
5. Maneka Sanjay Gandhi Vs Rani Jethmalani (1979) 4 SCC 167
6. Abdul Nazar Madani Vs St. of T.N.(2000) 6 SCC 204
7. K.P. Tiwari Vs St. of M.P. (1994) SCC (Cri) 712
8. K. Anbazhagan Vs S.P. (2004) 3 SCC 767
9. Zahira Habibulla H. Sheikh Vs St. of Guj. (2004) 4 SCC 158
10. Captain Amarinder Singh Vs Parkash Singh Badal & ors. (2009) 6 SCC 260
11. Nahar Singh Yadav & anr. Vs U.O.I. & ors. JT (2010) 12 641
12. Lalu Prasad Vs St. of Jharkhand (2013) 8 SCC 593
13. Amit Agarwal Vs Atul Gupta (2014) 11 ADJ 414 (All.)
14. Usangani Adambhai Vahora Vs St. of Guj. & anr. (2016) 3 SCC 370

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard learned counsel for the revisionist and learned A.G.A. for the State.
2. As per office report dated 17.02.2023/4.3.2023, notice issued by this Court vide order dated 12.1.2023 has been served upon opposite party nos. 2 to 6 but despite service of notice, no one has

appeared on their behalf. Therefore, the Court is proceeding to decide the case on merits.

3. The present transfer application has been moved under Section 407 Cr.P.C. against the opposite party nos. 2 to 6 with prayer to transfer the entire proceedings of Case No. 2554 of 2019 (Sonam Rai Vs. Rakesh Rai & others), under Sections 498-A, 323, 504, 506, 120-B IPC and Section 3/4 Dowry Prohibition Act, Police Station Tahabarpur, District Azamgarh, pending before the learned Judicial Magistrate, Azamgarh to the court of competent jurisdiction at District Mau.

4. Succinctly, the applicant's case is that applicant has filed a complaint on 27.8.2019 under Sections 498-A, 323, 504, 506, 120-B IPC and Section 3/4 Dowry Prohibition Act against the opposite party nos. 2 to 6 for summoning them.

5. Since 27.8.2019 the police has not submitted any report and inspite of the statement under Sections 200 and 202 Cr.P.C. the opposite party nos. 2 to 6 have not been summoned.

6. The applicant is originally resident of village Kothiyar, Police Station Tahabarpur, District Azamgarh. Presently she is resident of Hakikatpura, Police Station Dakshin Tola, Tehsil Maunath Bhanjan, District Mau while the opposite party no. 2 (husband) is resident of village Kothiyar, Police Station Tahabarpur, District Azamgarh.

7. Learned A.G.A. vehemently opposed the submissions made by learned counsel for the applicant, but could not dispute the aforesaid facts.

8. The instant transfer application has been moved by applicant Sonam Rai under Section 407 Cr.P.C., which deals with transfer of criminal cases by High Court from one district to other district or from one court to another court in the same district. A resume of Section 407 Cr.P.C. may be mentioned as under:-

9. Here it is apposite to mention that in view of sub-section (1) of Section 407 Cr.P.C. a case can be transferred, whenever it is made to appear to High Court-

407. Power of High Court to transfer cases and appeals.

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

It may order-

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2)The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative: Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3)Every application for an order under sub- section (1) shall be made by motion, which shall, except when the applicant is the Advocate- General of the State, be supported by affidavit or affirmation.

(4)When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub- section (7).

(5)Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with copy of the grounds on which it is made; and no order shall be made on of the merits of the application unless at least twenty- four hours have elapsed between the giving of such notice and the hearing of the application.

(6)Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose: Provided that such stay shall not affect the subordinate Court's power of remand under section 309.

(7)Where an application for an order under sub- section (1) is dismissed, the

High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8)When the High Court orders under sub- section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9)Nothing in this section shall be deemed to affect any order of Government under section 197.

10. There is plethora of cases wherein the Apex court has on several occasions considered the issue of transfer of cases, in different circumstances and after elaborate discussion with reference to the circumstances of each case laid down guidelines in this behalf, which are cited as under:-

(i) Gurcharan Dass Chadha Vs. State of Rajasthan AIR 1966 SC 1418, (ii) Vijay Pal and others Vs. State of Haryana and another, 1999 (9) SCC 67, (iii) Anjali Ashok Sadhwani Vs. Ashok Kishinchand Sadhwani, AIR 2009 SC 1374, (iv) Fatema Vs. Jafri Syed Husain @ Syed Parvez Jafferi, AIR 2009 SC 1773, (iv) Maneka Sanjay Gandhi Vs. Rani Jethmalani (1979) 4 SCC 167, (vi) Abdul Nazar Madani Vs. State of Tamil Nadu (2000) 6 SCC 204, (vii) K.P. Tiwari Vs. State of M.P. 1994 SCC (Cri) 712, (viii) K. Anbazhagan Vs. Superintendent of Police (2004) 3 SCC 767, (ix) Zahira Habibulla H. Sheikh Vs. State of Gujarat (2004) 4 SCC 158, (x) Captain Amarinder Singh Vs. Parkash

Singh Badal and others (2009) 6 SCC 260, (xi) *Nahar Singh Yadav and another Vs. Union of India and others* JT 2010 (12) 641, (xii) *Lalu Prasad Vs. State of Jharkhand* (2013) 8 SCC 593, (xiii) *Amit Agarwal Vs. Atul Gupta* 2014 (11) ADJ 414 (All.) and (xiv) *Usmangani Adambhai Vahora Vs. State of Gujarat and another* (2016) 3 SCC 370.

(I) In ***Maneka Sanjay Gandhi (Supra)***, the Apex Court has observed as under:-

"2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

(ii) In the case of ***Vijay Pal and others (Supra)***, the Apex Court has held that in absence of any justified reason, it is not proper and legal to exercise power under Section 407 Cr.P.C.

(iii) In the cases of ***Anjali Ashok Sadhwani (Supra) and Fatema Vs. Jafri***

Syed Husain @ Syed Parvez Jafferi (Supra), it is held in matrimonial cases the convenience of wife and in particular that she has no one in her family escort her to undertake a long journey, is a good ground for transfer of cases.

(iv) In ***Gurcharan Dass Chadha (Supra)***, the Apex Court held:-

"13. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge the reasonableness of the apprehension the State of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."

(v) In ***Abdul Nazar Madani (Supra)***, the Apex Court observed as follows:-

"7. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 of the Cr.P.C. The apprehension of not getting a fair and impartial inquiry or trial is required to be

reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any Court on even at any place, the appropriate Court may transfer the case to another Court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the Court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."

(vi) In *K.P. Tiwari (Supra)* Apex court has held :-

"4....It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive."

(vii) In *K. Anbazhagan (Supra)*, the Apex Court had held as follows:-

"30. Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not

free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."

(viii) In *Zahira Habibulla H. Sheikh (Supra)*, the Apex court propounded that fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.

(ix) In the case of *Captain Amarinder Singh (Supra)*, the Apex Court while dealing with two transfer applications preferred under section 406 of the Code, on the ground that with the change in State Government, the trial was suffering setback due to the influence of the new Chief Minister as also the lack of interest by the Public Prosecutor, has observed in paras 18, 19 and 20 as follows:-

"18. For a transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether apprehension alleged is a reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.

19. Assurance of a fair trial is the first imperative of the dispensation of justice.

The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 Cr.P.C.

20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the Court to be a reasonable one."

(x) In the case of **Nahar Singh Yadav and another (Supra)**, the Apex Court has observed as follows:-

"Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 of the Cr.P.C. should be exercised, it is manifest from a bare reading of sub-sections (2) and (3) of the said Section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:-

(i) when it appears that the State machinery or prosecution is acting hand in

glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;

(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;

(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State Exchequer in making payment of travelling and other expenses of the official and non-official witnesses;

(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and

(v) existence of some material from which it can be inferred that the some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice."

(xi) In **Lalu Prasad (Supra)**, Apex court has observed as under:-

"20. Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-a-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or

a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be conducted in a fair manner and the administration of justice would be fair and independent."

(xii) This Court in case of **Amit Agarwal (Supra)**, considering the scope of transfer in such a matter has held that:-

"24. Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. (Rajkot Cancer Society vs. Municipal Corporation, Rajkot, AIR 1988 Gujarat 63; Pasupala Fakruddin and Anr. vs. Jamia Masque and Anr., AIR 2003 AP 448; and, Nandini Chatterjee vs. Arup Hari Chatterjee, AIR 2001 Calcutta 26)

25. Where a transfer is sought making allegations regarding integrity or influence etc. in respect of the Presiding Officer of the Court, this Court has to be very careful before passing any order of transfer.

26. In the matters where reckless false allegations are attempted to be made to seek some favourable order, either in a transfer application, or otherwise, the approach of Court must be strict and cautious to find out whether the allegations are bona fide, and, if treated to be true on

their face, in the entirety of circumstances, can be believed to be correct, by any person of ordinary prudence in those circumstances. If the allegations are apparently false, strict approach is the call of the day so as to maintain not only discipline in the courts of law but also to protect judicial officers and maintain their self esteem, confidence and above all the majesty of institution of justice."

(xiii) The Apex Court in case of **Usmangani Adambhai Vahora (Supra)**, considering the previous judgments of the Supreme Court has held:-

"Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice."

11. On the basis of the law enunciated and guidelines laid down by the Apex Court in various decisions, the legal scenario emerges may be summarized as under:- A free and fair trial sine qua non of Article 21 of the Constitution. It is also established principle of law in dispensation of justice is that justice should not only be done but it should be seen to have been done. If criminal trial is not free and fair, criminal justice system would be at stake shaking the confidence of the public in the system and rule of law. A fair trial means a trial before an impartial judge, a fair prosecutor and atmosphere of the judicial calm. Fair trial also means in which bias or prejudice for or against the party or witness.

12. Under Section 407 Cr.P.C. when it is shown that public confidence in the fairness of the trial would be undermined any party can seek transfer of the case within the State. Thus, the court may transfer the case to another court where it feels that fair and proper trial is conducive for deciding a transfer petition, the court has also to see convenience of the parties and witnesses to be adduced at trial if also relevant consideration. The convenience of the parties is a misconceived motion of apprehension where the convenience of not only of prosecution, the accused and witness in the larger interest of the society. The apprehension that the applicant will not meet the ends of justice and convenience and availability of legal services, the court may exercise its power of transfer. This is cardinal principle of jurisprudence that although circumstances may be myriad and may vary case to case. The court has to test petitioner's ground for transfer on the touchstone bearing in the mind the rule that normally complainant has right to choose any court having jurisdiction even so the process of justice should not harass the parties and from that angle the court may weigh. The apprehension not receiving justice must be reasonable apprehension based on strong material and not hypothetical merely making vague allegation that there is apprehension in the mind of the applicant that justice will not be given in a given case and not lame excuse or for delaying tactics.

13. To analyse the grounds, facts and circumstances, submissions of learned counsel for the parties and guidelines laid down by the Apex Court, it emerges that at present the applicant is residing in District Mau while the opposite party no. 2 (husband) is resident of District Azamgarh. It is not disputed that both the cases, filed

by applicant are pending in the District Azamgarh.

14. Learned counsel for the applicant submits that she is a poor lady having no source of income and depends upon the income of her father, who also bears the liability of other family members. The applicant herself has a minor daughter aged about four years. The father of the applicant is an old person who is unable to attend the court on every date with the applicant and in absence of him, the opposite party nos. 2 to 6 regularly threatened her, when she goes to attend the court alone. Thus, life of the applicant is not safe in view of the previous conduct of the opposite party nos. 2 to 6. Due to fear of opposite party nos. 2 to 6 as well as their family members, she could not face the trial in District Azamgarh. In these circumstances, there is apprehension to her life keeping in view the previous conduct of opposite party nos. 2 to 6. The opposite party nos. 2 to 6 have good relation with anti social elements and they are waiting the occasion to take revenge from the applicant if she goes to Azamgarh for doing pairvi of the case in question. She is also not able to bear the expenses of pairvi of the case.

15. Considering the facts and circumstances of the case and submissions of learned counsel for the parties in the light of guidelines laid down by the Apex court, I find that applicant has filed a complaint under Sections 498-A, 323, 504, 506, 120-B IPC and Section 3/4 Dowry Prohibition Act, Police Station Tahabarpur, District Azamgarh before the Judicial Magistrate, Azamgarh wherein opposite party nos. 2 to 6 were summoned. Now she has also instituted an application under Section 128 Cr.P.C. for recovery of maintenance allowance. Applicant has no

source of income independently. She has a baby of four years who is also dependent upon her. She is totally dependent in all respect on her father who is living presently at District Mau. Although she did not disclose the income of her father nevertheless it is the duty of the opposite party no. 2 maintain the applicant and her child. It has been argued that opposite party no. 2 has paid only Rs. 25,000/- and Rs. 74,000/- is still in arrears towards maintenance. In these circumstances, it is clear that the applicant has no sufficient income to maintain herself, her minor daughter and meet expenses of the litigation. It is axiomatic that in the present days of high inflammation, it is difficult to lead a life without sufficient income. Thus, she is living in her parental home due to this matrimonial dispute between both the parties. She has to attend the proceedings at Azamgarh in both the cases. It has been submitted that the father is to look her and her daughter after only. It is also submitted that he is an old man and unable to company her on the each and every date fixed at Azamgarh. This compels the applicant to go the court at Azamgarh. Seizing the opportunity of her loneliness in the court, the opposite party no. 2 may mishandle and cause injuries and he even intimidate her life. Although there is no any other proof to substantiate these grounds nevertheless in the affidavit filed in support of transfer application confirm these allegations. Moreover, District Mau and Azamgarh are situated nearby each other. So the cases may conveniently be attended at Mau. Thus, in the opinion of this court apprehension expressed by the applicant is reasonable. In view of the above facts and legal scenario, I am of the view that it is in the interest of justice that the instant transfer application should be allowed.

16. Resultantly, the transfer application is **allowed**. Let the Case No.

2554 of 2019 (Sonam Rai Vs. Rakesh Rai & others), under Sections 498-A, 323, 504, 506, 120-B IPC and Section 3/4 Dowry Prohibition Act, Police Station Tahabarpur, District Azamgarh be transferred from Judicial Magistrate, Azamgarh to the competent court at District Mau for disposal in accordance with law within three months.

17. Let the copy of the order be sent to the Judicial Magistrate, Azamgarh for necessary action and compliance.

(2023) 5 ILRA 1065
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2023

BEFORE

THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Criminal Misc. Writ Petition No. 2268 of 2023

Harishchand Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Pawan Kumar Rao

Counsel for the Respondents:
 G.A., Sri Ashish Kumar Gupta

Criminal Law - U.P. Control of Goondas Act, 1970 - Section 3 - Externment of Goonda - Challenged Appellate Order of Commissioner - Petitioner made complaints against land grabbers for eviction from public utility land of Gaon Sabha as recorded in revenue records - Enquiry initiated, revenue officials found the land to be public utility land - Aggrieved by enquiry, land grabbers only to harass lodged FIR against petitioner alongwith his son and friends - District magistrate in a routine manner has passed the order of externment - Appeal,

dismissed - Held, externment order for six months has been passed only on basis of two criminal cases, the word habitual is used in definition of word 'Goonda' - No evidence before District Magistrate that petitioner was habitual to commit crimes or member or leader of any gang which involved in criminal activities - On the basis of one or two offences, petitioner cannot be treated as Goonda - Impugned orders quashed. (Para 8, 9, 16)

Writ Petitions Allowed. (E-13)

List of Cases cited:

Imran alias Abdul Quddus Khan Vs St. of U.P. & ors., Criminal Misc. Writ Petition No.7111 of 1999, (Para 13 to 15)

(Delivered by Hon'ble Mohd. Azhar
Husain Idrisi, J.)

1. Case called out.
2. Sri Ashish Kumar Gupta, Advocate has already filed caveat on behalf of Akhilesh Kumar Pathak, the complainant.
3. At the outset, Mr. Pawan Kumar Rao, learned counsel for the petitioner, submits that Akhilesh Kumar Pathak has no locus to oppose this writ petition.
4. Sri Ashish Kumar Gupta, Advocate submits that he may be permitted to withdraw his caveat application.
5. Prayer is allowed. Now, the writ petition is proposed to be heard on merit.
6. Heard Mr. Pawan Kumar Rao, learned counsel for the petitioner and the learned A.G.A. for the State.
7. The instant petition has been filed for the following relief:

"To stay the effect and operation of impugned order dated 19.1.2023 passed by the respondent no.2/ Commissioner, Basti Division, Basti in Appeal bearing Case No. 656/22 (Harishchand Vs. State of U.P.), under Section 6 of U.P. Control of Goondas Act, 1970, Police Station-Ghanghata, District-Sant Kabir Nagar and order dated 11.11.2022 passed by the respondent no. 3/District Magistrate, Sant Kabir Nagar in Case No. 480 of 2022, under Section 3/4 of U.P. Control of Goondas Act, 1970, Police Station-Ghanghata,, District Sant Kabir Nagar during the pendency of present writ petition before this Hon'ble Court, otherwise the petitioner shall suffer irreparable loss and injury."

8. Learned counsel for the petitioner submitted that petitioner is renowned person of the society and also he was the then Gram Pradhan of village Dhanghata. The reputation of the petitioner is good and clear in the society and also his wife is the present Gram Pradhan. It is further submitted that prior to 16.5.2022 no complaint or First Information Report was registered against the petitioner. It is next submitted that the land grabbers (Bhumafiya), namely, Shri Bhal Chand Pathak, Shivbrat Pathak, Akhilesh Pathak, Rakesh Pathak, Sintu @ Piyush Pathak and Subhas Pathak, who are the resident of village Dhanghata, Police Station Dhanghata, District Sant Kabir Nagar, have made encroachment on public utility land Gata No. 177 & 178 belongs to the Khalihan and Khadgaddha of the Revenue, Village Mithana, Sithana, Police Station Dhanghata, District Sant Kabir Nagar, which is adjoining village of Dhanghata and by playing fraud they have got entry on the aforesaid public utility land as Sankramaniya Bhumidhar, which is not permissible under the U.P. Revenue Code,

2006. In this regard the petitioner made several complaints before the concerned authorities as well as Chief Minister Portal against the land grabbers (Bhumafiya), namely, Shri Bhal Chand Pathak, Shivbrat Pathak, Akhilesh Pathak, Rakesh Pathak, Sintu @ Piyush Pathak and Subhas Pathak, who are the resident of village Dhanghata, Police Station Dhanghata, District Sant Kabir Nagar praying therein to evict the aforesaid persons from Gata No. 177 area 0.251 hectare and 178 area 0.051 hectare situated in Revenue, Village Mithana, Sithana, Police Station Dhanghata, District Sant Kabir Nagar, which is adjoining village of Dhanghata and restore the aforesaid public utility land of the said Gaon Sabha as was earlier recorded in the revenue record.

9. Learned counsel has further submitted that in compliance of the aforesaid complaint made by the petitioner, the respondent authorities have initiated enquiry against the alleged land grabbers in the aforesaid matter and in pursuance of that the revenue official has submitted report on 9.6.2022, 30.6.2022, 12.7.2022 and 19.7.2022, on the basis of Akarpartar 45 and stating therein that the aforesaid land belongs to the public utility land, therefore, made recommendation to delete the name of the said Degree College and recorded as Khalian and Khadgaddha. Subsequently, the said land grabbers have annoyed with the petitioner and being aggrieved with the said enquiry the land grabbers only to harass the petitioner has lodged the First Information Reports against him including his son and other friends on the false and concocted story. The following two cases have been registered against the petitioner which are given below:

(i) Case Crime No. 193 of 2022, under Sections 147, 323, 352, 506 IPC, Police

Station Dhanghata, District Sant Kabir Nagar, in which the petitioner has been granted bail by the court concerned;

(ii) Case Crime No. 200 of 2022, under Sections 147, 341, 504, 506 IPC, Police Station Dhanghata, District Sant Kabir Nagar, in which the petitioner has also been released on bail by the court concerned.

10. Learned counsel for petitioner further submitted that District Magistrate, Sant Kabir Nagar while passing the order of externment has not considered the objection of the petitioner that he is not habitual to commit crime and he does not come under the meaning of 'Goondas'. The District Magistrate in a routine manner has passed the order of externment. It is next submitted that Commissioner, Basti Division, Basti also had not applied its judicial mind and has dismissed the appeal preferred by petitioner. Both the authorities have failed to consider that petitioner is not habitual in committing crime and he does not come under the meaning of 'Goondas'. It is further submitted that District Magistrate has failed to consider that there was only two cases registered against the petitioner which were lodged by the land grabbers only to harass the petitioner on account of said complaint made by the petitioner. The petitioner on the basis of only two cases cannot be held to be a Goonda within the meaning of Section 3 of the Act. The findings recorded by both the authorities i.e. District Magistrate as well as Commissioner to the effect that petitioner is a Goonda, is illegal and are liable to be quashed.

11. Learned A.G.A. submitted that petitioner is a Goonda and a habitual offender. Nobody dares to come forward to depose in the cases related to the petitioner

and there is terror in the area of petitioner. Hence the petition is liable to be dismissed.

12. The externment order has been passed by the District Magistrate under Section 3 of the Act. The Section 3 of the Act is reproduced as under:-

"3. Externment, etc. of Goondas. - (1) Where it appears to the District Magistrate.-

(a) that any person is a Goonda; and

(b) (i) that his movements or acts in the district or any part thereof are causing, or are calculated to cause alarm, danger or harm to persons or property; or

[(ii) that there are reasonable grounds for believing that he is engaged or about to engage, in the district or any part thereof, in the commission of an offence referred to in sub clauses (i) to (iii) of clause (b) of Section 2, or in the abetment of any such offence; and]

(c) that witnesses not willing to come forward to give evidence against him by reason of apprehension on their part as regards the safety of their person or property.

The District Magistrate shall by notice in writing, inform him of the general nature of the materials allegations against him in respect of clauses (a), (b) and (c) and give him a reasonable opportunity of tendering an explanation regarding them.

(2) The person against whom an order under this Section is proposed to be made shall have the right to consult and be defended by a Counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires, and also of examining any other witness that he may wish to produce in support of his explanation, unless for reasons to be recorded in writing the District Magistrate

is of opinion that the request is made for the purpose of vexation or delay.

(3) Thereupon the District Magistrate on being satisfied that the conditions specified in clauses (a), (b) and (c) of sub-section (1) exist may by order in writing-

[(a) direct him to remove himself outside the area within the limits of his local jurisdiction or such area and any district or districts or any part thereof, contiguous thereto, by such route, if any, and within such time as may be specified in the order and to desist from entering the said area and such contiguous district or districts or part thereof, as the case may be, from which he was directed to remove himself until the expiry of such period not exceeding six months as may be specified in the said order.]

(b)(i) require such person to notify his movements, or to report himself, or to do both, in such manner at such time and to such authority or person as may be specified in the order;

(ii) prohibit or restrict possession or use by him or any such article as may be specified in the order;

(iii) direct him otherwise to conduct himself in such manner as may be specified in the order,

until the expiration of such period, not exceeding six months as may be specified in the order."

13. Section 3 of the Act empowered the District Magistrate to pass the order of externment if he is satisfied that any person is engaged or about to engage in the district or any part thereof in the commission of offence referred to in sub clause (i) to (iii) of clause b of Section 2.

14. The word 'Goonda' is defined in sub clause b of Section 2 of the Act which is reproduced as under:-

"2(b) "Goonda" means a person who-

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian Penal Code or Chapter XV, or Chapter XVI, Chapter XVII or Chapter XXII of the said Code; or

(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community; or

(v) has been habitually passing indecent remarks or teasing women or girls; or

(vi) is a tout;"

15. A perusal of Section 2(b) of the Act reveals that Goonda means a person who is either by himself or is a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of IPC or Chapter XV, or Chapter XVI, Chapter XVII or Chapter XXII of the Indian Panel Code.

16. From perusal of impugned orders it is apparent that externment order has been passed only on the basis of two cases whereas the word habitual is used in the definition of word 'Goonda'. There was no evidence or material before the District Magistrate that the petitioner was habitual to commit crimes or was member or leader

of any gang which involved in criminal activities. The word habitual means that by habit he was involved in commission of such offences. On the basis of one or two offences the petitioner cannot be treated as Goonda. The word 'Goonda' has been considered by the Division Bench of this Court in the case of **Imran alias Abdul Quddus Khan Vs. State of U.P. and others, Criminal Misc. Writ Petition No.7111 of 1999**. The words 'Goonda' and 'habitual' have been considered. The relevant paragraphs 13, 14, 15 of the said judgment are quoted hereunder:-

"13. Ex facie, a person is termed as a 'goonda' if he is a habitual criminal. The provisions of Section 2(b) of the Act are almost akin to the expression 'anti social element' occurring in Section 2(d) of Bihar Prevention of Crimes Act, 1981. In the context of the expression 'anti social element' the connotation 'habitually commits' came to be interpreted by the apex Court in the case of **Vijay Narain Singh v. State of Bihar and others, (1984) 3 SCC-14 : AIR 1984 SC 1334**. The meaning put to the aforesaid expression by the apex court would squarely apply to the expression used in the Act, in question. The majority view was that the word 'habitually' means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions. Even the minority view which was taken in **Vijay Narain's case** (supra) was that the word 'habitually' means 'by force of habit'. It is the force of habit inherent or latent in an individual with a

criminal instinct with a criminal disposition of mind, that makes a person accustomed to lead a life of crime posing danger to the society in general. If a person with criminal tendencies consistently or persistently or repeatedly commits or attempts to commit or abets the commission of offences punishable under the specified chapters of the Code, he should be considered to be an 'anti social element'. There are thus two views with regard to the expression 'habitually' flowing from the decision of **Vijay Narain's case** (supra). The majority was inclined to give a restricted meaning to the word 'habitually' as denoting 'repetitive' and that on the basis of a single act cannot be said to be forming the habit of the person. That is to say, the act complained of must be repeated more than once and be inherent in his nature. The minority view is that a person in habitual criminal who by force of habit or inward disposition inherent or latent in him has grown accustomed to lead a life of crime. In simple language, the minority view was expressed that the word 'habitually' means 'by force of habit'. The minority view is based on the meaning given in Stroud's Judicial Dictionary, Fourth Ed. Vol. II-1204 - habitually requires a continuance and permanence of some tendency, something that has developed into a propensity, that is, present from day to day. Thus, the word 'habitual' connotes some degree of frequency and continuity.

14. The word 'habit' has a clear well understood meaning being nearly the same as 'accustomed' and cannot be applied to single act. When we speak of habit of a person, we prefer to his customary conduct to pursue, which he has acquired a tendency from frequent repetitions. In *B.N. Singh v. State of U.P.*, AIR 1960 All 754 it was observed that it would be incorrect to say that a person has a habit of anything

from a single act. In the Law Lexicon - Encyclopedic Law Dictionary, 1997 Ed. by P. Ramanatha Aiyer, the expression 'habitual' has been defined to mean as constant, customary and addicted to a specified habit; formed or acquired by or resulting from habit; frequent use or custom formed by repeated impressions. The term 'habitual criminal', it is stated may be applied to any one, who has been previously more than twice convicted of crime, sentenced and committed to prison. The word 'habit' means persistence in doing an act, a fact, which is capable of proof by adducing evidence of the commission of a number of similar acts. 'Habitually' must be taken to mean repeatedly or persistently. It does not refer to frequency of the occasions but rather to the invariability of the practice.

15. The expression 'habitual criminal' is the same thing as the 'habitual offender' within the meaning of Section 110 of the Code of Criminal Procedure, 1973. This preventive Section deals for requiring security for good behaviour from 'habitual offenders'. The expression 'habitually' in the aforesaid section has been used in the sense of depravity of character as evidenced by frequent repetition or commission of offence. It means repetition or persistency in doing an act and not an inclination by nature, that is, commission of same acts in the past and readiness to commit them again where there is an opportunity."

17. The sole purpose of the Act, 1970 is to protect the citizens from the habitual criminals and to secure future of the citizens but it should be used very sparingly and in very clear cases of public disorder or for maintenance of public order and so this Act should not be used against innocent people.

18. It is well settled law that before passing the order of externment the District Magistrate should be satisfied that the person against whom the externment order has been passed, is habitual to commit crimes and there are several materials before him to the effect that there was terror in the public and no one has come forward to give evidence against that person.

19. From perusal of impugned order passed by District Magistrate it is apparent that only on the basis of two criminal cases, the externment order for six months has been passed by the District Magistrate. The Commissioner has also failed to consider the grounds taken by the petitioner in his appeal and in a routine manner has dismissed the appeal preferred by the petitioner.

20. On an overall conspectus of the aforesaid, this Court finds that since there was no sufficient material before the District Magistrate in holding that the petitioner is Goondas and is habitual to commit crimes, the impugned orders dated 19.1.2023 passed by the respondent no.2/ Commissioner, Basti Division, Basti and dated 11.11.2022 passed by the respondent no. 3/District Magistrate, Sant Kabir Nagar are bad in law and deserve to be quashed and the writ petition is liable to be allowed.

21. Accordingly, the writ petition is **allowed**.

22. The impugned orders dated 19.1.2023 passed by the respondent no.2/ Commissioner, Basti Division, Basti and dated 11.11.2022 passed by the respondent no. 3/District Magistrate, District-Sant Kabir Nagar are quashed.

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(2023) 5 ILRA 1071
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SURENDRA SINGH-I, J.

Criminal Misc. Writ Petition No. 2683 of 2023

Virendra Kasaudhan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bipin Kumar Tripathi, Sri Shubham

Counsel for the Respondents:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 279, 504 & 307 - Quashing of F.I.R - U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986 - Section 3(i) - U.P. Gangster and Anti-Social Activities (Prevention) Rules, 2021 - Rule 5(2), 5(3) - On the basis of single case as mentioned in gang chart, the provisions of Gangster Act has been imposed against petitioner, violation of above Rule framed under Gangster Act - District Magistrate has not recorded subjective satisfaction before imposition of provisions of Gangster Act - St. contended that chargesheet has already been submitted in base FIR - Held, satisfaction has been recorded as per Gangster Rules, 2021 and Form-I of Gangster Act, which provides the format of gang chart - Petition was devoid of merit, dismissed. (Para 5, 6, 9)

Writ Petitions dismissed. (E-13)

List of Cases cited:

1. Ram Rahees & anr. Vs St. of U.P. & ors. reported in 2011 (1) JIC 440
2. Shraddha Gupta Vs The St. Of U.P. reported in 2022 SCC OnLine SC 514, (Para 37)

3. Ambuj Parag Dubey & ors. Vs St. of U.P. & ors. reported in 2022 (4) ACR 3878, (Para 32 to 37 and 41)

(Delivered by Hon'ble Vivek Kumar Birla, J., & Hon'ble Surendra Singh-I, J.)

1. Counter affidavit filed on behalf of the State, is taken on record.

2. Heard Sri Bipin Kumar Tripathi, learned counsel for the petitioner and Sri Ratan Singh, learned AGA for the State and perused the records.

3. Present petition has been filed with a prayer for quashing the F.I.R. dated 17.12.2022, registered as Case Crime No. 660 of 2022, under Section 3(i) U.P. Gangster and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as the Gangster Act), Police Station Chiluatal, District Gorakhpur with a further prayer not to arrest the petitioner in pursuance of the impugned F.I.R.

4. Submission of the learned counsel for the petitioner is that in the gang chart details of only one case have been mentioned, however, simultaneously it is mentioned that two cases are registered against the petitioner. So far as the case referred in the gang chart bearing Case Crime no.7 of 2021 is concerned, it is submitted by the learned counsel for the petitioner that initially F.I.R. was lodged only under Sections 279, 504, 307 IPC against two unknown bike riders wherein during investigation in C.D. No.11 dated 24.01.2021 Mukhbir disclosed the name of the co-accused Manoj Chauhan and Monoj Sahani, who are notorious criminals having no concerned with the petitioner and in correspondence to that Mukhbir information co-accused Manoj Sahani,

Manoj Chauhan, Sunil Chauhan and Vikas Pathak were arrested on 31.01.2021 in C.D. No.12 and they have made confession before police and disclosed the name of the petitioner. It is further submitted that except aforesaid manner of complicity disclosed by co-accused persons there is no other material evidence collected by investigating officer against the petitioner and as such the investigating officer with addition of section 120B IPC charge-sheeted the accused person. It is next submitted that similarly in another case bearing Case Crime no.255 of 2022, under section 392 IPC, Police Station Cantt, District Gorakhpur the petitioner was not named in the FIR and during the course of investigation those co-accused persons arrested and disclosed the name of the petitioner as one of the participants of the alleged incident dated 04.04.2022. However, the petitioner was granted bail by the learned Sessions Judge, Gorakhpur vide order dated 20.09.2022.

5. Arguing the case on merits, submission of the learned counsel for the petitioner is that only on the basis of single case as mentioned in the gang chart the provisions of Gangster Act has been imposed against the petitioner and that there is a clear violation of Rule 5 clause (2) and (3) of the Rules framed under the Gangster Act. By placing reliance upon a Division Bench Judgment of this Court in the case of **Ram Rahees and Another vs. State of U.P. and Others** reported in **2011 (1) JIC 440** it is submitted that the District Magistrate at no point of time has recorded subjective satisfaction before imposition of provisions of Gangster Act. It is further submitted that on the basis of another first information report, Gangster Act has been imposed, copy whereof has been annexed as Annexure-2 to the supplementary

affidavit. It is next submitted that the petitioner is a businessman and has no concern with the offence as alleged. Therefore, the impugned first information report under the Gangster Act is nothing but an abuse of process of law and is liable to be quashed.

6. Per contra, learned AGA submits that chargesheet has already been submitted in the base first information report. By drawing attention to the gang chart it is submitted by the learned AGA that the satisfaction has categorically been recorded by the District Magistrate and endorsement dated 17.12.2022 to that effect has been made. It is next submitted that it has already been decided by Hon'ble Apex Court in the case of **Shraddha Gupta vs The State Of Uttar Pradesh reported in 2022 SCC OnLine SC 514** that even on the basis of a single case Gangsters Act can be imposed.

7. In the case of **Ambuj Parag Dubey and 2 Others vs. State of U.P. and 2 Others reported in 2022 (4) ACR 3878**, this court has considered the entire scheme of the Gangster Act and held that in a case, on the materials, the competent authority is convinced and *prima facie* satisfied that a case for prosecution is made out he may approve the gang chart bypassing discussion with the police officials. But in a case where the competent authority is not convinced or in two mind, on the material placed by the police authorities, the competent authority may necessarily decide to call for a discussion to *prima facie* satisfy himself that prosecution is warranted. The F.I.R. that follows the approval of the gang chart cannot be faulted or quashed merely for want of discussion. Relevant

paragraphs 32, 33, 34, 35,36,37 and 41 of the said judgment are quoted as under:-

"32. Satisfaction of the competent authority only means that the competent authority must be in fact satisfy and not a dishonest satisfaction, which will be no satisfaction at all. The satisfaction contemplated by the Gangster Rule is satisfaction in point of fact on the materials placed before the competent authority. The satisfaction of the competent authority referred to under the Rule is not with respect to the allegations levelled against the gangster but the satisfaction is confined to those allegations that the accused can be prosecuted under the Gangster Act. Whatever may be the nature of charge against the accused, the satisfaction of the competent authority should be with regard to that the materials placed before him and the nature of the accused indulging in community antisocial activities. It is expedient to sanction prosecution under the Gangster Act.

*33. The expression satisfied is much narrower than "application of mind". The competent authority is not to apply his mind and satisfy himself as to whether the material placed before him would be sufficient for convicting the accused under the Gangster Act. The satisfaction is confined within a narrow domain based on the materials placed before the competent authority, the authorities forwarding the gang chart is satisfied that the accused should be prosecuted under the Gangster Act. The expression satisfaction is not satisfaction on evidence but a *prima facie* satisfaction based on the representations of the nodal authority and the district police that the accused should be prosecuted under the Gangster Act.*

34. Rule 17 mandates that the competent authority is bound to exercise its own independent mind while forwarding the gang chart and should not be on a pre-printed rubber seal gang chart. Rule 17 reads thus:

17 (1) the Competent Authority shall be bound to exercise its own independent mind while forwarding the gang-chart.

(2) A pre-printed rubber seal gang-chart should not be signed by the Competent Authority; otherwise the same shall tantamount to the fact that the Competent Authority has not exercised its free mind.

35. Rule 18 provides that gang chart shall be sent only in the manner as given in Form No. 1 of these rules.

36. Rule 17 and 18 would have to be read together. Gang chart has to be sent in the prescribed Form No. 1. The endorsement to be made by each of the authorities have also been specified in Rule 16. The rule itself prescribes and mandates a printed Form. Rule 17 merely mandates that the competent authority while approving the gang chart should not be swayed by the recommendation of the police authorities mechanically but should satisfy himself independently that the grounds for prosecution is made out. The satisfaction at that stage is subjective and does not rest upon any evidence. The competent authority has to satisfy that the materials placed with the gang chart calls for prosecution. The stage of collecting evidence follows thereafter. The scope of judicial review is miniscule, the accused cannot challenge the FIR without challenging the gang chart. The question as to whether the antisocial activities of the proposed accused is that of a gang or gangster is a matter of investigation.

37. Rule 22 clarifies and specifies that a single act/omission will also constitute an

offence under the Act and a first information report must be registered on the basis of a single case. Rule 22(1) reads thus:

41. The submission of the learned counsel for the petitioners that there was no 'discussion' by the competent authority with the police officers before approving the gang chart would not be fatal to the prosecution of the petitioners. The expression 'discussion' has to be followed mandatorily by the competent authority in every case does not follow from reading of the Rule, though the rule employs the word 'shall'. The Gangster Rule nowhere mandates the consequence of not following 'discussion' by the competent authority. In our opinion the rule mandating discussion is directory. It is left to the discretion of the competent authority, having regard to the material placed before him for approval of the gang chart. In a case, on the materials, the competent authority is convinced and prima facie satisfied that a case for prosecution is made out he may approve the gang chart bypassing discussion with the police officials. But in a case where the competent authority is not convinced or in two mind, on the material placed by the police authorities, the competent authority may necessarily decide to call for a discussion to prima facie satisfy himself that prosecution is warranted. The FIR that follows the approval of the gang chart cannot be faulted or quashed merely for want of discussion."

8. It may also be noted that Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021 (hereinafter referred to as the Gangster Rules, 2021), were framed in 2021, which were not available at the time of decision in **Ram Rahees (supra)**. Needless to say that Gangster Rules, 2021 have been considered

in great detail in Ambuj **Parag Dubey (supra)** and the manner in which satisfaction is to be recorded has been laid down. Hence **Ram Rahess (supra)** is clearly distinguishable and is of no help to the petitioner.

9. Therefore, in view of the judgment of **Ambuj Parag Dubey (supra)** we find that in the present case satisfaction has been recorded as per the Gangster Rules, 2021 and Form-I of the Gangster Act, which provides the format of the gang chart. Rule 5(3)(d) of the Gangster Act also provides that those cases shall not be mentioned in the gang chart, on the basis whereof action has already been taken once under this Act. We, therefore, find that satisfaction recorded by the District Magistrate in the manner in which it has been done in the present case is in compliance of the Rules and it cannot be said that satisfaction is not recorded.

10. In para 37 of **Shraddha Gupta (supra)** it has been held by the Hon'ble Apex Court that even on the basis of a single case Gangster Act can be imposed, which is quoted as under:-

"37. Now so far as the main submission on behalf of the accused that for a single offence/FIR/charge sheet with respect to any of the anti- social activities, such an accused cannot be prosecuted under the Gangsters Act, 1986 is concerned, on a fair reading of the definitions of 'Gang' and 'Gangster' under the Gangsters Act, 1986, it can be seen that a 'Gang' is a group of one or more persons who commit/s the crimes mentioned in the definition clause for the motive of earning undue advantage, whether pecuniary, material or otherwise. Even a single crime committed by a 'Gang' is sufficient to

implant Gangsters Act on such members of the 'Gang'. The definition clause does not engulf plurality of offence before the Gangsters Act is invoked."

11. In view of the discussions made herein above, we do not find force in the argument of the learned counsel for the petitioner.

12. The petition is devoid of merit and is accordingly, **dismissed**.

(2023) 5 ILRA 1075
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2022

BEFORE

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

Criminal Misc. Writ Petition No. 9842 of 2020
with other connected cases

Piyush Prabhakar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Ravi Prakash Srivastava, Sri Anurag Khanna
(Sr. Advocate)

Counsel for the Respondents:

G.A., Sri Gaurav Kakkar

Criminal Law - Indian Penal Code, 1860 - Section 409 - Code of Criminal Procedure, 1973 - Sections 154 & 482 - Constitution of India, 1950 - Article 226 - Second FIR - Maintainability - Petitioners are bank officials while complainant is customer of same bank - The impugned FIR was subsequently lodged by informant on the same allegations and arising from same incident, but the only fact that was further alleged is that saving bank account of informant was released by Chief Judicial Magistrate, but the bank withheld the

amount and has not released it to informant - Held, registration of multiple FIRs was nothing but abuse of process of law - Impugned order quashed (Para 4, 8, 9, 20)

Writ Petitions Allowed. (E-13)

List of Cases cited:

1. T.T. Antony Vs St. of Kerala & ors., (2001) 6 SCC 181
2. Vijay Kumar Ghai & ors. Vs St. of W.B.& ors., (2022) 7 SCC 124
3. Tarak Dash Mukharjee & ors Vs St. of U.P. & ors., 2022 LiveLaw (SC) 731
4. Krishna Lal Chawla & Ors. Vs St. of U.P. & anr., (2021) 5 SCC 435
5. Vijay Kumar Ghai & ors. Vs St. of W.B.& ors., (2022) 7 SCC 124
6. St. of Har. & ors. Vs Bhajan Lal & ors, 1992 Supp (1) SCC 335

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

1. Heard Shri Anurag Khanna, learned Senior Advocate assisted by Shri Ravi Prakash Srivastava, learned counsel for the petitioners and learned A.G.A. appearing for the State.

2. Petitions are being decided by a common judgment and order as they arise from the same facts and incident on the consent of the parties.

3. Despite notice, counsel appearing for the fourth respondent has not filed counter affidavit, nor, has he put in appearance.

4. Petitioners in the bunch of petitions are the officials of the HDFC Bank Ltd.,

which include, Managing Director, Additional Managing Director, Company Secretary, Chief Finance Officer and the Branch Manager of the Branch. The complainant is the customer of HDFC bank, having a saving bank account.

5. For the sake of convenience, the facts setforth in the Writ Petition No. 9842 of 2020 (Piyush Prabhakar and another vs. State of U.P. and 3 Others) is being referred to.

6. HDFC bank is engaged in the business of banking and financial services, duly registered with the Reserve Bank of India, having its registered office at Mumbai (Maharashtra). The bank has various branch all over India, including, the branch at Agra. The complainant/respondent No. 4 is customer of bank having account (Saving Account No. # 01211000207684) at the Agra Branch.

7. First petitioner is the Branch Manager, HDFC Bank Ltd. at Agra, since 29.04.2019. It is submitted that the petitioner was not posted at the branch at the relevant point of time i.e. January 2018, during the period when the alleged debit took place from the bank account of the informant.

8. The informant had earlier lodged FIR being Case Crime No. 0083 of 2018, dated 03.02.2018, at Police Station Hariparwat, Agra, against the bank officials and one Dharmendra Singh. It is alleged that the informant in his bank account was having balance at Rs.1,00,69,633/- as on 17.01.2018. It is alleged that on an enquiry of his bank account on 02.02.2018, it transpired that informant was having balance at Rs.1,99,574.41 paisa only,

thereby, a sum at Rs.98,70,000/- was fraudulently in connivance with the bank officials was transferred in the account of Dharmendra Singh of the same branch. It is further alleged that the account of the informant was attached by the Income Tax officials, therefore, it was alleged that the amount could not have been withdrawn from the account without connivance of the bank officials. It is informed that the Investigating Officer in the said case crime has filed charge-sheet against six persons on 25.04.2018 under Sections 420, 467, 468, 471, 120-B, 419 & 411 IPC., including bank officials.

9. The impugned FIR was subsequently lodged by the informant on the same allegations and arising from the same incident, but the only fact that was further alleged is that the saving bank account of the informant was subsequently released by the Chief Judicial Magistrate, vide order dated 18.10.2021, but the bank withheld the amount and has not released it to the informant.

10. In this backdrop, it is submitted by learned counsel for the petitioners that lodging of the second FIR arising from the same facts and incident is gross misuse of process of the court and would be barred in view of the mandate of **T.T. Antony vs. State of Kerala and others**¹, which has subsequently been followed in **Vijay Kumar Ghai and others v. State of West Bengal and others**² and **Tarak Dash Mukharjee & others v. State of U.P. & others**³.

11. It is further submitted that the entire amount that was due and admissible to the informant has already been released in due course by the bank and a sum at Rs.1,00,000/- was deducted towards policy

excess (Insurance) which the informant is not entitled. It is urged that for this reason the cause to pursue the complainant no longer survives for the complainant.

12. The only question that arises is whether the second FIR arising from the same allegations would be maintainable or not.

13. Supreme Court in **Krishna Lal Chawla & Ors. Vs. State of U.P. & another**⁴ observed that multiple complaints by the same party against the same accused in respect of the same incident is impermissible. Permitting multiple complaints by the same party in respect of the same incident, whether it involves a cognizable or private complaint offence, will lead to the accused being entangled in numerous criminal proceedings. As such he would be forced to keep surrendering his liberty and precious time before the police and the courts, as and when required in each case.

14. The legality of the second FIR was extensively discussed by Supreme Court in **T.T. Antony (supra)**. It was held that there can be no second FIR where the information concerns the same cognizable offence alleged in the first FIR or the same occurrence or incident which gives rise to one or more cognizable offences. It was further held that once an FIR postulated by the provisions of Section 154 of Cr.P.C has been recorded, any information received after the commencement of investigation cannot form the basis of a second FIR as doing so would fail to comport with the scheme of the Cr.P.C. The Court further held that barring situations in which a counter- case is filed, a fresh investigation or a second FIR on the basis of the same or connected cognizable offence would

constitute an "abuse of the statutory power of investigation" and may be a fit case for the exercise of power either under Section 482 of Cr.P.C or Articles 226/227 of the Constitution of India.

15. If multiple First Information Reports by the same person against the same accused are permitted to be registered in respect of the same set of facts and allegations, it will result in the accused getting entangled in multiple criminal proceedings for the same alleged offence, the registration of such multiple FIRs is nothing but abuse of process of law.

16. The same principle was reiterated in ***Vijay Kumar Ghai and others v. State of West Bengal and others***⁵, and ***Tarak Dash Mukharjee & others v. State of Uttar Pradesh & others***⁶.

17. The impugned FIR is reproduction of the allegations made by the complainant in his earlier FIR alleging that the officials of the bank in connivance with one Dharmendra Singh, a customer of the bank at Agra branch, transferred a substantial amount of money from the saving bank account of the complainant, at a time when the saving bank account of the complainant was attached by the Income Tax Department. The further additional allegation made in the impugned FIR by the complainant is that the bank withheld/delayed the release of the money to the complainant upon release of the saving bank account by the order of the competent court.

18. The allegation of the complainant that the money of his saving bank account was withheld and not paid to the complainant promptly; even on taking the allegation on face value it would not

constitute an offence. The purpose of the second FIR appears to have been lodged with an ulterior motive to coerce the officials of the branch to permit the complainant to operate the saving bank account and withdraw his money. It is also a case of malicious prosecution.

19. In ***State of Haryana & Ors. Vs. Bhajan Lal & Ors.***⁷ considered in detail the scope of the High Court powers under Section 482 Cr.P.C. and/or Article 226 of the Constitution of India to quash the FIR and referred to several judicial precedents and held that the High Court should not embark upon an inquiry into the merits and demerits of the allegations and quash the proceedings without allowing the investigating agency to complete its task. The Court, inter alia, identified the following cases in which FIR/complaint can be quashed:

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

(2)

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

20. Having regard to the undisputed facts as noted hereinabove, the impugned FIR being second FIR for the same cause and incident, registration of such multiple FIR is nothing but abuse of process of law.

21. In view of the above, writ petitions are allowed.

22. Accordingly the impugned FIR dated 16.08.2020, registered as Case Crime No. 0326 of 2018, under Sections 409 IPC at Police Station Hari Parvat, District Agra, is quashed.

(2023) 5 ILRA 1079

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 13.04.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Misc. Writ Petition No. 12207 of 2022

Raj Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Ashutosh Upadhyay

Counsel for the Respondents:

G.A., Sri Om Prakash Vishwakarma, Sri Vinod Kumar Yadav

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 307, 308, 325, 395, 452, 506 & 120-B - Quashing of FIR - Second FIR - Maintainability - Application u/s 156(3) Cr.P.C. was moved by respondent no.3 before Magistrate - Report was sought from concerned police station regarding the incident - Police station forwarded the report, St.d that no FIR has been registered earlier - Relying on said report, the Magistrate directed for registration of impugned FIR - Held, in case, the correct information would have been furnished by police station, the impugned FIR would not have come into existence - As a second/subsequent FIR has been registered on the basis of wrong and misleading information forwarded by police station, therefore, it cannot be

sustained and liable to be quashed. (Para 6)

Writ Petitions Allowed. (E-13)

List of Cases cited:

T.T. Antony Vs St. of Kerala & ors. reported in (2002) 6 SCC 181

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard learned counsel for the petitioners, learned A.G.A. for the State and perused the record.

2. In the instant writ petition the petitioners seek to challenge the First Information Report dated 30.01.2022 arising out of Case Crime No. 0025 of 2022, under Sections 147, 148, 307, 308, 325, 395, 452, 506, 120-B IPC, Police Station-Sikrara, District-Jaunpur.

3. The main contention of learned counsel for the petitioners is that there are two FIRs registered for the same incident. Petitioners are named accused in the impugned FIR and are, therefore, aggrieved.

4. Per contra, learned A.G.A. for the State pointed out that for the same occurrence two FIRs have been registered; (i) the first FIR dated 22.08.2020, arising out of Case Crime No. 0170 of 2020, under Sections 323, 504, 506 IPC, Police Station Sikrara, District Jaunpur was lodged by Suraj Kumar (son of respondent no.3) against four persons (ii) another FIR dated 30.01.2022, arising out of Case Crime No. 0025 of 2022, under Sections 147, 148, 307, 308, 325, 395, 452, 506, 120B IPC, Police Station Sikrara, District Jaunpur was lodged by respondent no.3 against 14 named accused persons on the basis of an

application under Section 156(3) Cr.P.C. moved on 18.09.2020 by respondent No.3, wherein the Additional Chief Judicial Magistrate, Jaunpur directed vide order dated 10.01.2022 to the concerned police station to register the crime.

5. Upon having heard both the counsel for the parties as well as upon perusal of the record, it is admittedly true that for the same occurrence which took place on 21.08.2020, two separate FIRs have been registered. The first FIR was lodged by Suraj Kumar (son of the respondent no.3) under Sections 323, 504 and 506 IPC in which the investigation has been concluded and the charge sheet dated 04.09.2022 was filed in the Court against four named accused persons as well as against the petitioner no.1, Raj Kumar under Sections 323, 325, 504, 506, 147 and 188 IPC, thereafter, cognizance was taken on 13.06.2022. However, at the later stage on the directions of the concerned Circle Officer, a Supplementary charge sheet was filed on 07.12.2022 against petitioner nos.2 to 11, under Sections 147, 148, 308, 325, 324, 504 and 506 IPC and the name of the petitioner no.12 was exonerated.

6. From the perusal of the record, we find that after an application dated 18.09.2020, under Section 156(3) Cr.P.C. was moved by the respondent no.3 before the concerned Magistrate, a report was sought from the concerned police station regarding the incident. The concerned police station forwarded the report with a noting that, no FIR has been registered in the instant case. Considering this fact the concerned Magistrate, vide order dated

10.01.2022, directed the concerned police station to register the impugned FIR. Thus, relying on the said report, the concerned Magistrate directed for registration of the impugned FIR. In case, the correct information would have been furnished by the concerned police station the impugned FIR would not have come into existence. As a second/subsequent FIR has been registered on the basis of wrong and misleading information forwarded by the concerned police station, therefore, it cannot be sustained and is liable to be quashed.

7. It has been well settled by the Hon'ble Supreme Court in the case of **T.T. Antony vs State of Kerala & Others** reported in (2002) 6 SCC 181, that after registering the FIR and commencing investigation, registering the second FIR or successive FIR in respect of the same incident and crime and making of fresh investigation pursuant thereto would be irregular which calls for interference by the Court under Articles 226/227 of the Constitution of India or Section 482 Cr.P.C. and interference by the Supreme Court under Article 136 with a fresh investigation to prevent abuse of a statutory power of investigation or otherwise to secure the ends of justice.

8. After considering the aforesaid facts and circumstances and the settled position of law as laid down by the Hon'ble Supreme Court, the impugned FIR dated 30.01.2022, arising out of Case Crime No. 0025 of 2022 under Sections 147, 148, 307, 308, 325, 395, 452, 506, 120-B IPC, Police Station-Sikrara, District-Jaunpur is hereby quashed.

9. The writ petition is **allowed**.

(2023) 5 ILRA 1081
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.05.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

First Appeal from Order No. 158 of 2023
 alongwith
 First Appeal from Order No. 162 of 2023

Sanjay Kumar Modi & Anr. ...Appellants
Versus
Udairaj & Anr. ...Respondents

Counsel for the Appellants:

Satish Gulati, Sarvesh Kumar Tiwari, Sudeep Kumar

Counsel for the Respondents:

Shyam Mohan Pradhan, Brijesh Kumar

A. Civil Law – Scope of remand – Code of Civil Procedure: Order 41 Rule 23 - The power of remand is not to be exercised casually or it cannot be a ground to merely shirk from the responsibility of deciding the matter on merits since the powers of the Lower Appellate Court u/s 96 C.P.C. is wide and akin to that of the Trial Court and in any case being the Court of first appeal, it is legally obliged to consider points of fact and law afresh. (Para 25)

B. Unless and until, there was any handicap faced by the Appellate Court which fell within the parameters of Order-41 Rule 23- A, till then in absence of any such cogent reason, the order of remand is not justified. (Para 14)

In the present case, the Lower Appellate Court has not exercised the powers of remand in its correct perspective. The reasoning given by the Lower Appellate Court does not reflect conscious application of judicial principles as required to be applied before a remand order is passed. (Para 22)

From the perusal of the impugned order, it only reveals that the Lower Appellate Court made reference to certain sections such as Ss. 52 and 53 of the Transfer of Property Act and Section 101 and 102 of the Indian Evidence Act, however, what the Lower Appellate Court has failed to notice as to how the aforesaid sections would create any handicap for the Appellate Court to have decided the matter. The parties have led their entire evidence and there is no reference made by the Lower Appellate Court that on any particular issue or on any particular aspect of the matter, the parties have not been able to lead evidence which was imperative which leads the Lower Appellate Court to remand the matter. This is to be kept in mind especially in context of the fact that the Court cannot permit the parties to fill up the lacunae in their case by passing an order of remand. (Para 23)

If only the effect of the aforesaid legal provisions (provisions of Sections 52 and 53 of the Transfer of Property Act and Sections 102 and 103 of the Indian Evidence Act) were to be seen, then the Lower Appellate Court being the final court of fact and law was legally empowered and obliged to have considered the effect of the aforesaid sections on its own, without remanding the matter. (Para 24)

Appeals allowed. (E-4)

Precedent followed:

1. Shivkumar & ors. Vs Sharanabasappa & ors., (2021) 11 SCC 277 (Para 14)
2. Sanjay Kumar Vs Amar Nath Shukla, F.A.F.O. No. 431 of 2003, decided on 14.01.2020 (Para 20)
3. Jagannathan Vs Raju Sigamani & anr., (2012) 5 SCC page 540 (Para 20)
4. J. Balaji Singh Vs Diwaker Cole & ors., (2017) 14 SCC 207 (Para 20)

Present F.A.F.O. assails the judgment and decree dated 11.04.2023, passed by the Lower Appellate Court whereby two civil appeals bearing No. 10 of 2022 and 11 of

2022 have been allowed and the matter has been remanded to the Trial Court for decision afresh.

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard Heard Sri Sudeep Kumar, learned counsel for the appellants and Sri Brijesh Kumar Saxena, learned counsel who has put in appearance on behalf of the respondent no. 1 in F.A.F.O.No. 158 of 2023 and F.A.F.O. No. 162 of 2023. The learned counsel for the appellant submits that another appeal bearing F.A.F.O. No. 162 of 2023 which is connected also arises from the same judgment of remand and as such both the appeals can be considered and decided together.

2. The instant F.A.F.O. has been preferred under Order 43 Rule (1) (u) C.P.C. assailing the order of remand. The learned counsel for the appellants in both the cases is assailing the judgment and decree passed by the Lower Appellate Court dated 18.04.2023 whereby two civil appeals bearing No. 10 of 2022 and 11 of 2022 have been allowed and the matter has been remanded to the Trial Court for decision afresh.

3. Sri B.K. Saxena, learned counsel appearing for the respondent no.1-Udairaj in both the appeals submits that since the only legal issue regarding sufficiency of grounds for remand is involved, accordingly, the matter can be heard at the admission stage itself. It is in this view of the matter that the Court has heard the learned counsel for the parties at the admission stage and with the consent of learned counsel for the parties disposes of the both the appeals by this common judgment.

4. Certain facts which are relevant for a proper adjudication of the aforesaid appeals are being noticed hereinafter:-

5. The property in question which is the subject matter of the dispute is a three storied house situate in Govind Bagh, Balrampur, Pargana, Tehsil and District Balrampur. The said property was initially recorded in the name of Smt. Sushila Devi wife of Durga Prasad. The appellant no. 1 namely Sanjay Kumar was the tenant of the said premises since the time of Smt. Sushila Devi. On 25.06.2001, Smt. Sushila Devi executed a registered sale deed in respect of the entire property in favour of Reshu Gupta who was a minor through his guardian and father Ram Shankar Gupta (respondent no. 2 in the connected F.A.F.O. No. 162 of 2023 but is not a party in F.A.F.O. No. 158 of 2023).

6. At this stage, the Court found that Reshu Gupta is not a party in F.A.F.O. No. 158 of 2023 and thus the Court required the learned counsel for the appellant to implead Sri Reshu Gupta who was the appellant-vendor as a party in F.A.F.O. No. 158 of 2023 and he is permitted to carry out the necessary amendment in the memo of appeal of Appeal No. 158 of 2023. This has been necessitated on account of the fact that Reshu Gupta and Ram Shankar Gupta are already parties in F.A.F.O. No. 162 of 2023, accordingly, in order to avoid any future complications as well to correct the array of parties and to do substantial justice between the parties. The Court has permitted the learned counsel for the parties to do so during the course of the day.

7. As the Court has permitted the appellants to implead Sri Reshu as a party to the proceedings. The appellants shall also be at liberty of moving an application before the Lower Appellate Court to correct the array of parties in the memo of first appeal including by seeking an amendment

in the plaint for impleading Sri Reshu Gupta. In case if any such application is moved, the same be considered appropriately in light of the fact that Sri Reshu Gupta has already been permitted to be impleaded in this appeal.

8. The facts would indicate that the originally the property belonged to Smt. Suhsila Gupta who had sold the same to Reshu Gupta who was a minor at the relevant time by means of sale deed dated 25.06.2001. Subsequently, Reshu Gupta sold the property to the present appellants-Sanjay Kumar Modi and Rashmi Modi by means of registered sale deed dated 06.01.2006. This sale deed of the year 2006 was also executed by the minor Reshu Gupta through his guardian and father Ram Shanker Gupta.

9. The record would further indicate that Smt. Sushila Gupta is said to have instituted a suit for cancellation of the sale deed dated 06.01.2006 against Reshu Gupta and Ram Shankar Gupta which was registered as Regular Suit No. 123 of 2005, however, during the pendency of the said suit, the said property came to be purchased by the present appellants who were not parties to the suit. During pendency of the suit, upon the death of Smt. Suhshila Gupta, one Sri Uday Raj had moved an application seeking his substitution in place of Smt. Sushila Gutpa on the basis of a will executed by Smt. Sushila in his favour. Later, upon consideration on merits, the aforesaid suit came to be decreed by means of judgment and decree dated 20.04.2014.

10. It is the case of the appellants herein that Sri Uday Raj informed the present appellants regarding the judgment and decree dated 20.04.2014 and thereafter the appellants herein instituted a suit

bearing No. 134 of 2015 seeking cancellation of the judgment and decree dated 20.04.2014. The appellants instituted another suit seeking declaration of their rights bearing Regular Suit No. 163 of 2015. Since the two suits related to the same property in between the parties in question but they were not consolidated, though, they were tried simultaneously.

11. Both the suits filed by the appellants bearing R.S. No. 134 of 2015 and R.S. No. 163 of 2014 both were decreed by means of judgment and decree dated 09.05.2022. Being aggrieved against the judgment and decree dated 09.05.2022 passed in the two suits separately, Sri Uday Raj Preferred two separate Civil Appeals under Section 96 C.P.C. before the District Judge, Balrampur which was registered as Civil Appeal No. 10 of 2022 which emanated from Regular Suit No. 134 of 2022 whereas the other appeal which was registered as Civil Appeal No. 11 of 22 related to the judgment and decree passed in Regular Suit No. 163 of 2014.

12. Both the appeals have been decided by a common judgment dated 11.04.2023 which is under challenge in the two respective appeals before this Court.

13. Sri Sudeep Kumar, learned counsel for the appellant has primarily attacked the judgment on the point that once the Appellate Court had applied its mind to the controversy and had formulated the points for determination as indicated in the Order 41 Rule 31 C.P.C. and the entire evidence was already on record, then there was no occasion for the Appellate Court to have remanded the matter by means of the impugned judgment.

14. It is submitted that unless and until, there was any handicap faced by the

Appellate Court which fell within the parameters of Order-41 Rule 23-A till then in absence of any such cogent reason, the order of remand is not justified. The learned Counsel for the appellant has relied upon a decision of the Apex Court in **Shivakumar and others Vs. Sharanabasappa and Others; (2021) 11 SCC 277**.

16. Per contra, Sri B.K. Saxena, learned counsel for the respondents submits that in so far as the legal submissions regarding the power of remand is concerned, he submits that it is now well settled that an endeavour should be made by the Appellate Court to consider and decide the matter on merits as far as possible where the parties have already led the entire evidence.

15. He also submits that the issue which was to be considered was duly covered in light of the evidence which was already available on record and to that extent, he does not support the impugned judgment. He very fairly submits that ends of justice can be met in case if the impugned orders are set aside, however, while requiring the Lower Appellate Court to decide the matter afresh, some time frame may be fixed so that the longstanding controversy can be put to an end.

16. He further submits that in light of the contentions which have been raised by the parties and as noticed by the Lower Appellate Court but only two points for determination have been framed, however, they do not encapsulate the entire controversy comprehensively. He submits that it should be open for the parties to raise their plea whichever is available and fresh points for determination may be framed by the Lower Appellate Court to which the

learned counsel for the appellant also has no objection.

17. The Court has heard the learned counsel for the parties and also perused the material on record.

18. Before advertng to the respective submissions, it will be apposite to notice the scope of remand in terms of Order 41 Rule 23 and Order 41 Rule 23-A C.P.C. and for ready reference, the same is being reproduced hereinafter:-

"23. Remand of case by Appellate Court.-Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23.-A Remand in other Cases.-Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23."

19. The Apex Court in Shiv Kumar (supra) is in detail considered the scope of remand in paragraph nos. 26 to 26.6 of the said report after noticing the relevant

provisions for remand contained in Order 41 Rule 23, Rule 23-A, Rule 24 and Rule 25 in paragraphs 26.3 to 26.6 held has under:-

“26.3. A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23-A of Order 41 is not complete without reference to the provision contained in Rule 24 of Order 41 that enables the appellate court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the appellate court proceeds on a ground entirely different from that on which the trial court had proceeded.

26.4. A conjoint reading of Rules 23, 23-A and 24 of Order 41 brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Rule 24 of Order 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a retrial is considered necessary that the appellate court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the trial court may not be considered proper in a given case because the first appellate court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on

the facts and the given set of circumstances of a case.

26.5. It gets perforce reiterated that the occasion for remand would arise only when the factual findings of the trial court are reversed and a retrial is considered necessary by the appellate court.

26.6. The present case had clearly been the one where the parties had adduced all their evidence, whatever they wished to; and it had not been the case of the appellant-plaintiffs that they were denied any opportunity to produce any particular evidence or if the trial was vitiated because of any alike reason. As noticed, there had been several suspicious circumstances surrounding the will in question, some of which were noticed by the trial court but were brushed aside by it on untenable reasons. The High Court has meticulously examined the same evidence and the same circumstances and has come to a different conclusion that appears to be sound and plausible, and does not appear suffering from any infirmity. There was no reason or occasion for the High Court to consider remanding the case to the trial court. The contention in this regard is required to be, and is, rejected.”

20. This Court in **Sanjay Kumar Vs. Amar Nath Shukla in F.A.F.O. No. 431 of 2003** decided on 14.01.2020 also had the occasion to consider the scope of remand wherein this Court had relied upon the decision of the Apex Court in **Jegannathan vs. Raju Sigamani & Anr., reported in (2012) 5 SCC Page 540, and J. Balaji Singh vs. Diwaker Cole & Ors., reported in (2017) 14 SCC 207.**

21. Having noticed the scope of remand and applying the aforesaid principles to the facts of the case, it would indicate that the Lower Appellate Court has

not exercised the powers of remand in its correct perspective. The reasoning given by the Lower Appellate Court in paragraphs 9 to 11 of the impugned judgment does not reflect conscious application of judicial principles as required to be applied before a remand order is passed.

22. From the perusal of the impugned order, it only reveals that the Lower Appellate Court made reference to certain sections such as Sections 52 and 53 of the Transfer of Property Act and Section 101 and 102 of the Indian Evidence Act, however, what the Lower Appellate Court has failed to notice as to how the aforesaid sections would create any handicap for the Appellate Court to have decided the matter. In the instant case, this Court finds that the parties have led their entire evidence and there is no reference made by the Lower Appellate Court that any particular issue or on any particular aspect of the matter, the parties have not been able to lead evidence which was imperative which leads the Lower Appellate Court to remand the matter. This is to be kept in mind especially in context of the fact that the Court cannot permit the parties to fill the up the lacunae in their case by passing an order of remand.

23. It is also to be seen that the Lower Appellate Court has not given any reason whatsoever as to why the remand has been necessiated except that the provisions of Sections 52 and 53 of the Transfer of Property Act and Sections 102 and 103 of the Indian Evidence Act have not been considered. If only the effect of the aforesaid legal provisions were to be seen, then the Lower Appellate Court being the final court of fact and law was legally empowered and obliged to have considered the effect of the aforesaid sections on its own, without remanding the matter.

24. It is also to be noticed that the power of remand is not to be exercised casually or it cannot be a ground to merely shirk from the responsibility of deciding the matter on merits since the powers of the Lower Appellate Court under Section 96 C.P.C. is wide and akin to that of the Trial Court and in any case being the Court of first appeal, it is legally obliged to consider points of fact and law afresh and under the aforesaid circumstances, there was no justification for the Lower Appellate Court to have remanded the matter.

25. In view of the aforesaid, this Court finds that there is no appropriate reason nor any justifiable cause mentioned in the impugned order which can support the order of remand, accordingly, the impugned judgment and decree orders dated 11.04.2023 passed in the two appeals are liable to be set aside.

26. In view of the aforesaid, the two appeals bearing F.A.F.O. No. 158 of 2023 and F.A.F.O. No. 162 of 2023 shall stand allowed. The judgment and decree passed by the Lower Appellate Court dated 11.04.2023 passed in First Appeal No. 10 of 2022 and 11 of 2022 is set aside. The appeals shall stand restored on the Board of the District Judge, Balrampur. The parties shall appear before the District Judge, Balrampur on 10.07.2023. The Lower Appellate Court shall after affording full opportunity of hearing to the parties, including permitting them to raise all their contentions, shall decide the appeals afresh on merits preferably within a period of three months from the date the parties appear before the Lower Appellate Court. In the facts and circumstances, there shall be no order as to costs.

(2023) 5 ILRA 1087
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 19 of 2023

Amit Sharma ...Revisionist
Smt. Shiksha ...Respondent

Counsel for the Revisionist:

Sri Babban Prasad Dwivedi, Sri Hriday Narayan Pandey

Counsel for the Respondent:

Sri Ashish Kumar Singh

Civil Law – Civil Procedure Code, 1908 – Order 15 – Rule 5 & (5(1), - UP Urban Buildings Regulation of Letting, Rent and Eviction Act, - Section 30 - Rent Agreement - between revisionist-defendant and plaintiff-respondent - Suit - Decreed - order, challenged by revisionist - defendant on the ground that, plaintiff-opposite party has filed an application under O. 15 R. 5 to strike off revisionist-defendant, which was duly replied - but, while passing order trial court not considered properly - court finds that, so far fact of the case is concern, it relates to non-deposit of monthly rent is undisputed - revisionist-defendant had no option, but to deposit rent on month to month basis after initiation of the suit proceeding and after first date of hearing of case held, once it is undisputed that rent has not been deposited before the court concerned there is no provision in law to grant any relief, but the only option is to strike off the defence as provided in O. XV R. 5 of CPC - no illegality & infirmity in the impugned order, found - accordingly, revision lacks merit and is dismissed.

Revision Dismissed. (E-11)

List of Cases cited:

1. Radhe Shyam Chaurasiya & anr. Vs Smt. Babita, 2022 ADJ 272,

2. Asha Rani Gupta Vs Sri Vineet Kumar, (2022)
0 Supreme (SC) 594

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

1. Supplementary affidavit filed today is taken on record.

2. Heard learned counsel for the revisionist and Sri Ashish Kumar Singh, learned counsel for the opposite party.

3. Present Revision has been filed challenging the order dated 20.01.2023 as well as Decree dated 25.01.2023, passed by the Additional District & Session Judge, Ghaziabad in Suit No. 42 of 2016.

4. Learned counsel for the revisionist-defendant submitted that Suit No. 42 of 2016 was filed by the plaintiff-opposite party. He next submitted that plaintiff-opposite party has filed application dated 09.02.2022 under Order XV, Rule 5, C.P.C. to strike off the defence of the revisionist-defendant, which is dully replied by revisionist-defendant by reply dated 18.04.2022. He next submitted that, while passing the impugned order dated 20.01.2023 reply of revisionist-defendant has not been properly considered. In the reply dated 18.04.2022, revisionist-defendant has stated that filing of Suit No. 42 of 2016 was itself defective, as it has been filed before 30 days from the date of notice sent by the counsel for the plaintiff. He also submitted that as the rent agreement was extended for 11 months w.e.f. 01.02.2016 and he had paid the entire dues, therefore, nothing was due on the petitioner-defendant to pay, therefore, impugned order is bad and is liable to be set aside.

5. Learned counsel for the revisionist-defendant submitted that Order XV Rule 5

is having two parts, first part says that on or before the first hearing of suit, revisionist-defendant was required to deposit the entire admitted amount and, thereafter, rent on month to month basis. In the present case, the application dated 09.02.2022 has been allowed on the ground that revisionist-defendant has not paid a single penny on month to month basis as rent after first hearing of the suit initiated in 2016, which has also not been denied in the reply dated 18.04.2022 filed by revisionist-defendant, rather this has been accepted.

6. He next submitted that application of revisionist-defendant was allowed only on the ground that he has not deposited any rent after initiation of suit and after first date of hearing. In support of his contention, learned counsel for the plaintiff-opposite party has placed reliance on the judgment of this Court in the case of **Radhe Shyam Chaurasiya and Another Vs. Smt. Babita: 2022 ADJ 272** and judgment of Apex Court **Asha Rani Gupta Vs. Sri Vineet Kumar: (2022) 0 Supreme(SC) 594**.

7. Being confronted by the court, even before Bar, Sri Pandey, learned counsel for the revisionist-defendant fairly accepted that no rent has been deposited and monthly rent has been deposited after initiation of suit proceeding and after first date of hearing of the case.

8. I have considered submissions made by learned counsel for the parties and perused the record as well as judgments so relied upon. The fact of the case, so far it relates to non deposit of monthly rent is undisputed.

9. From the perusal of Order XV Rule 5, it is apparently clear that revisionist-

defendant had no option, but to deposit rent on month to month basis whether admitted or not admitted by him.

10. This issue was before this Court in the matter of **Radhe Shyam Chaurasiya(Supra)** and this Court after considering different judgments has held that it is mandatory to deposit rent on month to month basis before the court, where the suit has been instituted. Relevant paragraphs of the said judgment are quoted hereinbelow:

"5. Striking of defence for failure to deposit admitted rent, etc. In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per centum per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of any default in making the deposit of entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2), strike off his defence.

Explanation 1. The expression 'first hearing' means the date for filing written statement for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.

Explanation 2. The expression 'entire amount admitted by him to be due' means the entire gross amount, whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for

the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account and the amount, if any, paid to the lessor acknowledged by the lessor in writing signed by him and the amount, if any, deposited in any Court under Section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

Explanation 3. (1) The expression 'monthly amount due' means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority, in respect of the building on lessor's account.

(2) Before making any order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days, of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this Rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

The first part deals with the deposit of the 'entire amount admitted by him to be due' together with interest at or before the first hearing of the suit. The second part deals with the deposit of 'monthly amount due' which has to be made throughout the

continuation of the suit. So far as any amount deposited prior to institution of the suit, may be adjusted against the arrears, if any such application is filed. Whereas second part is concerned, it is mandatory requirement to deposit the rent before the Court concerned, where the suit is instituted. In the objection dated 2.2.2021 filed to the application under Order XV Rule 5 of C.P.C as well as affidavit filed before the Court, it is accepted by the revisionist no.2 that no rent has been paid by her before the Court concerned after first hearing of the suit.

This Court in the matter of Maya Devi (Supra) has taken specific view that in case of denial of tenancy, he may not be required to deposit the amount admitted to be due at or before the first hearing of the suit but he would still be required to deposit the monthly amount due within a week. Relevant paragraph of the said judgment is being quoted hereinbelow:-

"In the aforesaid case it was held that where the defendant denies the existence of landlord and tenant relationship, he may not be required to deposit the amount admitted to be due at or before the first hearing of the suit but he would still be required to deposit the monthly amount due within a week from the date of its accrual throughout the continuation of the suit because such deposit has to be made in spite of the fact he admits any amount to be due or not."

In the matter of Gaya Prasad (Supra), Court has taken the view that rent is required to be deposited in compliance of provisions of Order XV Rule 5 of C.P.C. Relevant paragraph of the said judgment is being quoted hereinbelow:-

"Default in payment of rent is admitted and stands proved on record inasmuch as according to own case of the defendant-petitioner he has not paid rent after

04.08.1999. It is also not disputed that the rent has not been deposited in compliance to the provisions of Order XV Rule 5 C.P.C. Consequently, his defense was also struck off. The order striking off the defense, therefore, also does not suffer from any manifest error of law."

In the matter of State Bank of India, City Branch Pandey Hata (Supra), Court has again taken the same view that rent is not deposited by the tenant, therefore, there is no illegality in striking off the defence. Relevant paragraph of the said judgment is being quoted hereinbelow:-

"Considering the admitted facts of the case that the defendants-petitioners have neither disputed the arrears of rent on the first date of hearing nor paid monthly rent and as such protection of order XV Rule 5 C.P.C. was not available to him. Consequently, the court below has not committed any error of law in allowing the application 37Ga and striking off the defence of the defendants-petitioners/tenants. So far as the rejection of application 50Ga is concerned, I find that as per statement made by learned counsel for the plaintiffs-respondents before this Court and not disputed by learned counsel for the defendants-petitioners, the date 8.2.2018 is fixed before the court below for arguments. Therefore, I find it appropriate to request the court below to decide the aforesaid SCC Suit No.05 of 2016 (Ram Niwas Verma and others Vs. State Bank of India and another) in accordance with law, expeditiously, preferably within eight weeks from the date of presentation of a certified copy of this order, without granting any unnecessary adjournment to either of the parties."

"11. From perusal of Order XV Rule 5 of C.P.C., it is apparently clear that any deposit made prior to first appearance in SCC suit may be adjusted for arrears of

rent due upon filing an application, but after institution of suit, it is mandatory requirement to deposit rent before the Court, where the suit is instituted. Once it is not disputed that rent has not been deposited before the Court concerned, where the suit is instituted, there is no option before the Court to struck off the defence as provided under the provisions of Order XV Rule 5 of C.P.C.

12. So far as present case is concerned, there is admission on the part of revisionist no.2 that she has paid rent from time to time and she is tenant. She also admitted that she has never paid rent before the Court concerned after first hearing of the suit as required under Order 5 Rule 15 of C.P.C.

13. Therefore, in light of facts of the case as well as law laid down by this Court from time to time, there is no illegality or irregularity and Court has rightly struck off the defence of revisionists. Revision lacks merit and is, accordingly, dismissed. No order as to costs."

11. Again the Apex Court has considered the same issue in the matter of **Asha Rani Gupta Vs. Sri Vineet Kumar: (2022) 0 Supreme(SC) 594** and has taken the very firm view that once the rent on month to month basis has not been deposited, Court has no power of discretion to exercise its power in favour of defendant-respondent. Relevant paragraphs of the said judgment are quoted hereinbelow:

"13. In a suit of the present nature, where the defendant otherwise has not denied his status as being the lessee, it was rather imperative for him to have scrupulously complied with the requirements of law and to have deposited the arrears of rent due together with

interest on or before the first date of hearing and in any case, as per the second part of sub-rule(1) of Rule 5 of Order XV CPC, he was under the specific obligation to make regular deposit of the monthly amount due, whether he was admitting any such dues or not.

16. In the totality of facts and circumstances, we are clearly of the view that there was absolutely no reason for the High Court to have interfered in the present case, where the Trial Court had struck off the defence after finding that there was no evidence on record to show the payment or deposit of rent in favour of the plaintiff by the defendant-respondent. The Revisional Court had also approved the order of the Trial Court on relevant considerations. Even the High Court did not find the pleas taken by the defendant-respondent to be of bonafide character, particularly when survey number of the shop let out to him was clearly stated in the sale deed executed in favour of the plaintiff. We find it rather intriguing that, despite having not found any cogent reason for which discretion under Rule 5 of Order XV CPC could have been exercised in favour of the defendant-respondent, the High Court, in the last line of paragraph 45 of the order impugned, abruptly stated its conclusion that: 'yet the defendant/tenant deserves some indulgence'.

12. Undisputedly, so far as the present case is concerned, facts are again the same. There is no dispute on the point that after first hearing of the case, petitioner-defendant has not deposited any amount as rent, required to be paid on month to month basis. Once, it is undisputed that rent has not been deposited before the court concerned there is no provision in law to grant any relief, but the only option is to

strike off the defence as provided in Order XV Rule 5 of CPC.

13. In view of facts and law laid down by the Court, I found no illegality & infirmity in the impugned orders dated 20.01.2023 & 25.01.2023. Accordingly, revision lacks merit and is **dismissed**.

14. No order as to costs.

(2023) 5 ILRA 1091
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ Tax No. 1039 of 2021

Kuldeep Agarwal ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Sharma, Sri Neeraj Sharma

Counsel for the Respondents:
C.S.C.

A. Tax Law – Cancellation of license – Search and Seizure - U.P. Excise Act: Section 74 - Uttar Pradesh Excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer) (Seventeenth Amendment) Rules, 2019-Rule 18(1); The Uttar Pradesh Excise (Settlement of Licenses for Retail Sale of Beer) Rules, 2001 - It is well settled that the show-cause notice is issued to put the assessee/licensee on guard and to enable him to file a reply to the allegations contained in the show-cause notice and infractions, which are alleged against the licensee in the said show-cause notice. (Para 28)

A show-cause notice invoking a particular provision must specifically allege in the show-cause notice and in the absence of such averments, the said show-cause notice is not sustainable. (Para 31)

The show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. (Para 32)

The show-cause notice served upon the petitioner, refers to the search carried out at the licensed premises and the recovery of the liquor from the said premises, and after recording the summary of the search carried out at the premises proceeds to allege against the petitioner that the said averments were in violation of Condition Nos. 5, 6 & 7 and has caused a loss of special fees of excise duty; the said grounds were alleged for proposing the cancellation of the license and for confiscation of the license fees. (Para 27)

The petitioner in the show-cause notice in question, alleges infraction of Condition Nos. 5, 6 & 7. In the cancellation order, the appellate order and the revisional order, there is no finding to the effect that there was any violation of Condition Nos. 5 & 6, the only finding is in respect of Condition No. 7, thus, it could not be presumed that while giving a reply to the show-cause notice, the petitioner had to presume that any infraction as contained in Rule 18(1)(a) to (i) were also alleged against the petitioner. In the event, respondents were of the view that the action is proposed to be taken for violation of conditions specified in Rule 18(1)(a) to (i), it ought to have been specifically stated. (Para 34)

B. If the intent of the legislature while framing the rules was to compound the offences referred to in Rule 18(1)(a) to (g), the same ought to have been mentioned in the list as has been done in respect of the infractions mentioned in the table attached to Rule 18(5). Clearly the infractions referred to in Rule 18(1)(a) to (i) are not mentioned in the infractions which are said

to be specified in the table annexed to Rule 18(5) and the same are different. The argument of petitioner in respect of infractions referred to at Serial No. 15 in the list attached to Rule 18(5) cannot be accepted as the infractions mentioned in Rule 18(1)(a) to (i) are in substance different and appear to be more rigorous infractions compared to infractions referred to in the table in Rule 18(5). Therefore, the infractions referred to in Rule 18(1)(a) to (i) are not compoundable. (Para 36)

C. Allegations were levelled against the petitioner w.r.t. opening of the shop on the days which were prohibited and as contained in Condition No. 7 to the license. Although, in the seizure memo, there is no averment that the liquor was being sold on the day of prohibition, however, while passing the cancellation order and in the show-cause notice, it was alleged and found that the petitioner was selling liquor on the day of prohibition, however, the said infraction clearly finds mentioned at Serial No. 10 in the list attached to Rule 18(5) and thus, in terms of Rule 18(5), the said infraction falls within the compoundable offence and thus, it was incumbent upon the authorities to have passed an order in respect of compounding of the said offence as prayed by the petitioner, which has not been done in the present case. (Para 37)

D. It is essential to notice that the special fees is chargeable for sale of liquor and beer at the restaurants, however, the said special fees or its loss can be caused only if the sale is effected. Merely by recovery of the liquor allegedly belonging to another shop and there being no finding in respect of the sale of such liquor, there is no basis whatsoever to record that loss of special fees was being caused and thus, to that extent, the finding recorded is wholly perverse. (Para 39)

This Court finds that the infractions in respect of Condition Nos. 5 & 6 of the license which were alleged in the show-cause notice are not established and proved against the petitioner. The infractions specified in Rule 18(1)(a) to (i) were not alleged in the show-cause notice, as such, the same are not established against the

petitioner. The infractions w.r.t. violation of Condition No. 7 of the license stands partially justified, however, the same is compoundable at the rate of Rs. 30,000/-in terms of the table u/Rule 18(5). (Para 40, 41)

It is directed that the respondents authorities shall pass a fresh order for compounding of the offence in respect of the infractions of Condition No. 7 of the license at the rates specified in the table to Rule 18(5) (Serial No. 10 of the list) by passing a fresh order within a period of one month from today. (Para 44)

Writ petition partly allowed. (E-4)

Precedent followed:

1. Nashirwar & ors. Vs State of Madhya Pradesh & ors., (1975) 1 SCC2 9 (Para 22)
2. Kaur & Singh Vs Collector of Central Excise, New Delhi, 1997 (94) E.L.T. 289 (Para 29)
3. Collector of Central Excise Vs H.M.M. Ltd., 1995 (76) E.L.T. 497 (Para 29)
4. Raj Bahadur Narayan Singh Sugar Mills Ltd. Vs U.O.I., 1996 (88) E.L.T. 24 (Para 29)
5. Oryx Fisheries Pvt. Ltd. Vs U.O.I., 2011 (266) E.L.T. 422 (Para 30)
6. Aban Loyd Chiles Offshore Ltd. Vs Commr. Of Cus., Maharashtra, 2006 (200) E.L.T. 370 (Para 32)
7. Collector of Central Excise, Bangalore Vs Gammon Far Chems Ltd., (2003) 11 SCC 693 (Para 33)

Present petition challenges the order dated 06.10.2021, 03.01.2020 and 27.10.2019 passed by the respondent No.1 (State of U.P. through Special Secretary (Excise), Govt. of U.P., at Lucknow), respondent No.2 (Excise Commissioner U.P., Mumfordganj, Prayagraj) and respondent No.3 (Collector, Aligarh), respectively.

Kuldeep Agarwal Vs State of U.P. and Ors. (04.04.2023 - ALLHC) : MANU/ UP/ 1317/ 2023

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Shri Neeraj Sharma, learned counsel for the petitioner and Sri A.C. Tripathi, counsel for the respondents.

2. Present petition has been filed challenging the order dated 06.10.2021, 03.01.2020 and 27.10.2019 passed by the respondent no.1, 2 and 3.

3. Facts, in brief, are that the petitioner was granted a bar license of Hotel Ganesh Garden & Restaurant at Khaier, District Aligarh in the year 2012 under Rule 8(ii) of the Rules relating for vending foreign liquor read with Notification No.25535 and Notification No.10759; license fees is said to have been paid up to the year 2019 - 20.

4. It is alleged against the petitioner that an inspection was carried out at the bar of the petitioner on 02.10.2019 and in the said inspection, certain irregularities were found. From the inspection report it transpires that certain bottles of liquor which were of different shops were found in the bar of the petitioner for which the license was granted. It was also found that the bar was running on the date of prohibition through salesman. In terms of the search and seizure carried out, spot memo was prepared and an FIR was lodged on 03.10.2019 against the licensee and the salesman on the same allegations as recorded in the search and seizure memo.

5. In terms of the said inspection, several irregularities were found in the licensed premises; the petitioner was served with a show cause notice on 03.10.2019 (Annexure - 2). The infractions recorded in the search and seizure memo were stated in the show cause notice and it was stated that

on the basis of the infractions, it transpires that the petitioner had violated Condition No.5, 6 and 7 of the license and further loss of revenue was caused as there was a provision for charging a special fees for serving liquor at the bar.

6. In the light of the infractions and on the allegations that prima-facie, the licensee was breaching Condition Nos.5, 6 & 7 of the license and was evading the payment of special fees, the petitioner was called upon to show-cause as to why the steps may not be taken for cancellation of the license. The petitioner was required to submit a reply within a period of seven days. Simultaneously, alongwith the said show-cause notice, a suspension order was also passed against the petitioner.

7. The petitioner submitted a reply to the said show-cause notice on 12.10.2019 before Respondent No.3 (Annexure - 3) denying the allegations as levelled in the show-cause notice on all grounds and in addition to the said denial, made a request that the case of the petitioner be considered for compounding in terms of the mandate of Section 74 of the U.P. Excise Act (hereinafter referred to as 'the Act').

8. After considering the reply filed by the petitioner, an order came to be passed on 27.10.2019 (Annexure - 4) whereby in exercise of powers conferred by virtue of Rule 18(1) of The Uttar Pradesh Excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer) (Seventeenth Amendment) Rules, 2019 and The Uttar Pradesh Excise (Settlement of Licences for Retail Sale of Beer) Rules, 2001 as amended in the year 2019 (hereinafter referred to as "the Rules, 2019"), license of the petitioner was cancelled.

9. The petitioner approached this Court by filing a writ petition challenging the order of cancellation dated 27.10.2019. The said petition was dismissed on the ground of availability of alternative remedy of appeal under Section 11(1) of the Act. The petitioner preferred an appeal under Section 11(1) of the Act, which too was dismissed vide order dated 03.01.2020. The petitioner once again filed a writ petition challenging the appellate order. The said writ petition was dismissed on the ground of availability of remedy of revision before the State Government. The petitioner preferred a revision under Section 11(2) of the Act before the State Government. The revision also came to be dismissed on 06.10.2021. All the said three orders are under challenge in the present writ petition.

10. Shri Neeraj Sharma, learned counsel for the petitioner argues that the grant of license is governed by the U.P. Excise Act and the Rules framed thereunder. He draws my attention to the specific Rules of 2019 framed with regard to sale of beer as well as the sale of wine and liquor other than beer.

11. He argues that in terms of the said Rules, a specific power with regard to cancellation of license is prescribed under Rule 18. He argues that power to cancel license under Rule 18 can be invoked by the licensing authority in the event of any of the conditions specified in Clause (a) to (i) of Rule 18(1). He argues that Rule 18(5) prescribes for compounding breaches pertaining to the retail licenses on terms indicated in the table as contained in Rule 18(5). He further argues that in any event, the power to compound the infractions is contained in Section 74 of the Act, which power has not been exercised by the authorities despite there being a request in

the objections filed in the show-cause notice.

12. He further argues that the show-cause notice had alleged infractions/violation of Condition Nos.5, 6 & 7 of the license granted to the petitioner as well as the allegation that there was an evasion of special fees by the petitioner, thus, the petitioner could have been expected to give reply only to the allegations levelled against him. He argues that there was no averment in the show-cause notice with regard to any breach/conditions prescribed under Rule 18(1)(a) to (i) of the 2019 Rules and in that regard, he submits that the authorities have exceeded in passing the order in excess of the allegations levelled in the show-cause notice.

13. He further argues that the allegations as levelled in the search and seizure memo are that the liquor was meant for the shop situate at Lodha and foreign liquor shop Khaier Aada (of which the petitioner and his wife are licensees) and subsequently, in respect of the shop at Lodha, the respondents have themselves proceeded to compound the offences and have regularized the license and, it was incumbent upon the respondents to have compounded the infractions.

14. In respect of the allegations levelled against the petitioner in the show-cause notice, he draws my attention to the specific allegation that the bar was found open on the date the sale is prohibited i.e. 2nd October and with regard to the said allegation, he argues that Rule 18(5) and the table annexed thereto specifically provides for compounding of the said infraction on payment of fees as prescribed. He argues that in terms of the power

conferred under Section 34 of the Act and the Rule, the word used is "may" and not "shall", and thus, a wide discretion vests in the licensing authority to cancel or not to cancel the license, however, the said discretion should be exercised in terms of the mandate of the Rules and not in an arbitrary manner. He, thus, argues that the orders impugned passed against the petitioner are liable to be quashed as being arbitrary and in violation of the spirit of the Act and the Rules framed thereunder.

15. Shri A.C. Tripathi, learned counsel appearing for the respondents vehemently opposed the writ petition and argues that the infractions alleged in the show-cause notice and found during the search and seizure operation were serious in nature and no error has been done in cancelling the license through impugned order.

16. Controverting the argument of learned counsel for the petitioner, Shri A.C. Tripathi argues that Rule 18 has been framed in terms of the power conferred by Section 41 of the Act. On a plain reading of provisions of Rule 18(1), infractions contained in Clause (a) to (i) provide for grounds for suspension or cancellation. He argues that argument of Shri Neeraj Sharma that all the offenses are compoundable as provided under Rule 18(5) is incorrect for the simple reason that the infractions contained in Rule 18(1) are not mentioned in the table specified in Rule 18(5) and thus, both the two Rules being Rule 18(1) and Rule 18(5) operate in different spheres and on that count, argument of counsel for the petitioner is liable to be rejected.

17. He further argues that another argument of counsel for the petitioner with regard to Section 74 of the Act is also liable

to be rejected as Section 74 is itself divided into two parts; one pertaining to the infractions and the power flowing from Section 34, and the other in respect of offences which are punishable under Section 64 and Section 68. He argues that both can be compounded separately in terms of the powers conferred, however, in the present case, the cancellation proceedings have not emanated from Section 34 and in fact, have emanated from Rule 18(1) and thus, the powers of compounding provided for under Section 74 cannot be availed of.

18. He, thus, argues that once that power was not available, the licensing authority has not made any error in not considering the request for compounding as prayed in the reply to the show-cause notice.

19. He further argues that although in the show-cause notice, there is a reference to violation of Condition Nos.5, 6 & 7 of the license, however, on the composite reading of the show-cause notice, various allegations which are traceable to infractions contained in Rule 18(1)(a) to (i) can be traced and thus, the submission of counsel for the petitioner on that count that the show-cause notice was vague is liable to the rejected.

20. In the light of the submissions made by the parties, following questions emerge for determination:

i. Whether the show-cause notice, which alleges violation of Condition Nos.5, 6 & 7 of the license is enough to take action for cancellation by taking recourse to Rule 18(1)(a) to (i) of the Rules, 2019 ?

ii. Whether the offences under Rule 18(1)(a) to (i) of the Rules, 2019 are compoundable under Rule 18(5) ?

iii. Whether the allegation of opening of the shop/restaurant on the day of prohibition is a compoundable offence in terms of the mandate of Rule 18(5) ?

21. To decide the said issues as framed above, it is essential to see the scheme of the Act and the Rules framed therein.

22. It is well settled that there is no right of license and it is only a privilege granted by the State Government as held by the Hon'ble Supreme Court in the case of **Nashirwar & Ors. v. State of Madhya Pradesh & Ors.**; (1975) 1 SCC 29.

23. The U.P. Excise Act makes a special provision empowering the State Government to grant license for the sale of liquor and the other intoxicant and for charging excise duty on the same. The said Act also empowers the licensing authority to take action for cancellation or suspension of the license so granted in terms of the powers under Section 34 of the Act. Section 34 reads as under:

"34. Power to cancel or suspend licenses, etc.- (1) *Subject to such restrictions as the State Government may prescribe, the authority granting any license, permit or pass under this Act may cancel or suspend it --*

(a) if any duty or fee payable by the holder thereof be not duly paid; or

(b) in the event of any breach by the holder of such license, permit or pass or by his servants, or by any one acting on his behalf with his express or implied permission of any of the terms or

conditions of such license, permit or pass;
or

(c) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence, or of any offence punishable under the Dangerous Drugs Act, 1930, or under the Merchandise Marks Act, 1889, or of any offence punishable under sections 482 to 489 (both inclusive) of the Indian Penal Code; or

(d) where a license, permit or pass has been granted on the application of the grantee of an exclusive privilege under this Act, on the requisition in writing of such grantee; or

(e) if the conditions of the license or permit provide for such cancellations or suspension at will.

(2) When a license, permit or pass held by any person is cancelled under clause (a), (b) or (c) of sub-section (1), the authority aforesaid may cancel any other license, permit or pass granted to such person by, or by the authority of the State Government under this Act or under any other law for the time being in force relating to excise revenue or under the Opium Act, 1878.

(3) No Compensation or refund claimable for cancellation or suspension of license, etc. under this section.- The holder shall not be entitled to any compensation for the cancellation or suspension of his license, permit or pass under this section nor to refund of any fee paid or deposit made in respect thereof."

24. In addition to the powers conferred under Section 34 of the Act, further powers have been conferred under Section 35 of the Act.

25. It is interesting that Section 40 and Section 41 of the Act empowers the State Government and Excise Commissioner to make rules for enforcing and regulating the provisions of the Act. Section 40 and Section 41 are quoted herein below:

"40. Power of State government to make Rules.- (1) The State Government may make rules for the purpose of carrying out the provisions of this Act or other law for the time being in force relating to excise revenue:

Provided that the Uttar Pradesh Licensing under the Surcharge Fee System Rules, 1968 made by the Excise Commissioner, Uttar Pradesh, with the previous sanction of the State Government, as amended by the Excise Commissioner, Uttar Pradesh, from time to time, before the commencement of this Act, shall until altered or repealed by the State Government rules made under this section be deemed to be and always to have as valid and effective as if the said rules were duly made by the State Government under this section.

(2) In particular and without prejudice to the generality of the foregoing provision, the State Government may make rules --

(a) regulating the delegation of any powers by the Excise Commissioner or Collector under section 10 (2) (h);

(b) prescribing the powers and duties of officers of the Excise Department;

(c) prescribing the manner in which appeals or revisions shall be presented and the procedure for dealing with such appeals and revisions;

(d) regulating the import, export, transport or possession of any intoxicant;

(e) regulating the periods and localities for which and the persons to

whom licenses for the vend by wholesale or by retail of any intoxicant may be granted;

(f) prescribing the procedure to be followed and the matters to be ascertained before, any license for such vend is granted for any locality ;

(g) for the prohibition of the sale of any intoxicant to any person or class of persons;

(h) for the grant of expenses to witnesses and compensation for loss of time to persons released under section 49 on the ground that they have been improperly arrested and to persons charged before a Magistrate with offences punishable under the Act but acquitted;

(i) regulating the power of Excise Officers to summon witnesses from a distance under the provisions of section 49;

(j) for declaring the Excise Officers to whom, and the manners in which, information or aid should be given under section 56;

(k) for the prohibition of the employment by the license-holder of any person or class of persons to assist in his business in any capacity whatsoever;

(l) for the prevention of drunkenness, gambling or disorderly conduct in or near any licensed premises and the meeting or remaining of persons of bad character in such premises.

(m) for the grant of rewards to officials, officers or informers by the Collector out of and up to fifty per cent of composition fee and by the Magistrate trying the case, out of and up to fifty per cent of fine recovered under the Act.

(3) * * *

"41. Power to Excise Commissioner to make Rules.- (1) The Excise Commissioner subject to the previous sanction of the State Government may make rules ;

(a) regulating the manufacture, supply, storage or sale of any intoxicant including -

(i) the erection, alteration, repair, inspection, supervision, management and control of any place for the manufacture, supply, storage or sale of such article and the fittings implements and apparatus to be maintained therein ;

(ii) the cultivation of the hemp plant (*cannabis sativa*);

(iii) the collection of portions of the hemp plant (*cannabis sativa*) from which any intoxicating drug can be manufactured and the manufacture of any intoxicating drug therefrom ;

(b) regulating the deposit of any intoxicant in a warehouse and the removal of any intoxicant from any such warehouse or from any distillery brewery or manufactory;

(c) prescribing the scale of fees or the manner of fixing the fees payable for any licence, permit or pass including any consideration for the grant of any exclusive or other privilege granted under section 24 or section 24-A or for sorting of any intoxicant:

Provided that nothing contained in this clause shall be construed to prevent the State Government from levying by notification made from time to time, any fee, including vend fee, as part of consideration for the granting of any such privilege.

Explanation-- (1) Fees may be prescribed under this sub-clause at different rates for different classes of licences, permits, passes or storage and for different areas ;

(2) The manner of fixing such fee or consideration includes any one or more of the following manners, namely :--

(i) auction,
 (ii) invitation of tenders,
 (iii) assessment on the basis of sales made or quota lifted under the license, permit or pass.

(d) regulating the time, place and manner of payment of any duty or fee ;

(e) prescribing the restrictions under and the conditions on which any license, permit or pass may be granted, including provision for the following matters –

(i) the prohibition of the admixture with any intoxicant of any substance deemed to be noxious or objectionable;

(ii) the regulation or prohibition of the reduction of liquor by a licensed manufacturer or licensed vendor from a higher to a lower strength;

(iii) the fixing of the strength price or quantity in excess of or below which any intoxicant shall not be sold or supplied, and of the quantity in excess of which denatured spirit shall not be possessed, and the prescription of a standard of quality for any intoxicant;

(iv) the prohibition of sale except for cash;

(v) the fixing of the days and hours during which any licensed premises may or may not be kept open, and the closure of such premises on special occasions ;

(vi) the specification of the nature of the premises to which any intoxicant may be sold and the notices to be exposed at such premises ;

(vii) the form of the accounts to be maintained and the returns to be submitted by license-holders; and

(viii) the regulation of the transfer of licenses ;

(f) (i) declaring the process by which spirit manufactured in India shall be denatured ;

(ii) for causing such spirit to be denatured through the agency or under the supervision of its own officers;

(iii) for ascertaining whether such spirit has been denatured ;

(g) providing for the destruction or other disposal of any intoxicant deemed to be unfit for use ;

(h) regulating the disposal of confiscated articles."

26. In terms of the rule making power conferred under Section 41 of the Act, the State Government has made Rules known as "Uttar Pradesh Excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer) (Seventeenth Amendment) Rules, 2019. Rule 18(1) to (5) thereof provide for suspension/cancellation and compounding of the license and penalties, which are quoted herein below:

"18. Suspension and cancellation of the license and penalties. - (1) Licensing authority may suspend or cancel the license:-

(a) if any bottle is found in the licensed premises on which duty has not been paid and which does not carry the security Code affixed duly approved by the Excise Department as proof of payment of duty.

(b) if any other kind of liquor or intoxicating drug (for which license is not granted) is found in the licensed premises.

(c) if any liquor of intoxicating drug is found in the possession of the licensee against the provisions of the Act or rules.

(d) if the affidavit submitted by the licensee at the time of application is found incorrect and assertions made therein are found to be false.

(e) if the licensee is convicted of an offence punishable under the Act or any other law for the time being in force

relating to revenue, or of any cognizable and non-bailable offence, or any offence punishable under the Narcotics Drugs and Psychotropic Substances Act, 1985 or of any offence punishable under Sections 482 to 489 of the Indian Penal Code, 1860.

(f) if any bottle/container is found in the licenced premises on which maximum retail price is not printed and

(g) if it is found that the licence has been obtained in a false name and the licensee is holding the licence on behalf of some other person.

(h) If any caramel, colour, essence, hologram/ shrink sleeve or barcode, label, capsule, seal or other illegal material found in licence premises.

(i) If any Adulteration with water or any other substance/dilution of liquor mixing of low category liquor with high category liquor is found in licence premises. Action under other relevant provisions of law shall also be taken

(2) The licensing Authority shall immediately- suspend the license and issue a show cause notice for cancellation of license and forfeiture of security deposit. The licensee shall submit his explanation within 7 days of the receipt of notice. Thereafter, the licensing authority shall pass suitable orders after giving due opportunity of hearing to the licensee, if he so desires.

(3) The licensee shall not be entitled to claim any compensation or refund for suspension or cancellation of licence under this rule.

(4) In case the licence is cancelled the licensee may also be blacklisted and debarred from holding any other excise licence.

(5) Matter of compoundable breaches pertaining to retail licenses such as below, shall be imposed with minimum compounding fee-

SI. No.	Type of violation	For first time (in Rs)	For second time (in Rs)	For third time (in Rs)
1	Shop found opened before or after the stipulated time.	2500	3000	5000
2	Unauthorised sales man found to be making sale.	5000	7000	10,000
3	Stock register not produced when asked for.	10,000	15,000	20,000
4	Stock register found incomplete.	10,000	15,000	20,000
5	Tempering with bottles and quarters or their labels or bar code, pilfer	10,000	15,000	20,000

	proof cap or seals.			
6	Found having recourse to inducement to the customer with a view to increasing sales such as dancing or gambling.	5000	7000	10,000
7	To store duty paid stock in unauthorised premises / warehouse.	20,000	25,000	30,000
8	Duty paid stock being found in excess of account.	25,000	30,000	50,000
9	Found selling of loose liquor.	5000	10,000	15,000
10	Found	30,000	40,000	50,000

	making sale of liquor during days of prohibition and closure.	0	00	
11	Any alteration in the premises without permission.	20,000	25,000	30,000
12	Found selling of liquor above the prescribed MRP.	75,000	150000	Proceeding of cancellation of license
13	Non-displaying of essential information according to rule or displaying faulty information on the signboard installed outside the premises.	5000	10,000	20,000

14	On being found no proper arrangement of cleanliness in the shop.	2000	5000	10,000
15	Any other irregularity which is not mentioned under serial - 01 to 14	2,000	5,000	10,000

27. To decide the first issue as recorded above, the show-cause notice served upon the petitioner and as contained in Annexure - 2, refers to the search carried out at the licensed premises and the recovery of the liquor from the said premises, and after recording the summary of the search carried out at the premises proceeds to allege against the petitioner that the said averments were in violation of Condition Nos.5, 6 & 7 and has caused a loss of special fees of excise duty; the said grounds were alleged for proposing the cancellation of the license and for confiscation of the license fees. Condition Nos.5, 6 & 7 of the license granted to the petitioner are as under:

"5- शराब केवल पैगों, पैग बराबर 50 मि०ली० में) बेचा जायेगा। कोई बिकी मुहर बन्द बोतलों में नहीं की जायेगी।

6- लाइसेंस धारी एल०एल० - 2 से केवल 750 मि०ली० क्वार्टर्स में सम्भारण प्राप्त करने के हकदार होंगे। उन्हें अपने स्टॉक में निपस और पिन्ट्स रखने की अनुज्ञा नहीं होगी।

7- बार का 14 अप्रैल (अम्बेडकर जयन्ती), 15 अगस्त (स्वतन्त्रता दिवस), 02 अक्टूबर (गाँधी जयन्ती), 26 जनवरी (गणतन्त्र दिवस) को अवकाश रहेगा। "

28. It is well settled that the show-cause notice is issued to put the assessee/licensee on guard and to enable him to file a reply to the allegations contained in the show-cause notice and infractions, which are alleged against the licensee in the said show-cause notice.

29. It is gainful to note the judgment of the Hon'ble Supreme Court in the case of **Kaur & Singh v. Collector of Central Excise, New Delhi; 1997 (94) E.L.T. 289** wherein the Supreme Court following the earlier two judgments in the case of **Collector v. H.M.M. Ltd.; 1995 (76) E.L.T. 497** and **Raj Bahadur Narayan Singh Sugar Mills Ltd. v. U.O.I.; 1996 (88) E.L.T. 24** recorded in Para - 3 as under:

"3. This Court has held that the party to whom a show cause notice of this kind is issued must be made aware of the allegation against it. This is a requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him. This is all the more so when a larger period of limitation can be invoked on a variety of grounds. Which ground is alleged against the assessee must be made known to him, and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice. [See *Collector of Central Excise v. H.M.M. Limited, 1995 (76) E.L.T. 497* and *Raj Bahadur Narayan Singh Sugar Mills Limited v. Union of India, 1996 (88) E.L.T. 24*]."

30. The Hon'ble Supreme Court further had the occasion to consider the

need for issuance of a show-cause notice and the requirements in the show-cause notice to satisfy the test of fairness in the case of **Oryx Fisheries Private Limited v. Union of India; 2011 (266) E.L.T. 422** wherein the Supreme Court recorded as under:

"24. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

25. Expressions like "a reasonable opportunity of making objection" or "a reasonable opportunity of defence" have come up for consideration before this Court in the context of several statutes.

26. A Constitution Bench of this Court in *Khem Chand v. Union of India and Others*, reported in AIR 1958 SC 300, of course in the context of service jurisprudence, reiterated certain principles which are applicable in the present case also.

27. Chief Justice S.R. Das speaking for the unanimous Constitution Bench in *Khem Chand* (supra) held that the concept of "reasonable opportunity" includes various safeguards and one of them, in the words of the learned Chief Justice, is:

"(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges leveled against him are and the allegations on which such charges are based,"

28. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and

prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony."

31. The Hon'ble Supreme Court further had the occasion to consider the scope of a show-cause notice and its intent in the case of **Collector of Central Excise v. H.M.M. Limited; 1995 (76) E.L.T. 497** and held that a show-cause notice invoking a particular provision must specifically allege in the show-cause notice and in the absence of such averments, the said show-cause notice is not sustainable.

32. The Hon'ble Supreme Court once again had the occasion to consider the scope of show-cause notice issued under the Customs Act in the case of **Aban Loyd Chiles Offshore Ltd. v. Commr. Of Cus., Maharashtra; 2006 (200) E.L.t. 370**, wherein the Supreme Court recorded as under:

"20. The proviso to Section 28 can be invoked where the payment of duty has escaped by reason of collusion or any willful misstatement or suppression of facts. So far as 'misstatement or suppression of facts' are concerned, they are qualified by the word "willful". The word "willful" preceding the words "misstatement or suppression of facts" clearly spells out that there has to be an intention on the part of the assessee to evade the duty.

21. This Court while interpreting Section 11A of the Customs Act in *Collector of Central Excise v. H.M.M. Ltd.* (supra)

has observed that in order to attract the proviso to Section 11A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful mis-statement of suppression of fact with intent to evade the payment of duty. It has been observed:

"... Therefore, in order to attract the proviso to Section 11A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful mis-statement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of willful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act."

22. It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held:

"...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no

opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso...."

23. In the present case we find that in the show cause notice it is not alleged that duty of custom could not been levied or paid by reason of collusion or willful misstatement or willful suppression of facts. The appellants were not put to notice which of the various omissions or commissions stated in the proviso were committed by them to extend the period of limitation from six months to five years. The appellants having not been put to notice did not have the opportunity to meet the case of the Department."

33. The Supreme Court also had the occasion to consider the scope of a show-cause notice in the case of **Collector of Central Excise, Bangalore v. Gammon Far Chems Ltd.; (2003) 11 SCC 693** wherein the Supreme Court held as under:

"5. This para precludes a person from availing the benefit of exemption under the notification if clause (a) or clause (b) applies. Had the Revenue proceeded on the basis of facts which make out a case under para 2 of the notification, extracted above, it would have been valid for the Tribunal (sic Collector) to have recorded the finding which it did. The show-cause notice, as noted above, did not proceed on the footing that the assessee did not disclose the fact of production of goods in two factories by the same manufacturer or in a factory by more manufacturers than one. The simple case of the Revenue was that by not disclosing the

fact that M/s Freyssinet Prestressed Concrete Co. Ltd. is a subsidiary of M/s Gammon India Ltd. of which the assessee is a division, there has been a suppression of fact which entitled the Collector to invoke the proviso to Section 11-A of the Central Excise Act. On this aspect, the finding recorded by the Tribunal (sic a Collector) is not in accord with the case of the Revenue. We are, therefore, of the view that it is not open to the Revenue to make out a new case for invoking the proviso to Section 11-A of the Central Excise Act."

34. The petitioner in the show-cause notice in question, alleges infraction of Condition Nos. 5, 6 & 7 referred to above. In the cancellation order, the appellate order and the revisional order, there is no finding to the effect that there was any violation of Condition Nos. 5 & 6, the only finding is in respect of Condition No.7, thus, it could not be presumed that while giving a reply to the show-cause notice, the petitioner had to presume that any infraction as contained in Rule 18(1)(a) to (i) were also alleged against the petitioner. In the event, respondents were of the view that the action is proposed to be taken for violation of conditions specified in Rule 18(1)(a) to (i), it ought to have been specifically stated.

35. To that extent, the submission of Shri A.C. Tripathi that the violations referred to in Rule 18(1)(a) to (i) were implicit in the show-cause notice, deserves to be rejected.

36. Coming to the second point of determination as to whether the infractions referred to in Rule 18(1)(a) to (i) are compoundable? Clearly the infractions referred to in Rule 18(1)(a) to (i) are not mentioned in the infractions which are said to be specified in the table annexed to Rule

18(5) and the same are different and thus, to that extent, the submission of Shri A.C. Tripathi deserves to be accepted and the arguments of Shri Neeraj Sharma are liable to be rejected on that count. If the intent of the legislature while framing the rules was to compound the offences referred to in Rule 18(1)(a) to (g), the same ought to have been mentioned in the list as has been done in respect of the infractions mentioned in the table attached to Rule 18(5). The argument of Shri Neeraj Sharma in respect of infractions referred to at Serial No.15 in the list attached to Rule 18(5) cannot be accepted as the infractions mentioned in Rule 18(1)(a) to (i) are in substance different and appear to be more rigorous infractions compared to infractions referred to in the table in Rule 18(5).

37. Coming to the third point of determination in respect of allegations levelled against the petitioner with regard to opening of the shop on the days which were prohibited and as contained in Condition No.7 to the license. Although, in the seizure memo, there is no averment that the liquor was being sold on the day of prohibition, however, while passing the cancellation order and in the show-cause notice, it was alleged and found that the petitioner was selling liquor on the day of prohibition, however, the said infraction clearly finds mentioned at Serial No.10 in the list attached to Rule 18(5) and thus, in terms of Rule 18(5), the said infraction falls within the compoundable offence and thus, it was incumbent upon the authorities to have passed an order in respect of compounding of the said offence as prayed by the petitioner, which has not been done in the present case.

38. Coming to the allegation levelled against the petitioner in respect of loss of

special fees in the form of revenue on account of sale, the order passed by the Licensing Authority in its finding, after referring to the submissions, records the reason that on the basis of the above referred submissions, in the licensed premises on the date of prohibition (Gandhi Jayanti), foreign liquor of a different shop and beer of a different shop were recovered for which an FIR was lodged; on the basis of the said finding, the authority proceeded to record that on the basis of the illegal keeping of foreign liquor and beer, there was a loss of special fees to the State.

39. It is essential to notice that the special fees is chargeable for sale of liquor and beer at the restaurants, however, the said special fees or its loss can be caused only if the sale is effected. Merely by recovery of the liquor allegedly belonging to another shop and there being no finding in respect of the sale of such liquor, there is no basis whatsoever to record that loss of special fees was being caused and thus, to that extent, the finding recorded is wholly perverse.

40. On the basis of the findings as recorded above, this Court finds that the infractions in respect of Condition Nos.5 & 6 of the license which were alleged in the show-cause notice are not established and proved against the petitioner. The infractions specified in Rule 18(1)(a) to (i) were not alleged in the show-cause notice, as such, the same are not established against the petitioner.

41. The infractions with regard to violation of Condition No.7 of the license stands partially justified, however, the same is compoundable at the rate of Rs.30,000/- in terms of the table under Rule 18(5).

42. The allegation with regard to loss of special fees is not sustainable.

43. The writ petition stands partly **allowed**.

44. It is directed that the respondents authorities shall pass a fresh order for compounding of the offence in respect of the infractions of Condition No.7 of the license at the rates specified in the table to Rule 18(5) (Serial No.10 of the list) by passing a fresh order within a period of one month from today.

45. The orders impugned in the present writ petition except to the extent as indicated above, are quashed.

46. Necessary consequences to follow.

(2023) 5 ILRA 1106
APPELLATE JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 12.05.2023

BEFORE

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

Special Appeal No. 215 of 2023

Urmila Devi Pal **...Appellant**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Appellant:
Om Prakash Mani Tripathi

Counsel for the Respondents:
C.S.C.

A. Service Law – Salary - Normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ

petition). One of the exceptions to the said rule is cases relating to a continuing wrong, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. (Para 21)

The Writ Petition was filed claiming certain arrears of salary, which was not paid on the ground of the petitioner's unauthorised absence and it is not a continuing cause of action. (Para 22)

B. It is settled law that although there is no limitation prescribed for filing a writ petition, the same should necessarily be filed with reasonable promptitude and merely by making repetitive representations, the conduct of the appellant in not approaching the Court for redressal of her grievance for a very long period, which in the present case is more than two decades, cannot be justified and making repetitive representations would not dilute the effect of undue delay in filing the writ petition and will not create any fresh cause of action. (Para 24)

The appellant had approached this court on two occasions earlier by filing two writ petitions i.e. WP No. 4664 (S/S) of 2005 and WP No. 4848 (S/S) of 2014 but she chose not to raise her grievances of non-payment of salary for some period between the years 1998 to 2001, which was raised by her in Writ A No. 6123 of 2022, although cause of action for the same had already accrued to her. **The writ petition filed for the reliefs which could have been claimed by the appellant while filing the earlier writ petitions and which were not claimed by her, would be clearly hit by the principles contained in Order II Rule 2 of the Code of Civil Procedure, 1908. (Para 27)**

C. It is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time. (Para 25)

Even at the time of hearing of the aforesaid writ petition, the learned counsel for the appellant chose not to press for the reliefs claimed in the writ petition and he confined his prayer for a direction for decision of the appellant's representation. The representation has accordingly been decided by a reasoned and speaking order. This court would not substitute the reasoning given by the Director in the impugned order. (Para 28)

Special appeal dismissed. (E-4)

Precedent followed:

1. U.O.I. Vs Tarsem Singh, (2008) 8 SCC 648 (Para 21)
2. St. of Uttaranchal & anr. Vs Sri Shiv Charan Singh Bhandari & ors., 2013 (12) SCC 179 (Para 25)
3. The St. of W. B. Vs Debabrata Tiwari & ors., 2023 SCC OnLine 219 (Para 26)

Precedent distinguished:

1. Tukaram Kana Joshi & ors. Vs M.I.D.C., (2013) 1 SCC 353 (Para 17)
2. Sukh Dutt Ratra & anr. Vs St of H. P. & ors., (2022) 7 SCC 508 (Para 17)

Present appeal challenges judgment and order dated 19.04.2023, passed by an Hon'ble Single Judge dismissing the writ petition, which was filed by the appellant-petitioner for quashing of the order dated 13.01.2023 passed by Director, Bal Vikas Seva Evam Pushtahar, rejecting her representation dated 29.09.2022.

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

1. Heard Sri Om Prakash Mani Tripathi Advocate, the learned counsel for the appellant and Sri V. P. Nag, the learned Standing Counsel appearing on behalf of the State.

2. By instituting the instant Special Appeal filed under Chapter VIII, Rule 5 of the Allahabad High Court Rules, 1952, the appellant -petitioner has challenged the judgment and order dated 19.04.2023, passed by an Hon'ble Single Judge dismissing the Writ-A No. 2924 of 2023, which was filed by the appellant-petitioner for quashing of the order dated 13.01.2023 passed by Director, Bal Vikas Seva Evam Pushtahar, rejecting her representation dated 29.09.2022.

3. Briefly stated, facts of the case, as pleaded in the writ petition, are that the petitioner was appointed on the post of Mukhya Sevika on 31.05.1995 and she joined her duties on 25.04.1996.

4. On 15.06.2005, the petitioner was transferred to Sultanpur. The petitioner challenged this transfer order by filing Writ Petition No. 4664 (S/S) of 2005 and on 25.07.2005 an interim order was passed in the aforesaid writ petition that the petitioner shall not be relieved in pursuance of the transfer order. The writ petition was finally disposed of by means of a judgment and order dated 30.09.2005, directing that if the petitioner makes any representation within a period of ten days for change of the place of posting in accordance with the Government Order dated 13.07.2000, she will be accommodated in any of the blocks in District Lucknow, except the home block, or in any block in any adjoining district and till then no coercive measure

shall be taken against her. In furtherance of the aforesaid judgment and order dated 30.09.2005, the petitioner was given posting in District Lucknow.

5. The petitioner filed another writ petition, bearing Writ Petition No. 4848 (S/S) of 2014, raising her grievance of non-payment of some dues of salary, medical leave and benefit of 6th Pay Commission recommendations, which was disposed off by means of a judgment and order dated 04.09.2014 directing that the Director, Child Development and Nutrition, Lucknow should take a decision on the petitioner's representation.

6. On 27.3.2015, the Director passed an order in compliance of the aforesaid order dated 04.09.2014, passed by this Court in Writ Petition No.4849 (S/S) of 2014, stating that as per the report submitted by the District Program Officer, Lucknow, medical leave for the period 03.08.2007 to 20.08.2007 (18 days), 03.07.2008 to 17.07.2008 (15 days), 04.06.2009 and 26.06.2009 to 27.06.2009 (3 days), 01.02.2011 to 28.02.2011 (28 days) and 01.07.2013 to 31.08.2013 had already been sanctioned and no leave application was available for two days' absence in September, 2012 and three days' absence in May, 2013. It was further stated in the order that the benefit of the 6th Pay Commission's recommendations had already been given to the petitioner.

7. The petitioner thereafter filed Writ-A No.6123 of 2022 claiming salary for the period 02.03.2001 to 31.10.2001, salary and other allowances for the period 16.05.1998 to 01.03.2001, assured carrier progression for the year 2003 and some other dues. However, after advancing submissions at some length in support of

the writ petition, the learned counsel for the petitioner confined his prayer for issuance of a direction to the Director, Bal Vikas Seva Evam Pushtahar to consider and decide the petitioner's representation dated 10.08.2022. The Hon'ble Single Judge disposed off the writ petition without entering into the merits of the case by directing the Director, Bal Vikas Seva Evam Pushtahar to consider and decide the petitioner's representation dated 10.08.2022 with a reasoned and speaking order, in accordance with law.

8. In compliance of the aforesaid order, the Director, Bal Vikas Seva Evam Pushtahar decided the petitioner's representation by a detailed and reasoned order dated 13.01.2023.

9. Regarding the petitioner's claim for payment of salary for the period 20.06.2005 to 26.10.2006, it has been stated that by means of a letter dated 24.04.2007 sent by the Directorate, the petitioner had been informed that in case she submits a leave application for the period of her absence, the same will be considered in accordance with the rules but the petitioner did not submit any leave application and, therefore, she was not entitled to receive salary of the period of her absence without leave.

10. Regarding petitioner's claim for payment of salary for the period 02.03.2001 to 31.10.2001, it has been stated that Rs.17,120/- had been paid to the petitioner for the dates on which she had attended her duties during the period between March, 2001 to August, 2001, as against her claim for payment of salary for 8 days in March, 2001, 7 days in April, 2001, 29 days in March, 2001, 2 days in June, 2001, 9 days in July, 2001 and 26

days in August, 2001 and for the rest of the days, when she was unauthorizedly absent without any prior information / leave application, she was not entitled to receive payment of salary.

11. Regarding the petitioner's claim for payment of salary for the period of her suspension, the Director has stated that as per a letter dated 04.01.2023 sent by the District Program Officer, Barabanki, the arrears of salary for the period of suspension (16.05.1998 to 09.02.2001) has been paid to the petitioner by Child Development Project, Pure Dalai, Barabanki.

12. In respect of the petitioner's claim for payment of salary of two days in September, 2012 and three days in May, 2013 it has been stated that the petitioner was absent without any information on the aforesaid days and therefore her claim for payment of salary was not found to be proper.

13. Regarding the petitioner's claim for payment of arrears of increment in salary it was stated in the order that Rs.6,39,057/- only has been paid to her through Token No.464142024 dated 10.01.2023 and the salary for the days on which the petitioner remained absent without leave, was not paid to her.

14. After the aforesaid detailed discussion, the order states that the petitioner remained unauthorizedly absent for 23 days between 01.03.2001 to 23.03.2001, for 61 days in the year 2001-02, for 276 days in the year 2005-06, for 209 days in the financial year 2006-07, for two days in the financial year 2012-13 and for 30 days in financial year 2013-14. Thus, the petitioner remained unauthorizedly

absent from her duties for a total of 665 days in her service tenure, without obtaining any kind of leave and, therefore, her service was not continuous and she is not entitled to claim the Assured Carrier Progression (ACP) benefit.

15. The aforesaid order dated 13.01.2023 was challenged by the petitioner by filing Writ A No. 2924 of 2023. The Hon'ble Single Judge dismissed the writ petition by means of a judgment and order dated 19.04.2023, which is under challenge in this special appeal. The Hon'ble Single Judge held that the order passed by the Director narrates the facts and circumstances of the case and reasons for non-payment of salary etc. and this court would not substitute the reasoning given in the impugned order, which takes notice of the fact that the petitioner had remained unauthorizedly absent from duty for 665 days.

16. The Hon'ble Single Judge held that earlier the petitioner had filed multiple writ petitions and the subsequent writ petition filed by the petitioner suffers from gross delay and laches, as it had been filed 27 years after accrual of the alleged cause of action. The Hon'ble Single Judge further held that the writ petition had been filed in respect of the stale claim which the petitioner chose not to raise while approaching this court on two earlier occasions by filing two writ petitions. The Hon'ble Single Judge held that the writ petition had been filed raising monetary claims and such a writ petition could not be entertained 27 years after accrual of the cause of action. The Hon'ble Single Judge observed that the writ petition was liable to be dismissed with exemplary cost but the court refrained from imposing cost, keeping in view the fact that the petitioner

is a Class III employee, who is on the verge of retirement.

17. Sri O. P. M. Tripathi, the learned counsel for the appellant has submitted that non-payment of service related dues is a continuing cause of action and, therefore, the writ petition did not suffer from any delay or laches. He has relied upon two judgments of Hon'ble the Supreme Court in the cases of ***Tukaram Kana Joshi and others Vs. M.I.D.C.: (2013) 1 SCC 353 & Sukh Dutt Ratra and another Vs. State of Himachal Pradesh and others: (2022) 7 SCC 508.***

18. In ***Sukh Dutt Ratra v. State of H.P.*** (Supra), the petitioners' land was utilized by the respondent State for construction of a Road in the year 1972-1973, without any land acquisition proceedings and without payment of any compensation. Pursuant to a judgment by the Himachal Pradesh High Court in *Devender Singh v. State of H.P.*, CWP No. 816 of 1992 directing the State to initiate land acquisition proceedings, a Notification under Section 4 of the Land Acquisition Act, 1894 was issued on 16-10-2001 and the award was passed on 20-12-2001. Proceedings under Section 18 of the Act for enhancement of compensation were initiated by ten neighbouring land owners, whose lands were similarly utilised for the construction of the same road and an award dated 4-10-2005 was passed by the Reference Court in their favour. This led the appellants to file a writ petition before the High Court in 2011, seeking compensation for the subject land or initiation of acquisition proceedings. The High Court held that the matter involved disputed questions of law and fact for determination on the starting point of limitation, which could not be adjudicated

in writ proceedings. The writ petition was disposed of, with liberty to file a civil suit in accordance with law. In the aforesaid background, the Hon'ble Supreme Court held that: -

“19.The facts of the present case reveal that the State has, in a clandestine and arbitrary manner, actively tried to limit disbursement of compensation as required by law, only to those for which it was specifically prodded by the courts, rather than to all those who are entitled. This arbitrary action, which is also violative of the appellants' prevailing Article 31 right (at the time of cause of action), undoubtedly warranted consideration, and intervention by the High Court, under its Article 226 jurisdiction.”

19. The Hon'ble Supreme Court referred to the following passage from **Tukaram Kana Joshi v. Maharashtra Industrial Development Corpn. (MIDC)**, (Supra), wherein the Court was dealing with a similar fact situation: -

“11. There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking remedy, even if his fundamental right has been violated, under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario altogether. The functionaries of the State took over possession of the land belonging to the appellants without any sanction of law.

The appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode.”

(Emphasis supplied)

20. The aforesaid observations were made keeping in view the facts of the cases that government had utilized the land of the petitioners without payment of compensation. The right to property is a constitutional right protected by Article 300-A of the Constitution of India and, therefore, the Hon'ble Supreme Court had held that the State could not deprive a citizen of his property without sanction of law and in such circumstances, the delay in initiating the litigation would not be an absolute impediment. However, the Hon'ble Supreme Court explicitly observed that there are authorities pertaining to service jurisprudence which state that delay and laches extinguish the right to put forth a claim.

21. In **Union of India v. Tarsem Singh**, (2008) 8 SCC 648, the Hon'ble Supreme Court held that: -

“7.To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception

to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

(Emphasis supplied)

22. The learned Counsel for the appellant has submitted that the Writ Petition was filed in respect of a continuing cause of action and, therefore, it could not have been dismissed on the ground of delay. However, as has already been noted above, the Writ Petition was filed claiming certain arrears of salary, which was not paid on the ground of the petitioner's unauthorised absence and it is not a continuing cause of action and we do not find merit in the aforesaid submission of the learned Counsel for the petitioner.

23. Sri O. P. M. Tripathi, the learned counsel for the appellant has next submitted that she had made several representations for payment of salary and as she had been pursuing her grievances with the authorities by making

representations, it cannot be said that the writ petition suffers from delay and laches. He has further submitted that as by means of the order dated 22.09.2022, passed in Writ-A No.6123 of 2022, this court had directed the Director, Bal Vikas Seva Evam Pushtahar to consider and decide her representation dated 10.08.2022, the subsequent writ petition filed by her challenging the order of rejection of her representation and claiming payment of salary is not barred by delay.

24. The aforesaid submission also does not have any merit because it is settled law that although there is no limitation prescribed for filing a writ petition, the same should necessarily be filed with reasonable promptitude and merely by making repetitive representations, the conduct of the appellant in not approaching the Court for redressal of her grievance for a very long period, which in the present case is more than two decades, cannot be justified and making repetitive representations would not dilute the effect of undue delay in filing the writ petition and will not create any fresh cause of action.

25. In the case of ***State of Uttarakhand and another Vs. Sri Shiv Charan Singh Bhandari and others: 2013 (12) SCC 179*** the Hon'ble Supreme Court held that "*it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time.*"

26. The aforesaid decision has been relied upon by the Hon'ble Supreme Court

in a recent judgment in the case of *The State of West Bengal Vs. Debabrata Tiwari and others: 2023 SCC OnLine 219*, where after submitting an application in the year 2005-06 the petitioners did nothing further to pursue the matter for a period of ten years. The Hon'ble Supreme Court held that such prolonged delay in approaching the High Court may be regarded as a waiver of a remedy and such a delay would disentitle the writ petitioners to the discretionary relief under Article 226 of the Constitution of India.

27. In the present case, the appellant had approached this court on two occasions earlier by filing two writ petitions i.e. Writ Petition No. 4664 (S/S) of 2005 and Writ Petition No. 4848 (S/S) of 2014 but she chose not to raise her grievances of non-payment of salary for some period between the years 1998 to 2001, which was raised by her in Writ A No. 6123 of 2022, although cause of action for the same had already accrued to her. The writ petition filed for the reliefs which could have been claimed by the appellant while filing the earlier writ petitions and which were not claimed by her, would be clearly hit by the principles contained in Order II Rule 2 of the Code of Civil Procedure, 1908.

28. Even at the time of hearing of the aforesaid writ petition, the learned counsel for the appellant chose not to press for the reliefs claimed in the writ petition and he confined his prayer for a direction for decision of the appellant's representation. The representation has accordingly been decided by a reasoned and speaking order. We find ourselves in complete agreement with the view taken by the Hon'ble Single Judge that this court would not substitute the reasoning given by the Director in the impugned order.

29. We are also in agreement with the reason given by Hon'ble Single Judge for dismissing the writ petition that it had been filed with gross delay and as such it was liable to be dismissed for this reason also.

30. Therefore, we are not persuaded to take any view other than the view taken by Hon'ble Single Judge that the writ petition filed by the petitioner in the year 2003 regarding her grievances against non-payment of salary for various intermittent periods starting from the period 1998, suffers from gross delay and laches and also that the order under challenge in the writ petition was a well reasoned order and this court would not substitute the reasoning given by the Director in the order.

31. In view of the aforesaid discussions, we are of the considered opinion that the special appeal lacks merit which is accordingly dismissed. However, there will be no order as to the costs.

(2023) 5 ILRA 1113
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-A No. 4476 of 2019
with other connected cases

Bhawani Prasad Sahu & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Amrendra Nath Tripathi, Ashutosh Shahi

Counsel for the Respondents:
C.S.C.

A. Service Law – Regularization – Seniority - Uttar Pradesh Regularization of Daily Wages (Appointment on Group D Posts) Rules, 2001 - Rule 4(1)(a) - U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 - It is no longer *res integra* that any regularization should be given effect prospectively. Right of regularization is conferred vide Rule 4(1)(a) of Rules 2001, only against such vacancies as were available on the date of commencement of Rules, 2001 and not against any vacancy occurring subsequently as it is not a perennial source of recruitment so as to induct a person, as and when vacancies are available, either due to creation of post or otherwise on any date, subsequent to 20.12.2001. (Para 35)

Regularization Rules were framed with intent to regularize the persons engaged prior to 29.06.1991 through back door entry, as a one time measure, keeping in mind that such engagement is not illegal as concept of regularization of service is a means to condone and procedural irregularity and is meant to cure only such defects, which are attributable to notions followed while making appointments. (Para 34)

It is also relevant to take note of the fact that supernumerary posts 80+27 were created vide Government Orders dated 25.06.2013 and 26.06.2013. Regularization of the petitioners could have been only against those posts. If there was no post, their regularization would come only from the date of creation of post and not from the retrospective date. (Para 44)

B. Rule 4 mandates that for the purposes of Regularization under Rules, 2001, eligibility list would be prepared in order of seniority. On the basis of this eligibility list prepared as per the seniority, the select committee would consider the cases of the candidates for regularization. It is further provided that seniority of the persons regularized under the Rules, 2001 would be counted from the date of order of regularization. (Para 39)

Regularization of the petitioners was subject to final outcome of the Writ Petition No.4302(SS) of 2003 in which an order was passed on 20.08.2015 to prepare the fresh seniority list as per law. Earlier, seniority list dated 20.06.2003 had several anomalies and the Government had cancelled the said seniority list dated 20.06.2003 vide order dated 05.07.2003. The petitioners on the strength of the interim order dated 24.07.2003 passed in WP No.4302(SS) of 2003 continued as regular employees. (Para 37, 40)

C. Having regard to the principle of *Actus curiae Neminem Gravabit* (the act of the Court shall prejudice no one) when the statutory/constitutional right of a person has been infringed by an order of the Court, the Court will not hesitate to withdraw or review such order. (Para 41)

Interim order would not confer any indefeasible right on the petitioners to draw the benefits of the order dated 20.06.2003, which was cancelled by the order dated 05.07.2003. After dismissal of the WP No.4302(SS) of 2003 vide order dated 15.02.2023, order dated 05.07.2003 got revived and, therefore, there could not have been any bar to draw the fresh seniority list in accordance with law as directed by this Court vide order dated 20.08.2015 passed in WP No.4302(SS) of 2003 and even without any order of the Court as the order dated 05.07.2003 got revived. (Para 42)

D. Regularization cannot be given effect to retrospectively. It is ordinarily be prospective so that seniority of all those, who are in regular service, should not be disturbed or affected. If *the ad hoc* service is regularized from the back date in this manner, it will disturb the seniority of regularly appointed employees in the cadre and, therefore, ordinarily the regularization must take effect prospectively and not retrospectively. *Ad hoc* appointees, casual labour and daily-rated persons are not subject to strict discipline of service, and it is a matter of common experience that their attendance is very often not regular and at times they do not even meet the qualification for appointment since they are taken on *ad hoc* basis. These deficiencies are overlooked by way of granting relaxation and,

therefore, care must be taken to see that they do not upset the seniority of regular appointees. (Para 43)

E. Regularization is not a mode of appointment. If appointment is made without following the Rules, the same being a nullity, the question of confirmation of an employee upon the expiry of the purported period of probation would not arise. (Para 44)

Any appointment made in violation of the Recruitment Rules as also in violation of Articles 14 and 16 of the Constitution would be a nullity. (Para 45)

Regular recruitment should be insisted upon and only in a contingency can an *ad hoc* appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularisation. The cases directing regularisation have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment. (Para 45)

F. The State does not enjoy a power to make appointments in terms of Article 162 of the Constitution.

The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing

advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined u/Article 16 of the Constitution. (Para 45)

G. The High Courts in exercise of jurisdiction u/Article 226 of the Constitution of India should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. (Para 46)

Since some of the petitioners are retired or they are on the verge of retirement, taking away the benefit which has been conferred on them because of the interim order dated 24.07.2003 would not be justified and, therefore, it is provided that while implementing the impugned orders Government should ensure that the benefit already conferred on the petitioners or similarly situated persons should not be withdrawn except that they should be treated to have been regularized w.e.f. the respective dates as per impugned order dated 11/12.10.2018. (Para 47)

Writ petitions dismissed. (E-4)

Precedent followed:

1. St. of U.P. & ors. Vs Putti Lal, (1998) 1 UPLBEC 313 (Para 34)
2. Secretary, St. of Karn. & ors. Vs Uma Devi (3) & ors., (2006) 4 SCC 1 (Para 34)
3. Registrar General of India Vs Thippa Setty, 1998 (8) SCC 690 (Para 35)
4. National Fertilizers Ltd. & ors. Vs Somvir Singh, (2006) 5 SCC 493 (Para 44)
5. Secretary, St. of Karn. Vs Umadevi, (2006) 4 SCC 1 (Para 46)

Present writ petitions challenge the order dated 11.10.2018/12.10.2018, passed by the Executive Engineer, Provisional Division, Public Works Department,

Lucknow, whereby the petitioners' regularization orders dated 25.06.2013 regularizing their services w.e.f. 02.07.2003 have been made ineffective and the order of regularization has been revisited as per fresh seniority list dated 21.04.2018. Also challenged order dated 12.10.2018, for the reason that the petitioners' date of regularization has been altered/changed from 02.07.2003 to the year of 2011.

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

1. This bunch of writ petition leading one being Writ Petition No.4476(SS) of 2019 has been preferred assailing the order dated 11.10.2018/12.10.2018 passed by the Executive Engineer, Provisional Division, Public Works Department, Lucknow (Annexure 1 to the writ petition), whereby the petitioners' regularization orders dated 25.06.2013 regularizing their services with effect from 02.07.2003 have been made ineffective and the order of regularization has been revisited as per fresh seniority list dated 21.04.2018.

The petitioners have also challenged the order dated 12.10.2018 whereby the petitioners' date of regularization has been altered/changed from 02.07.2003 to the year of 2011.

The petitioners in Writ Petition No.34756 of 2018 have also prayed for a direction in the nature of mandamus commanding the respondents to prepare a fresh seniority list taking into consideration the Government Order dated 17.04.2003 inasmuch as the State Government, in the meantime, had framed regularization rules namely Uttar Pradesh Regularization of Daily Wages (Appointment on Group D Posts) Rules, 2001.

2. The petitioners were initially engaged as Daily Wagers from time to time considering the exigency of work on the posts of Wireman, Electrician, Helper, Mate, Fire Alarm Operator, A.C. Operator etc., in the Department of Public Works Department. Some of the petitioners preferred a Writ Petition No.1427(SS) of 1997: Ram Swaroop & Anr versus State of UP with a prayer to grant them regular pay scale of Class IV post and consider them for regularization. This Court passed an interim order dated 21.02.1997 whereby direction was given for payment of minimum of pay scale to which regular employees of the category of the petitioners were being paid salary, subject to verification of length of service of the petitioners in the writ petition.

3. The State Government, in the meantime, framed rules namely Uttar Pradesh Regularization of Daily Wages (Appointment on Group D Posts) Rules 2001 (hereinafter referred to as Rules, 2001). Rule 4 of the Rules, 2001 provides that any person, who was appointed on daily wage basis prior to 29.06.1991 and is continuing in service, as such on the date of commencement of rules i.e. 21.12.2001 and possess requisite qualifications shall be considered for regularization.

4. In pursuance to the promulgation of the said rules, the State Government took a policy decision vide Government Order dated 17.04.2003 to regularize all such persons, who had been engaged prior to 29.06.1991, as daily wages/ work charge agents by preparing a combined seniority list as per the availability of the vacancies.

5. Another Government Order dated 11.06.2003 was issued in continuation of the earlier Government Order for

proceeding with the intent of regularization process. Thereafter, an office memorandum dated 20.06.2003 was issued whereby combined seniority list of daily wagers, working in Public Works Department was issued.

6. A decision was taken on 02.07.2003 to regularize 54 persons from the seniority list dated 20.06.2003 trade-wise. Thereafter, vide order dated 05.07.2003, a decision was taken to cancel the seniority list dated 20.06.2003. 54 persons, who got regularized on 02.07.2003, as per the seniority list dated 20.06.2003, being aggrieved by the cancellation of the seniority list and order dated 06.07.2003 cancelling their regularization, preferred a Writ Petition No.4302(SS) of 2003: Bharat Singh & Ors vs State of U.P. & Ors before this Court. This Court vide order dated 24.07.2003 stayed the order dated 06.07.2003. On the strength of the said interim order dated 24.07.2003, aforesaid employees continued in employment as regular employees.

7. In the meantime, Writ Petition No.1427(SS) of 1997 preferred by Ram Swaroop & Ors was disposed of finally on 13.11.2003 with a direction to the respondents to consider their cases for regularization in accordance with the existing rules with effect from the date, their juniors were regularized. When no decision was taken, as directed by this Court in order dated 13.11.2003 passed in Writ Petition No.1427 (SS) of 1997, the petitioners therein preferred a contempt petition being Contempt No.1687 of 2006, and in pursuance of directions issued in the contempt petition, a decision was taken vide order dated 12.04.2007 specifically saying that no juniors to the petitioners had been regularized. Some further orders came

to be passed in the contempt proceedings on 15.07.2011. In compliance thereof a decision was taken by the respondents vide order dated 28.03.2011, in pursuance to the Government Order dated 21.02.2011 and all the petitioners were regularized, however, effect of the said order was prospective in nature, thereafter, the contempt petition was dismissed vide order dated 13.01.2014.

8. The petitioners had preferred a representation before the competent authority for regularizing their services with effect from 02.07.2003, when allegedly juniors to them were allegedly regularized.

9. A decision was taken vide Government order dated 25.06.2013 to regularize the petitioners with effect from the date, juniors were regularized and the said order was a conditional order subject to outcome of the Writ Petition No.4302(SS) of 2003, and in pursuance to the same, earlier order was modified and petitioners were given benefit of the regularization retrospectively.

10. Another writ petition being Writ Petition No.2412(SS) of 2009 was filed by Mohsin Ali & Ors for considering their cases for regularization from the date, their juniors were regularized and said writ petition was jointly heard with the Writ Petition No.4302(SS) of 2003. This court passed the order dated 20.08.2015 directing for preparation of a seniority list as per law. Order dated 20.08.2015 passed in Writ Petition No.4302(SS) of 2003 would read as under:-

"Heard learned Counsel for the petitioner and learned Standing Counsel for the respondents.

These two writ petitions are inter-connected. The dispute relates to the consequential seniority as a result of regularization of work charge and daily wage employees in service under the Regularization of Daily Wages Rules, 2001 being carried out without determination of their comparative seniority prior to regularization.

The statutory rules provide for consideration as per seniority of the daily wage employees drawn on the basis of length of service. So far as the present case is concerned, the employees working as work charge or on daily wage basis belong to different trades and their regularization has been considered against the respective trades on the basis of disputed seniority. Necessarily, the seniority of the employees on the basis of total length of service is liable to be drawn not for the purpose of regularization but also for the purpose of determination of inter-se seniority, which is a consequence of regularization in service for other service benefits.

Learned Standing Counsel has submitted that the final seniority list could not be finalized on account of an interim order passed by this court in writ petition no. 4302(SS) of 2003 on 24.07.2003 which reads and under:-

"Notice on behalf of opposite parties has been accepted by the learned Chief Standing Counsel.

Let counter affidavit be filed within a period of four weeks. Rejoinder affidavit, if any, may be filed within three weeks.

List thereafter.

Till the date of next listing, the operation of the order dated 05.07.2003 as contained in Annexure No.1 shall remain stayed."

Having heard the parties in both the writ petitions at some length and with the consent of parties, it is provided that final

seniority (combined) may be drawn and issued by the department in accordance with the rules and government orders applicable in relation to work charge/daily wage employees without disturbing their present status.

This exercises shall be completed by respondents within a period of three months from the date a certified copy of this order is filed before the competent authority. The final seniority list shall be placed on record and circulate to all concerned, in the meantime. An affidavit shall be positively filed by the concerned authority explaining the finalization of process before the next date of listing.

The promotional benefits arising out of seniority shall be open to be granted only after the seniority is finalized in accordance with law.

List immediately after three months immediately."

11. In compliance of the order dated 20.08.2015, a decision was taken on 09.01.2015 to prepare a fresh seniority list from the muster roll of all the daily wagers engaged in the department, and for the said purpose, a Committee was constituted vide order dated 27.12.2017. After inviting objections, a final seniority list dated 21.04.2018 was issued in accordance with law.

12. Writ petition filed by Shri Mohsin Ali and others being Writ Petition No.2412(SS) of 2009 was finally disposed of vide judgment and order dated 10.11.2017 with a direction to decide the representation of the petitioners in accordance with law. Representation of the petitioners of the said writ petition was duly considered and decided vide order dated 01.02.2019. Said order has been placed on record as Annexure-1 to the

counter affidavit filed on behalf of the State which was passed after taking note of the several orders and judgments passed in several writ petitions preferred by the daily wagers. It was said that vide order dated 12.10.2018 question of regularizing services of the petitioner with effect from 02.07.2003 had been already decided and the workmen had been regularized as per their eligibility on the basis of their seniority list. In view thereof representation of Mohsin Ali & Ors as directed by this Court was also decided. After finalization of the seniority list dated 21.04.2018, final orders have been issued as per the seniority.

13. Anomalies in regularization orders have been rectified and fresh orders have been passed as per seniority list, which are impugned in the batch of the present writ petitions.

14. It would be important to take note of the fact that all the employees in the batch of petitions, were regularized; most of them have retired and some of them have also died.

15. Shri Amarendra Nath Tripathi and Shri Ashutosh Sahi learned counsel appearing for the petitioners have submitted that once the petitioners were regularized with effect from 02.07.2003 vide orders dated 01.07.2013 and 04.07.2013 issued in furtherance of the Government Order dated 25.06.2013 and all the benefits were granted to them, vide impugned order dated 11.10.2018 read with 12.10.2018, vested rights accrued in favour of the petitioners could not have been taken away by the impugned orders without affording an opportunity of hearing to the petitioners. The impugned orders are in violation of the principle of natural justice,

and they are also arbitrary and illegal amounting to violation of the fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India and, therefore, same are liable to be set aside.

16. Learned counsel appearing for the petitioners have further submitted that act of changing/altering date of regularization from 02.07.2003 to the year 2011 vide impugned order dated 12.10.2018 without affording any opportunity of hearing is an infraction of Article 14 of the Constitution of India, therefore, is liable to be set aside.

17. Learned counsel appearing for the petitioners has further submitted that impugned orders dated 11.10.2018 and 12.10.2018 have annulled the order dated 01.07.2013 and 04.07.2013, which were passed in pursuance to the decision of the State Government dated 25.06.2013. Said decision was taken in compliance of the directions issued by this Court in the writ petition, and on the basis of which, the contempt proceedings were dropped and, therefore, orders dated 1.07.2013 and 04.07.2013 had attained finality, which could not have been revisited by the impugned orders and, therefore, the impugned orders are liable to be quashed.

18. Effect of the impugned order dated 11.10.2018 is reopening of the issue of regularization of the petitioners, which was set at rest in earlier round of litigation, and, therefore, impugned orders amount to overriding the various judgments and orders passed by this Court in earlier writ petitions.

19. It has been further submitted by the learned counsel appearing for the petitioners that the impugned orders have been passed on the basis of the impugned

seniority list dated 20.04.2018. Seniority list dated 20.04.2018 is against Rule 4(4) of the Rules, 2001, which contemplates preparation of eligibility list for the purpose of regularization in accordance with the date of initial engagement. It is settled proposition of law that where a Statute requires a particular act to be done in a particular manner, the act has to be done in that manner.

20. Sri Amarendra Nath Tripathi has further submitted that impugned seniority list has been allegedly prepared in furtherance of the interim direction of this Court dated 20.08.2015 passed in Writ Petition No.2412(SS) of 2009, however, in the said interim order, this Court had specifically provided for drawing of seniority list "without disturbing their present status." Said interim order dated 20.08.2015 stood merged with the final judgment and order dated 10.11.2017, and, therefore, interim order dated 20.08.2015 had lost its enforceability.

21. It has been further submitted that no opportunity of hearing was given to the petitioners before finalization of the seniority list, and, therefore, even on this ground the seniority list is bad in law.

22. Sri Amarendra Nath Tripathi, learned counsel appearing for the petitioners has further submitted that respondents had given benefit of regularization to the writ petitioners in Writ Petition No.2073(SS) of 1997 namely Late Ramesh Chandra and Mool Chandra by not challenging their date of regularization with effect from 02.07.2003 and gave appointment to their wards under The U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 by treating late Ramesh Chandra and

Moolchand as regular employees, who died on 10.04.2008 and 5.03.2011 respectively whereas petitioners' date of regularization has been changed by the impugned order, which amounts to hostile discrimination.

23. Sri Shyam Mohan Pradhan, learned counsel appearing for the petitioners in Writ Petition No.34756(SS) of 2018 has submitted that vide Government Order dated 17.04.2003 read with Rules, 2001, it was provided that eligibility list of daily wagers employees working in the Public Works Department of the Government of Uttar Pradesh would be prepared from the date of initial appointment and Rule 4(4) of 2001, Rules, also prescribes that the appointing authority shall prepare the eligibility list of candidates in order of seniority as determined from the date of order of appointment on daily wage basis, and after the eligibility list would be prepared, the selection committee shall consider the case of the workmen in order of seniority for regularization from the eligibility list so prepared.

24. It has been submitted by Sri Shyam Mohan Pradhan, learned counsel that seniority list has not been prepared from the date of order of appointment or engagement on daily wage basis or from the date of appointment in the trade. Eligibility list for the purpose of regularization is required to be prepared from the date of initial appointment and when the seniority list dated 20.06.2003 was issued considering the date of order of appointment in the cadre/trade and not from the date of initial appointment on daily wage basis, the petitioners filed their objections and the State Government vide order dated 05.07.2003 cancelled the seniority list after examining the same on

the ground that it had not been prepared from the date of initial appointment on daily wage basis. The Government also took the view that the candidates, who had been appointment on daily wage basis on 29.06.1991, were also included though they were not eligible for regularization under the rules. There were other discrepancies regarding some of the employees' date of initial appointment. The Government cancelled the said seniority list vide order dated 05.07.2003, which was stayed by this Court vide order dated 24.07.2003 passed in Writ Petition No.4302(SS) of 2003. The said writ petition got dismissed. Government order dated 16.07.2003 provided for the preparation of eligibility cum seniority list for the purpose of regularization from the date of initial appointment on daily wage basis.

25. It has been further submitted that interim order dated 20.08.2015 passed in Writ Petition No.4302(SS) of 2003 provided that necessarily seniority list of the employees was to be prepared on the basis of total length of service not only for the purpose of regularization but also for the purpose of determination of inter se seniority. Impugned seniority list dated 20.04.2018 had been prepared not on the basis of initial date of appointment on daily wage basis but again from the date of entry in the cadre in a trade. Initial appointment of petitioner No.2 in the in Writ Petition No.34756(SS) of 2018 has been shown in the seniority as 28.03.1997 instead of 01.04.1994 though same was mentioned in Government Order dated 05.04.2003 while cancelling the earlier seniority list.

26. It has been further submitted that prior to the year 1997 all persons appointed on Daily Wage/Work Charge establishment were not appointed against any post but

were given employment as Helper, and all were getting Rs.437/- per month salary. It is only on 18.03.1997, an order was passed by this Court for minimum of pay scale to such daily wager/work charge employee. The said writ petition was decided on 13.11.2003 with a direction for regularization in accordance with Rules from the date their juniors and similarly situated daily wagers were regularized. It has been, therefore, submitted that impugned seniority list dated 20.04.2018 is illegal and liable to be quashed.

27. Sri Prafulla Kumar Yadav, learned Additional Chief Standing Counsel appearing for the State has submitted that regularizing the petitioners with retrospective effect with effect from 02.07.2003 was not done by the competent authority. This Court had stayed the order dated 05.07.2003 vide an interim order dated 24.07.2003 passed in Writ Petition No.4302(SS) of 2003. At that time exercise for regularization the Daily Wager of different trades was under process as per the seniority list dated 20.06.2003. However, in the meantime, the State Government took a policy decision for creation of supernumerary posts for regularization of those employees, who were engaged on 29.06.1991 or before and were not regularized due to non availability of the sanctioned posts. Hence, vide Government Order dated 21.02.2011, 9189 supernumerary posts were sanctioned in different trades for regularization of the workmen, who were appointed on or before 29.06.1991, and, thereafter, services of those employees who were engaged on 20.06.1991 or before and were working on the date of promulgation of the rules were regularized. These supernumerary posts were created subject to adjustment in future regular vacancies.

28. Sunder Lal & Ors had filed Writ Petition No.2073(SS) of 1997 and this Court allowed the writ petition vide order dated 13.11.2003. In compliance of the order dated 13.11.2003 passed in Writ Petition No.2073(SS) of 1997, Executive Engineer, Provisional Division Lucknow took a decision on the representation of the petitioners vide order dated 12.04.2007, and accordingly compliance affidavit was submitted in the contempt petition. During the pendency of the said contempt petition, the Government issued an order dated 26.06.2013 by means of which 87 more supernumerary posts were created subject to final decision of the Writ Petition No.4302(SS) of 2003 (Bharat Singh & Ors vs State of U.P.) and against the supernumerary posts, services of the petitioners of Writ Petition No.2073(SS) of 1997 were regularized and G.P.F., Time Scale and consequential benefits were provided with effect from 02.07.2003 though no juniors to the petitioners were regularized with effect from 02.07.2003.

29. As mentioned above that Ram Swaroop & Ors filed Writ Petition No.1427(SS) of 1997 before this Court, and this Court passed the order dated 13.11.2003 in favour of the petitioners and the said writ petitioners filed a contempt petition being Criminal Misc. Case No.1687(C) of 2006: Bhawani Prasad & Ors vs Satish Chandra Agarwal, Principal Secretary & Ors.

30. During the pendency of the aforesaid contempt petition, the Government issued an order dated 25.06.2013 by means of which 27 more supernumerary posts were created subject to final decision of the Writ Petition No.4302(SS) of 2002, and against the supernumerary posts, services of the writ

petitioners of Writ Petition No.1427(SS) of 1997 were regularized with effect from 02.07.2003 and other benefits like G.P.F., Time Scale and consequential benefits were provided from the date of their juniors but actually no junior to the petitioners was regularized.

31. Sri Prafulla Yadav, learned Standing Counsel has further submitted that in both orders dated 25.06.2013 and 26.06.2013, the date of creation of post was 02.07.2003 on the basis of holding the post of work agent. In such a situation only Sri Pawan Kumar Pandey and Sri Tez Bahadur Singh, who were Senior Work Agents were entitled for regularization from the date but without considering this aspects, against the sanctioned supernumerary posts $27 + 87 = 114$ posts, the services of the writ petitioners were regularized in their respective divisions by the Executive Engineers at their own level. Aforesaid regularization was not done on the basis of seniority and eligibility, however, same had been done under the pain of the contempt proceedings.

32. Sri Prafulla Yadav, learned Standing Counsel has further submitted that power of regularization is vested in State Government. State Government has taken a decision for regularizing those employees who were engaged in the Department on or before 29.06.1991 as per the provisions of Regularization Rules but some employees have filed Writ Petitions before this Court claiming that juniors employees were regularized and they were entitled for regularization from the date on which their juniors were regularized.

33. After finalizing of the seniority list on 21.04.2018, final orders have been passed as per seniority list, and the

anomalies have been rectified and fresh orders have been passed in accordance with law, which are impugned in the present writ petition. Writ Petition No.4302(SS) of 2003 has been dismissed on 15.02.2023. Earlier orders of regularization were conditional subject to outcome of the Writ Petition No.4302(SS) of 2003 by which order dated 05.07.2003 was stayed and after dismissal of the writ petition order dated 05.07.2003 got revived by which earlier seniority list dated 20.06.2003 was cancelled. Present seniority list has been issued strictly in compliance of the order dated 20.08.2015, which does not require any interference by this Court.

34. Regularization Rules were framed after the judgment in the case of **State of U.P. & Ors. Vs. Putti Lal, [(1998) 1 UPLBEC 313]** with intent to regularize the persons engaged prior to 29.06.1991 through back door entry, as a one time measure, keeping in mind that such engagement is not illegal as concept of regularization of service is a means to condone and procedural irregularity and is meant to cure only such defects, which are attributable to notions followed while making appointments and the concept has been duly clarified in a landmark judgment namely **Secretary, State of Karnataka & Ors. Vs. Uma Devi (3) & Ors., (2006) 4 SCC 1.**

35. Right of regularization is conferred vide Rule 4(1)(a) of Rules 2001, only against such vacancies as were available on the date of commencement of Rules, 2001 and not against any vacancy occurring subsequently as it is not a perennial source of recruitment so as to induct a person, as and when vacancies are available, either due to creation of post or otherwise on any date, subsequent to

20.12.2001. It is no longer res integra that any regularization should be given effect prospectively as held in the case of **Registrar General of India vs V.Thippa Setty : 1998(8) SCC 690.**

36. The question which falls for consideration is that whether the petitioners, who were regularized vide order dated 20.06.2003 on the basis of the seniority list, which was cancelled vide order dated 05.07.2003, had perfected their right inasmuch as the order dated 05.07.2003 whereby the seniority list dated 20.06.2003 was stayed by this Court vide order dated 20.06.2003 passed in Writ Petition No.4302(SS) of 2003 stands vacated as the said writ petition has been dismissed.

37. Regularization of the petitioners was subject to final outcome of the Writ Petition No.4302(SS) of 2003 in which an order was passed on 20.08.2015 to prepare the fresh seniority list as per law.

38. It would be apt to reproduce relevant provisions of Rules, 2001 under which the petitioners are claiming benefit and their regularization orders were passed as under:-

"4. Regularisation of daily wages appointments on Group 'D' posts.-(1) Any person who -

(a) was directly appointed on daily wage basis on a Group 'D' post in the Government service before June 29, 1991 and is continuing in service as such on the date of commencement of these rules; and

(b) possessed requisite qualifications prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular

appointment in permanent or temporary vacancy, as may be available in Group 'D' post, on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.

2. In making regular appointments under these rules, reservations for the candidates belonging to the Scheduled Castes, Scheduled Tribes, Other Backward Classes of citizens and other categories shall be made in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, and the Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 as amended from time to time and the orders of the Government in force at the time of regularisation under these rules.

3. For the purpose of sub-rule (1) the appointing authority shall constitute a Selection Committee in accordance with the relevant provisions of the service rules.

4. The appointing authority shall, having regard to the provisions of sub-rule (1), prepare an eligibility list of the candidates, arranged in order of seniority as determined from the date of order of appointment on daily wage basis and if two or more persons were appointed together, from the order in which their names are arranged in the said appointment order. The list shall be placed before the Selection Committee along with such relevant records pertaining to the candidates, as may be considered necessary, to assess their suitability.

5. The Selection Committee shall consider the cases of the candidates on the basis of their records referred to in sub-rule

(4), and if it considers necessary, it may interview the candidates also.

6. The Selection Committee shall prepare a list of selected candidates in order of seniority, and forward the same to the appointing authority."

5. The appointing authority shall, subject to the provisions of sub-rule (2) of Rule 4, make appointments from the list prepared under sub-rule (6) of the said rule in the order in which their names stand in the list.

7. (1) A person appointed under these rules shall be entitled to seniority only from the date of order of appointment after selection for regularisation in accordance with these rules and shall, in all cases, be placed below the persons appointed in accordance with the relevant service rules, or as the case may be, the regular prescribed procedure prior to the appointment of such persons under these rules:

(2) If two or more persons are appointed together, their seniority inter se shall be determined in the order mentioned in the order of appointment."

39. Rule 4 mandates that for the purposes of Regularization under Rules, 2001, eligibility list would be prepared in order of seniority. On the basis of this eligibility list prepared as per the seniority, the select committee would consider the cases of the candidates for regularization. It is further provided that seniority of the persons regularized under the Rules, 2001 would be counted from the date of order of regularization.

40. Earlier, seniority list dated 20.06.2003 had several anomalies and the Government had cancelled the said seniority list dated 20.06.2003 vide order dated 05.07.2003. The petitioners on the

strength of the interim order dated 24.07.2003 passed in Writ Petition No.4302(SS) of 2003 continued as regular employees.

41. Having regard to the principle of *Actus curiae Neminem Gravabit* (the act of the Court shall prejudice no one) when the statutory/constitutional right of a person has been infringed by an order of the Court, the Court will not hesitate to withdraw or review such order.

42. Interim order would not confer any indefeasible right on the petitioners to draw the benefits of the order dated 20.06.2003, which was cancelled by the order dated 05.07.2003. After dismissal of the Writ Petition No.4302(SS) of 2003 vide order dated 15.02.2023, order dated 05.07.2003 got revived and, therefore, there could not have been any bar to draw the fresh seniority list in accordance with law as directed by this Court vide order dated 20.08.2015 passed in Writ Petition No.4302(SS) of 2003 and even without any order of the Court as the order dated 05.07.2003 got revived.

43. Regularization cannot be given effect to retrospectively. It is ordinarily be prospective so that seniority of all those, who are in regular service, should not be disturbed or affected. The Supreme Court in the case of **Registrar General of India vs V.Thippa Setty : (1998) 8 SCC 690** has held that if the ad hoc service is regularized from the back date in this manner, it will disturb the seniority of regularly appointed employees in the cadre and, therefore, ordinarily the regularization must take effect prospectively and not retrospectively. Ad hoc appointees, casual labour and daily-rated persons are not subject to strict discipline of service, and it is a matter of

common experience that their attendance is very often not regular and at times they do not even meet the qualification for appointment since they are taken on ad hoc basis. These deficiencies are overlooked by way of granting relaxation and, therefore, care must be taken to see that they do not upset the seniority of regular appointees.

44. It is also relevant to take note of the fact that supernumerary posts 80+27 were created vide Government Orders dated 25.06.2013 and 26.06.2013. Regularization of the petitioners could have been only against those posts. If there was no post, their regularization would come only from the date of creation of post and not from the retrospective date. The Supreme Court in the case of **National Fertilizers Ltd., & Ors. vs Somvir Singh: (2006) 5 SCC 493** has held that regularization is not a mode of appointment. If appointment is made without following the Rules, the same being a nullity, the question of confirmation of an employee upon the expiry of the purported period of probation would not arise.

45. Paras 20 to 22 and 26 of the aforesaid judgment is extracted hereinbelow:-

"20. The Constitution Bench opined that any appointment made in violation of the Recruitment Rules as also in violation of Articles 14 and 16 of the Constitution would be a nullity. The contention raised on behalf of the employees that those temporary or ad hoc employees who had continued for a fairly long spell, the authorities must consider their cases for regularisation was answered, thus: [Umadevi (3) case [(2006) 4 SCC 1 : (2006) 4 Scale 197] , SCC p. 29, para 26]

“26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent—the distinction between regularisation and making permanent, was not emphasised here—can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in para 50 (of SCC) of *Piara Singh* [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403] is to some extent inconsistent with the conclusion in para 45 (of SCC) therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognised in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.”

21. It was furthermore opined: [*Umadevi* (3) case [(2006) 4 SCC 1 : (2006) 4 Scale 197] , SCC p. 32, para 33]

“33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency can an ad hoc appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularisation. The cases directing regularisation have mainly proceeded on the basis that having permitted the

employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.”

22. Taking note of some recent decisions of this Court, it was held that the State does not enjoy a power to make appointments in terms of Article 162 of the Constitution. It further quoted [*Umadevi* (3) case, SCC pp. 33-34, para 38] with approval a decision of this Court in *Union Public Service Commission v. Girish Jayanti Lal Vaghela* [(2006) 2 SCC 482 : 2006 SCC (L&S) 339 : (2006) 2 Scale 115] in the following terms: (SCC p. 490, para 12)

“The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution.”

It was clearly held: [*Umadevi* (3) case [(2006) 4 SCC 1 : (2006) 4 Scale 197] ,

SCC p. 35, para 41] Constitution is a must in the process of public employment.”

26. It is true that the respondents had been working for a long time. It may also be true that they had not been paid wages on a regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the respondents have worked for some time, the same by itself would not be a ground for directing regularisation of their services in view of the decision of this Court in *Umadevi* (3) [(2006) 4 SCC 1 : (2006) 4 Scale 197] .

46. The Supreme Court in the case of **Secretary, State of Karnataka vs Umadevi : (2006) 4 SCC 1** it has been specifically observed that the High Courts in exercise of jurisdiction under Article 226 of the Constitution of India should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.

47. Thus, I find that the impugned orders do not violate in any manner the statutory prescription or any judgment of this Court or the Supreme Court. So far as challenge to the impugned orders is concerned, I find no merit in the present writ petitions, which are hereby ***dismissed***. However, since some of the petitioners are retired or they are on the verge of retirement, taking away the benefit which has been conferred on them because of the interim order dated 24.07.2003 would not be justified and, therefore, it is provided that while implementing the impugned orders Government should ensure that the benefit already conferred on the petitioners or similarly situated persons should not be

withdrawn except that they should be treated to have been regularized with effect from the respective dates as per impugned order dated 11/12.10.2018.

(2023) 5 ILRA 1127
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.05.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-A No. 7888 of 2022

Anjali Chaurasia ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Avinash Chandra

Counsel for the Respondents:
C.S.C.

A. Service Law – misconduct and *malafide* exercise of power - Departmental proceedings – Salary - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 Rule-7 Integrated Goods and Service Tax Act, 2017 - Section 20 r/w Central Goods and Services Tax Act, 2017 - Section 129(1) - If a complaint is received against an employee for grave misconduct without affidavit, the said complaint would not debar the Department to look at the allegation independently and conduct a preliminary inquiry with respect to the same.

In the present case, the technical report as well as preliminary inquiry report would suggest the grave misconduct by the petitioner. It is not the case of the petitioner that except for anonymous complaint, there is no evidence against the petitioner. The petitioner was fully associated with during conduct of preliminary inquiry, and the Three Members Committee has submitted a report regarding gross misconduct of the petitioner. Therefore, there is no violation

of the Government Orders dated 09.05.1997 and 01.08.1997 (mentioned below). The disciplinary proceedings have been initiated against the petitioner on the basis of the departmental preliminary inquiry report, and not on the basis of the complaint and, therefore, there is no illegality in initiation of the departmental proceedings against the petitioner. (Para 20)

Government Orders dated 09.05.1997 and 01.08.1997 - Government had issued Orders dated 09.05.1997 and 01.08.1997 that anonymous complaint should not be entertained. However, if the complaint is received from some important person then it should be ensured that whether it was actually sent by the said important person. If anonymous complaint is received from any other source, the affidavit of the complainant should be sought and, he should be directed to provide evidence in that regard. The Government issued again Order on 19.04.2012 that the earlier orders issued by it on 09.05.1997 and 01.08.1997 should be strictly complied with. (Para 15)

B. If a Government servant, exercising quasi-judicial function, passes an order, which is illegal, with *malafide* intention, for extraneous purposes, and where there is corruption involved, the Department is not precluded to proceed with the disciplinary proceedings against such an employee, if the order has not been challenged in revision/appeal. (Para 20)

The petitioner has been placed under suspension vide impugned order dated 21.04.2022. The suspension does not amount to punishment but an employee is placed under suspension to hold disciplinary inquiry against such an employee in a free, fair and impartial manner. When allegations against the delinquent employee are serious regarding his/her misconduct, the suspension order cannot be said to be invalid. Under Rule-7 of Rules, 1999, there is power of placing an employee under suspension, which has been exercised correctly for valid and cogent reasons for placing the petitioner under suspension. (Para 21)

Writ petition dismissed. (E-4)

Precedent distinguished:

1. U.O.I. & ors. Vs K.K. Dhawan, (1993) 2 SCC 56 (Para 16, 20)
2. Zunjarrao Bhikaji Nagarkar Vs U.O.I. & ors., (1999) 7 SCC 409 (Para 16, 20)
3. Union of India & ors. Vs Duli Chand, (2006) 5 SCC 680 (Para 16, 20)
4. Ramesh Chander Singh Vs High Court of Allahabad & anr., (2007) 4 SCC 247 (Para 16, 20)
5. Krishna Prasad Verma (Dead) through Legal Representatives Vs St. of Bihar & ors., (2019) 10 SCC 640 (Para 16, 20)

Present petition challenges order dated 21.04.2022, by which petitioner has been placed under suspension.

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

1. The present petition, under Article 226 of the Constitution of India has been preferred by the petitioner, who is at present Assistant Commissioner, Commercial Tax, Government of Uttar Pradesh, for the following reliefs:-

"I) Issue an appropriate writ, order or direction in the nature of certiorari quashing the order dated 21.04.2022 annexed a Annexure No. 1;

II) Issue an appropriate writ, order or direction in the nature of mandamus directing the respondent to allow the petitioner to work on the post Assistant Commissioner, State Tax Department and pay her regular salary;

III) Issue ad-interim direction to the aforesaid effect.

III) to issue a writ, order or direction which the Hon'ble court may deem fit and proper in the interest of justice looking to the fact and circumstances of the case; and

IV) Issue order or direction commanding the opposite parties to pay the cost in favour of the petitioner."

2. The petitioner, after selection, was appointed on the post of Assistant Commissioner, Commercial Tax in the year 2014. On transfer of Mr. Sandeep Tiwari, Assistant Commissioner, Commercial Tax, Mobile Squad, Barabanki to Range-5 Ayodhya on 03.09.2020, the petitioner took charge of the post of Assistant Commissioner, Mobile Squad, Barabanki on 07.09.2020.

3. The Joint Commissioner, Special Investigation Branch (for short "SIB"), State Tax, Ayodhya Region-B, Ayodhya on 10.09.2020 issued a direction that the petitioner should be accompanied with her subordinate officer, Commercial Tax Officer, during inspection/checks.

4. On 19.11.2020, the petitioner intercepted vehicle bearing registration no.HR38AA-6286 at Safedabad, Barabanki. Mobile Squad Unit Barabanki consists of one Assistant Commissioner and two Commercial Tax Officers, along with driver, peon and police staff. The work of the Mobile Squad is integrated team work. The Joint Commissioner, SIB, State Tax, Ayodhya Range-B, Ayodhya had issued written instructions dated 10.09.2020 that the petitioner should conduct road inspections with complete team.

5. The e-way bill, produced by the driver of the vehicle no. HR38 AA - 6286, was dated 18.11.2020. The gross weight of the vehicle no. HR38AA-6286 was found

to be 15170 kilograms, whereas the bare weight of the vehicle was 5570 kilograms. Thus, the net weight of the goods/material in the vehicle was approximately 9.500 tons, contrary to the weight (7.500 tons) mentioned in the relevant documents for transporting the material in the vehicle.

6. According to the petitioner, the driver of the vehicle again produced the second invoice, mentioning 2505 kilograms of old metal scrap in the vehicle, without any e-way bill for the said material. When certain discrepancies were found in the documents, a detailed physical verification along with complete videography was required to have been done as per the settled enforcement norms. The petitioner had shown that the plastic scrap was 7.00 tons and metal scrap was only to the extent of 2.500 tons. The petitioner passed detention order under Section 20 of the Integrated Goods and Service Tax, 2017 read with Section 129(1) of The Central Goods and Services Tax Act, 2017. It is said that on 21.11.2020 itself a demand notice was issued by the petitioner. The owner of the goods, Mrs. Sweetie Goyal accepted the liability and paid the tax and penalty to the tune of Rs.90,250/- on the same day, just after one minute of physical verification.

7. A complaint was received from one Mr. Raj Kumar, Patna, Bihar against the petitioner in respect of interception of the vehicle no. HR38AA-6286 on 19.11.2021-. The Additional Commissioner, SIB, Commercial Tax, Ayodhya Region, Ayodhya vide Office Letter No. 624 dated 11.02.2021 directed the Joint Commissioner, SIB to conduct a preliminary inquiry in respect of the allegation made by said Mr. Raj Kumar, Patna, Bihar after requiring from the said

complainant an affidavit in respect of the allegation and giving opportunity of hearing.

8. As the complainant had not given his complete address, mobile number, e-mail id etc, notice sent to him was returned back and no contact could be established from the complainant, Mr. Raj Kumar. However, the owner of Shri Raj Dharmkanta, where the vehicle was weighted after it got loaded, told that the vehicle no. HR38AA-6286 was weighted on 16.11.2020, without any load on it. The allegations made in the complaint were independently enquired into.

9. The driver of the vehicle no. HR38AA-6286 was Mr. Nagendra Kumar, who was carrying the material of Khatoo Shyam Traders. He produced invoice issued by Khatoo Shyam Traders to Mr. Mukesh Kumar, Delhi dated 18.11.2020 after the vehicle was intercepted. During the preliminary inquiry, the petitioner was issued show-cause-notice to which she submitted her reply. Thereafter, the preliminary inquiry report dated 29.10.2021 was submitted.

10. The finding of the preliminary technical inquiry report would disclose that no physical verification of the vehicle in question was conducted and, no entry was made regarding physical inspection of vehicle no. HR38AA-6286. The petitioner submitted fabricated evidence in respect of the physical verification of the vehicle, mentioning wrong facts. The CD in which videos were made by the petitioner would disclose that there was no plastic scrap in the vehicle no. HR38AA-6286, which was a container and the plastic scrap of 7.00 tons would not have been loaded in the said container. Whole material was metal scrap.

It was further noticed in the technical inspection report that according to the report generated by the petitioner, the physical inspection of the vehicle was conducted on 21.11.2020 at around 5.1 p.m. and soon thereafter, within one minute i.e. at 5.2 p.m., the owner of the goods made payment of the tax and penalty. Notice and order was passed within 28 minutes after physical inspection got done. After technical inquiry report was received, a Three Members Inquiry Committee was constituted. The Three Members Inquiry Committee report dated 28.12.2021 would disclose the following findings recorded in it:-

"(1) Physical verification is not done on the scheduled date.

(2) No record of physical verification is found in prescribed physical verification register.

(3) In complete and manipulated partial physical verification as well as incomplete videography is done by the petitioner for the purpose of tax evasion.

(4) No claim for payment for physical verification.

(5) The so-called incomplete videography of physical verification does not show any traces or evidence of plastic scrap.

(6) The show called incomplete videography shows exclusively the evidence of metal scrap.

(7) The owner of loaded truck deposited the exact amount of tax and penalty just after one minute of manipulated physical verification, even before issuing of show-cause-notice/final assessment order.

(8) The seized truck was a container vehicle (MCV) in which 7.00 ton plastic scrap (in bags or jhall) cannot be loaded because of its huge expanded volume.

(9) Audio clip recorded in mobile regarding conversation between the related parties and departmental officers are also against the petitioner's integrity."

11. In the preliminary inquiry, it was concluded that the seized truck/container no. HR38AA-6286 was loaded with 9.500 tons metal scrap, but the petitioner conspired with the truck owner and converted it into 7.500 tons plastic crap and 2.500 tons metal scrap on which the tax and penalty was imposed and the same was paid by the owner to the extent of Rs. 90,250/- within one minute of the physical inspection, however, the show-cause-notice and final order was passed subsequently.

12. Considering the said two reports i.e. technical and preliminary, the petitioner was placed under suspension by the competent authority vide the impugned order dated 21.04.2022 to secure the proper evidence and fair and impartial disciplinary inquiry against her.

13. As the vehicle in question was carrying 9.500 tons metal scrap, the tax and penalty would have been to the extent of Rs. 10 Lakhs, however, it is alleged that with the collusion and for extraneous reason/consideration, the petitioner had shown 2.500 tons plastic scrap for which the owner paid the tax and penalty within one minute after the inspection. Though the inquiry was set up after receiving the complaint from said Mr. Raj Kumar, but the subsequent technical inquiry report and preliminary inquiry report would disclose that all the relevant materials and evidence have been taken into account, including the reply submitted by the petitioner, before come to the preliminary findings against the petitioner.

14. Heard Mr. Vivek Raj Singh, learned Senior Advocate, assisted by Mr.

Avinash Chandra, representing the petitioner, as well as Mr. Sandeep Sharma, learned Standing Counsel, representing the respondents-State Authorities, and gone through the entire record.

15. On behalf of the petitioner, Mr. Vivek Raj Singh, learned Senior Advocate, submits that no preliminary inquiry could have been instituted on complaint of Mr. Raj Kumar, as the same was not supported by an affidavit, and his whereabouts and details could not be known later on, therefore, the said complaint was anonymous one. It is stated that the Government had issued Orders dated 09.05.1997 and 01.08.1997 that anonymous complaint should not be entertained. However, if the complaint is received from some important person then it should be ensured that whether it was actually sent by the said important person. If anonymous complaint is received from any other source, the affidavit of the complainant should be sought and, he should be directed to provide evidence in that regard. The Government issued again Order on 19.04.2012 that the earlier orders issued by it on 09.05.1997 and 01.08.1997 should be strictly complied with. It is, therefore, submitted that since the complaint was anonymous one, without being accompanied by an affidavit, the preliminary inquiry ought not to have been set up, and further action, taken pursuant to the preliminary inquiry, including placing the petitioner under suspension and setting up the departmental inquiry, are to be quashed.

16. The next submission made on behalf of the petitioner by the learned Senior Advocate is that the petitioner passed order imposing tax and penalty of Rs.90,250/- in exercise of quasi-judicial

power. The said order has not been challenged in the revision or appeal and the same has attained finality, therefore, the departmental proceedings cannot be set in motion on the basis of the said quasi-judicial order dated 21.11.2020. The learned Senior Advocate, appearing for the petitioner, places reliance upon the following cases:-

1. **(1993) 2 SCC 56 (Union of India and others Vs. K.K. Dhawan);**

2. **(1999) 7 SCC 409 (Zunjarrao Bhikaji Nagarkar Vs. Union of India and others);**

3. **(2006 5 SCC 680 (Union of India and others Vs. Duli Chand);**

4. **(2007) 4 SCC 247 (Ramesh Chander Singh Vs. High Court of Allahabad and another); and**

5. **(2019) 10 SCC 640 (Krishna Prasad Verma (Dead) through Legal Representatives Vs. State of Bihar and others)**

17. On the other hand, Mr. Sandeep Sharma, learned Standing Counsel, submits that the suspension order dated 21.04.2023 as well as disciplinary proceedings initiated are based on preliminary inquiry report and substantial evidence collected regarding misconduct and malafide exercise of power by the petitioner. If some complaint is received regarding misconduct of a Government servant though it is not supported by an affidavit, the Department is not barred to independently enquire into the matter of grave misconduct such as committed by the petitioner. It is submitted that the Government Orders dated 09.05.1997 and 01.08.1997 define general guidelines and norms related to general complaint disposal mechanism. If the allegations have been independently enquired into, and it has been found that the

Government servant prima facie has committed grave misconduct, the Department is not barred from initiating the departmental proceedings for such misconduct against a Government servant. It is further stated that if a Government servant, functioning as quasi-judicial authority, passes an order in malafide exercise of the power, for extraneous consideration, and such allegations have been prima facie found to be correct in the preliminary inquiry, the departmental proceedings are to be instituted against such an employee, and he/she cannot get away by saying that the order was passed by him/her in exercise of quasi-judicial power, and since the same has not been challenged in revision or appeal, no disciplinary proceedings can be instituted against him/her.

18. I have considered the submissions advanced by the learned Senior Advocate, on behalf of the petitioner, as well as learned Standing Counsel, on behalf of the respondents.

19. Before proceeding with the merit of the case, some developments, which have taken place in the present case, are required to be taken note of, which are as follows:-

(i) When this writ petition was instituted, the coordinate Bench passed an interim order on 28.11.2022 to the extent that till the next date of listing, operation and effect of the impugned order dated 21.04.2022 would remain stayed. However, the respondents were given liberty to proceed with the disciplinary proceedings, without being influenced by the findings recorded in the interim order dated 28.11.2022. The respondents were also given liberty to post the petitioner at any

place, considering the fact that disciplinary proceedings are pending against her.

(ii) The petitioner challenged the said interim order by filing intra-Court Special Appeal Defective No. 40 of 2023, which was allowed by the Division Bench vide judgment and order dated 01.02.2023, setting-aside the interim order dated 28.11.2022 whereby the coordinate Bench had given liberty to the respondents to proceed with the disciplinary proceedings, without being influenced by the findings recorded in the interim order dated 28.11.2022 as well as the liberty to the respondents to post the petitioner at any place, considering the fact that the disciplinary proceedings were pending against her. Paras 26, 27, 28 and 29 of the judgment and order dated 01.02.2023 passed by the Division Bench in intra-Court Special Appeal Defective No. 40 of 2023 are extracted herein below:-

"(26) The disciplinary proceedings against the appellant have been initiated merely because the assessee has deposited the penalty within a very short span of time which raised a suspicion with regard to the penalty order passed by the appellant. In Zunjarrao Bhikaji Nagarkar (Supra), the Hon'ble Supreme Court has categorically held that the disciplinary proceedings against an officer cannot take place on information, which is vague and indefinite and suspicion has no role to play in such matters when the department has taken a conscious decision not to challenge the order passed by the appellant and has allowed the same to attain finality. Prima facie, it appears at this stage that the disciplinary proceedings cannot be drawn against the appellant to punish her for having passed the aforesaid order.

(27) In view of the aforesaid discussion, we are of the view that the

respondents ought not to have been given liberty to proceed with the disciplinary proceedings against the appellant and to post her anywhere considering the facts that the disciplinary proceedings are pending against her.

(28) Accordingly, the instant special appeal is allowed. The order dated 28.11.2022 passed by the Hon'ble Single Judge in Writ-A No. 7888 of 2022 : Anjali Chaurasia Vs. State of U.P. and 5 others, so far as it provides that "Respondents are at liberty to proceed with the disciplinary proceedings, without being influenced by the findings recorded in this order. The respondents are also at liberty to post the petitioner at any place, considering the fact that disciplinary proceedings are pending against her" is hereby set-aside.

(29) It is clarified that while deciding the case on merits, Hon'ble Single Judge shall not be guided or influence by any observations made hereinabove, which have been made only for the purposes of disposal of the instant appeal.

(iii) The State Government had challenged the said order before the Supreme Court by filing Special Leave to Appeal No.9042 of 2023, and the Supreme Court has passed the following order on 18.05.2023 :-

"Issue notice.

Mr. Pankaj Singh, learned counsel appearing on caveat accepts notice on behalf of the sole respondent.

Respondent may file counter affidavit within six weeks. Petitioner will have two weeks' time thereafter to file rejoinder affidavit.

As an interim measure, it is provided that the disciplinary proceedings against the respondent may continue, however, no

final decision would be taken without leave of this Court.

We further request the learned Single Judge of the High Court to decide the writ petition expeditiously, subject to other matters on Board.

It goes without saying that parties shall co-operate in the hearing of the writ petition.

List the matter after expiry of ten weeks."

(iv) The petitioner has been issued the charge-sheet on 06.07.2022. The petitioner, with the purposes of delaying the enquiry against her, had been demanding documents which have not been cited in the charge-sheet as evidence. The petitioner has written various letters and all the evidence and material, relied on by the Department in support of the charge-sheet, have been supplied to the petitioner. The petitioner had made inspection of the documents, which were permitted to her, but the facts, as narrated in the writ petition itself, would disclose that every time effort was made by the petitioner, to delay the proceedings, and in the meantime, she could secure the interim order dated 28.11.2022, and the order dated 01.02.2023 passed by the Division Bench.

20. If a complaint is received against an employee for grave misconduct without affidavit, the said complaint would not debar the Department to look at the allegation independently and conduct a preliminary inquiry with respect to the same. In the present case, the technical report as well as preliminary inquiry report would suggest the grave misconduct by the petitioner, as pointed out above. It is not the case of the petitioner that except for anonymous complaint, there is no evidence against the petitioner. The petitioner was

fully associated with during conduct of preliminary inquiry, and the Three Members Committee has submitted a report regarding gross misconduct of the petitioner. Therefore, I am of the view that there is no violation of the Government Orders dated 09.05.1997 and 01.08.1997, as contended by the learned Senior Advocate on behalf of the petitioner. The disciplinary proceedings have been initiated against the petitioner on the basis of the departmental preliminary inquiry report, and not on the basis of the complaint and, therefore, there is no illegality in initiation of the departmental proceedings against the petitioner. If a Government servant, exercising quasi-judicial function, passes an order, which is illegal, with malafide intention, for extraneous purposes, and where there is corruption involved, the Department is not precluded to proceed with the disciplinary proceedings against such an employee, if the order has not been challenged in revision/appeal. The judgments, cited by the learned Senior Advocate on behalf of the petitioner, are in respect of judicial officers where no such finding in the preliminary inquiry regarding extraneous consideration was recorded and, therefore, those judgments have no bearing in the facts of the present case.

21. The petitioner has been placed under suspension vide impugned order dated 21.04.2022. The suspension does not amount to punishment but an employee is placed under suspension to hold disciplinary inquiry against such an employee in a free, fair and impartial manner. When allegation against the delinquent employee are serious regarding his/her misconduct, the suspension order cannot be said to be invalid. Under Rule-7 of the Uttar Pradesh Government Servant

(Discipline and Appeal) Rules, 1999, there is power of placing an employee under suspension, and I am of the view that the power has been exercised correctly for valid and cogent reasons for placing the petitioner under suspension.

22. In view thereof, I find no merit and substance in the present petition, which is hereby **dismissed**. It is, however, provided that the Department should proceed with the departmental inquiry expeditiously and conclude the same, preferably within a period of four months, subject to full cooperation by the petitioner. Any observation, made herein above, would not influence the inquiry officer, who should conduct the inquiry independently and record his finding based on the evidence.

(2023) 5 ILRA 1135
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.05.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ-B No. 295 of 2023

Jagadamba Singh ...Petitioner
Versus
D.D.C., Ayodhya & Ors. ...Respondents

Counsel for the Petitioner:

Prabhakar Vardhan Chaudhary, Mohammad
Aslam Khan

Counsel for the Respondents:

C.S.C., Ankit Pande, Rakesh Kumar Srivastava

A. Consolidation Law – UP Consolidation of Holding Act, 1953 – Section 48 – Power of Revision – Scope – About 43 age of litigation – Relevance – Deputy Director of Consolidation, while deciding the revision, remanded the matter – Validity challenged

– No evidence was required to be adduced in the matter – Effect – Held, taking note of the power of DDC and the age of litigation between the parties, the High Court set aside the remand order and directed the DDC to consider and decide all the issues including the issue(s) related to applicability of Section 11-A and 49 of the Act of 1953. (Para 17, 18 and 19)

Writ petition allowed. (E-1)

List of Cases cited:

1. WRIT B No. 108 of 2023; Angad Pratap Singh & ors. Vs Deputy Director Consolidation & ors. decided on 10.02.2023
2. Prabhu Dayal Vs D.D.C. & anr.; 2018 (140) RD 460 (All.)
3. Musuttu Vs D.D.C. & ors.; 2018(140) RD 505 (All.)
4. Dhooram Vs Deputy Director of Consolidation, Bagpat; 2006 (100) RD 505 (H.C.)
5. Smt.Anju Rajpal & ors. Vs St. of U.P. & ors.; 2023 (41) LCD 626
6. Bechan Pandey & ors. Vs Dulhin Janki Devi; AIR 1976 SC 866
7. Arvind Kumar Jaiswal (Dead) through L.R. Vs Devendra Prasad Jaiswal; 2023 SCC Online SC 146,

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

1. Heard Mohammad Arif Khan, learned Senior Advocate assisted by Sri Prabhakar Vardhan Chaudhary and Mohammad Aslam Khan, learned counsel for the petitioner, Sri Hemant Kumar Pandey, learned State counsel appearing for the respondent No. 1 and Sri R.S. Pandey, learned Senior Advocate assisted by Sri Rakesh Kumar Srivastava, learned counsel appearing for the caveator.

2. The order impugned in this petition dated 23.03.2023 passed by the respondent

No. 1/Deputy Director of Consolidation, Ayodhya in Revision No. 1864/2020530423000014 (Bajrang Pratap Singh and others vs. Jagdamba Singh) is an order of remand, whereby, the respondent No. 1 after interfering in the order dated 22.06.2019 passed by the Settlement Officer of Consolidation as also the orders dated 29.06.2016 and 11.07.2016 passed by the Consolidation Officer remanded the matter back to the Court of Consolidation Officer, Sadar, Ayodhya for deciding the matter afresh. The relevant portion of the order impugned dated 23.03.2023 on reproduction reads as under:-

"विचारोपरांत मैं इस मत का हूँ कि चकबन्दी अधिकारी द्वारा निर्मित वाद बिन्दुओं की बिन्दुवार स्पष्ट विवेचना नहीं की गयी है एवं अपीलीय न्यायालय द्वारा भी सरसरी रूप से अवर न्यायालय के आदेश की पुष्टि कर दी गयी है। इस प्रकरण में मुख्य विचारणीय बिन्दु यहीं रहा है कि प्रथम चक्र चकबन्दी में उप संचालक चकबन्दी स्तर तक पारित आदेश के विरुद्ध माननीय उच्च न्यायालय में मु० लखराजी द्वारा याचिका प्रस्तुत की गयी और मु० लखराजी के मृत्यु के उपरान्त उक्त याचिका की पैरवी विधिक वारिस द्वारा न किये जाने के कारण निगरानी न्यायालय द्वारा पारित आदेश दिनांक 09.08.1958 अन्तिम हो चुका है तो द्वितीय चक्र चकबन्दी में उक्त प्रकरण से सम्बन्धित वाद धारा-11क व धारा-49 जोत चकबन्दी अधिनियम से बाधित है अथवा नहीं एवं निगरानी स्तर तक पारित आदेश प्रांग न्याय का प्रभाव रखते है अथवा नहीं तथा चकबन्दी प्राधिकारियों को प्रस्तुत आपत्तियों पर सुनवाई का क्षेत्राधिकार प्राप्त है अथवा नहीं। परीक्षण न्यायालय को सर्वप्रथम इन्हीं बिन्दुओं पर सुनवाई करके इन बिन्दुओं का निस्तारण करना चाहिए। इस बिन्दुओं के निस्तारण के उपरान्त ही अन्य बिन्दुओं पर गुणदोष पर विचार किया जा सकता है। तदनुसार निगरानी स्वीकार किये जाने योग्य है।

आदेश

उपरोक्त विवेचन के आधार पर यह निगरानी स्वीकार की जाती है। बन्दोबस्त अधिकारी चकबन्दी द्वारा पारित आदेश दिनांक 22.06.2019 एवं चकबन्दी अधिकारी द्वारा पारित आदेश दिनांक 29.06.2016 व 11.07.2016 निरस्त किया जाता है। प्रकरण ऊपर की गयी विवेचना के अनुसार

पुनः निस्तारण हेतु चकबन्दी अधिकारी सदर अयोध्या के न्यायालय पर प्रति प्रेषित किया जाता है। वाद के निस्तारण तक आधार वर्ष का इन्द्राज यथावत रहेगा। पक्ष चकबन्दी अधिकारी सदर के न्यायालय पर अग्रेतर कार्यवाही हेतु दिनांक 18.04.2023 को उपस्थित हो। पत्रावली वाद अग्रेतर कार्यवाही राजस्व अभिलेखागार में संग्रहीत हो।"

3. A perusal of relevant observation, quoted above, as also the recitals of the order impugned dated 23.03.2023, this Court finds that the parties to the litigation after remand were not required to adduce evidence in support of their case. Despite this, the respondent No. 1 vide order impugned dated 23.03.2023 remanded the matter back to Consolidation Officer for decision afresh on merits.

4. Sri Khan, learned Senior Advocate while assailing the order impugned dated 23.03.2023 stated that the respondent No. 1 in the given facts and circumstances of the case ought not to have remanded the matter back to the Consolidation Officer for deciding the case afresh on merits as he himself is empowered to decide it on merits in view of settled legal proposition. In support of his submission, Sri Khan has placed reliance on the judgment dated 10.02.2023 passed by this Court in **WRIT-B No. 108 of 2023 (Angad Pratap Singh And Others vs. Deputy Director Consolidation/ Addl. District Magistrate (F/R), Lakhimpur Kheri And Others)**.

5. He further submitted that the Revisional Court/Authority under the Act of 1953 is having wide powers. Power under this section of the Act of 1953 includes power to examine any finding whether it is of fact or law. D.D.C. while hearing revision under this section is fully empowered to reassess the evidence and record its own findings of fact by virtue of Section 48 Explanation 3. Under this

section of the Act of 1953, the D.D.C. has power to reassess the findings of subordinate consolidation Authorities. Reference has also been made to the judgment of this Court **Prabhu Dayal v. D.D.C./Additional District Magistrate (Administration) Manipuri and Another, 2018 (140) RD 460 (All.); Musuttu vs. D.D.C. and others, 2018 (140) RD 505 (All.); Dhooram vs. Deputy Director of Consolidation, Bagpat, 2006 (100) RD 505 (H.C.)**.

6. Sri Khan further submitted that in the dispute between the parties, the Consolidation Officer passed the order on 10.10.1957. Thereafter, an order on 18.02.1958 was passed by the Settlement Officer of Consolidation and thereafter the Deputy Director of Consolidation passed the order on 09.08.1958. Being aggrieved, a Writ Petition No. 3389 of 1958 was filed by Smt. Lekhrabi, which was dismissed as abated. The dispute between the parties regarding rights over the land, in issue, could not be settled. To adjudicate the issue involved, a suit for declaration was filed under Section 229-B/209 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short "Act of 1950"), which was registered as Case No. 1168. Another suit was also filed in the same provisions, which was registered as Case No. 1099/75-519/1102. During pendency of the said suits, second operation of consolidation was started on 15.11.1980 and since then, the dispute between the parties has not been decided. The matter has again been remanded back to the Consolidation Officer concerned for decision afresh. This remand order has been passed after lapse of about 43 years from initiation of second consolidation proceedings. He says that in view of settled principle of law, the respondent No. 1 ought to have decided the issues involved

in the case including the issue of maintainability after taking note of Section 11-A and 49 of U.P. Consolidation of Holdings Act, 1953 (in short "Act of 1953"). Thus, interference of this Court is required in the matter. The prayer is to allow this petition and remand the matter back to respondent No. 1 to consider and decide the issues involved in the case after giving proper opportunity of hearings to the parties to the litigation.

7. Sri R.S. Pandey, learned Senior Advocate has opposed the present petition. He stated that in view of the facts of the case, the order of remand impugned in this petition dated 23.03.2023 is reasonable and justifiable and the same is not liable to be interfered with by this Court, as several issues, which were framed by the Consolidation Officer, ought to have been decided, however, the said issues were not dealt with as required under the law.

8. He submitted that in the similar facts and circumstances, this Court declined to interfere in the order of remand. In support of his submissions, Sri Pandey has placed reliance on the judgment of this Court dated 22.12.2022 passed in the case of Smt. Anju Rajpal and others vs. State of U.P. and others reported in [2023 (41) LCD 626]. However, on being asked, Sri Pandey could not dispute the power of Deputy Director of Consolidation, as observed in various judgments of this Court and that of Hon'ble Apex Court.

9. Considered the submission of learned counsel for the parties and perused the record.

10. This Court is not entering into the factual aspect of the case, as it is dealing with the order of remand in the light of

submissions advanced by the learned Counsel for the respective parties.

11. From the facts, in brief, indicated above, as also on record, it is apparent that second consolidation proceedings, in which the order impugned dated 23.03.2023 has been passed, were initiated on 15.11.1980 and the Consolidation Officer has decided the case on 29.06.2016. Thereafter, the Settlement Officer of Consolidation/Appellate Authority has decided the appeal No. 1031/2016540423000069 (Ram Prakash Singh vs. Jagdamba Singh) filed under Section 11(1) of the Act of 1953 on 22.06.2019 and the order impugned has been passed by the respondent No. 1 on 23.03.2023. From these facts, it is apparent that this order of remand has been passed after lapse of about 43 years.

12. It is undisputed that the respondent No. 1 under the Act of 1953 particularly in view of language couched under Section 48 of the Act of 1953 is having wide power, as observed in the judgment(s), referred above.

13. From the judgment relied upon by Sri Pandey passed in the case of **Smt. Anju Rajpal** (supra), it reflects that this Court after considering the facts of the case and taking note of the provisions of Indian Partnership Act, 1932, in para 41 and 46, observed as under:-

"41. In order to arrive at a correct conclusion, the provisions contained in the Partnership Act i.e. Sections 5, 6, 14, 37, 42 to 49 have to be taken note in context with the evidence relating to the different partnership firms constituted from time to time and their respective dissolution. Since none of the two authorities i.e.

Consolidation Officer and the Settlement Officer of Consolidation had taken a look at the problem with the correct lens of the legal provisions and this aspect has attracted the attention of the DDC who after noticing the same found that the matter required a re-look and for the said purpose it has remanded the matter.

46. It may be true that the DDC is the final Court of fact and law in but in the present case where the matter has proceeded upon a tangent and ignoring the principles as attracted to the dispute in question de-hors the provisions of the Partnership Act and the parties have also not brought on record the requisite evidence which could support the respective contentions, hence, this Court is of the clear view that it cannot be said that the order of remand is bad in the given circumstance."

14. From the above quoted paragraphs of the judgment passed in the case of **Smt. Anju Rajpal** (supra), it is apparent that on the ground of requirement of evidence for deciding the dispute between the parties, the remand order was not interfered. Thus, the judgment relied upon by Sri Pandey is distinguishable on facts and would not apply in the instant case.

15. The Hon'ble Apex Court in the case of **Bechan Pandey and others vs. Dulhin Janki Devi reported in AIR 1976 SC 866**, on the plea of remand of case, after considering Rule 23 of Order 41 CPC as also the age of litigation between the parties, in paragraph 9, made some observation, which on reproduction reads as under:-

"9. Prayer has also been made by Mr Sarjoo Prasad for the remand of the case to the trial court as the plaintiff-appellants

were labouring under the impression that the defendant-respondents had not disputed that the land in dispute was the same as had been purchased by Maina Kuer. It is urged that because of that impression, material which could have clearly proved that the land in dispute was the same as had been purchased by Maina Kuer could not be brought on the record. We find it difficult to accede to this prayer. As already pointed out above, the contesting defendants clearly stated in their written statements that Maina Kuer was not the auction purchaser of the land in dispute. In view of that unequivocal averment, there was no valid basis for the assumption or the impression under which plaintiff-appellants are stated to have laboured. Apart from that, we find that the suit out of which the present appeal has arisen was filed as long ago as January 1950. From the title of the appeal we find that many of the original plaintiffs and defendants have during this period of more than a quarter of century departed and are no more in the land of the living, having bowed as it were to the inexorable law of nature. They are now represented by their legal representatives. To remand the suit to the trial court would necessarily have the effect of keeping alive the strife between the parties and prolonging this longdrawn litigation by another round of legal battle in the trial court and thereafter in appeal. It is time, in our opinion, that we draw the final curtain and put an end to this long meandering course of litigation between the parties. If the passage of time and the laws of nature bring to an end the lives of men and women, it would perhaps be the demand of reason and dictate of prudence not to keep alive after so many years the strife and conflict started by the dead. To do so would in effect be defying the laws of nature and offering a futile resistance to the ravage of time. If human life has a short

span, it would be irrational to entertain a taller claim for disputes and conflicts which are a manifestation of human frailty. The courts should be loth to entertain a plea in a case like the present which would have the effect of condemning succeeding generation of families to spend major part of their lives in protracted litigation. It may be appropriate in the above context to reproduce what was said in the case of *Sant Naroin Mathurv.Rama Krishna Mission*[(1974) 2 SCC 730] : (p. 737, para 15)

“It is time, in our opinion, that we draw the final curtain on this long drawn litigation and not allow its embers to smoulder for a further length of time, more so when the principal contestants have all departed bowing as it were to the inexorable law of nature. One is tempted in this context to refer to the observations of Chief Justice Crewe in a case concerning peerage claim made after the death without issue of the Earl of Oxford. Said the learned Chief Justice:

‘Time hath its revolutions; there must be a period and an end to all temporal things — an end of names, and dignities and whatsoever is terne, and why not of De Vere? For where is Bohun? Where is Mowbray? Where is Mortimer? Why, which is more and most of all, where is Plantagenet? They are all entombed in the urns and sepulchres of mortality. What was said about the inevitable end of all mortal beings, however eminent they may be, is equally true of the affairs of mortal beings, their disputes and conflicts, their ventures in the field of love and sport, their achievements and failures for essentially they all have a stamp of mortality on them.’

One feels tempted to add that if life like a dome of many-coloured glass stains the white radiance of eternity, so do the

doings and conflicts of mortal beings till death tramples them down."

16. In the case of **Arvind Kumar Jaiswal (Dead) through L.R. vs. Devendra Prasad Jaiswal reported in 2023 SCC OnLine SC 146**, after considering the relevant provisions of order 41 CPC viz. Rule 23, 23A, 24 and 25, on the issue of remand of a case, observed as under:-

"3.An order of remand prolongs and delays the litigation and hence, should not be passed unless the appellate court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account. (See:Shivakumarv.Sharanabasappa, (2021) 11 SCC 277; andBachahan Deviv.Nagar Nigam, Gorakhpur,(2008) 12 SCC 372)Where evidence has already been adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential. The first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court.

4.In the present case, the High Court, as the first appellate court, which is also a court of fact and law, has passed an order of remand observing that the judgment of the

trial court was, in its opinion, not written as per the mandate of Section 33 and Rule 4(2) and 5 of Order XX of the Code, as the discussion and reasoning on certain aspects was not detailed and elaborate."

17. Considering the power of DDC under Section 48 of the Act of 1953, this Court is of the view that the observations made by the Hon'ble Apex Court in the judgments passed in the case of **Bechan Pandey** (supra) and **Arvind Kumar Jaiswal** (supra) are liable to be taken note of.

18. In the instant case regarding the dispute between the parties, the first order was passed by the Consolidation Officer on 10.10.1957 and dispute continued between them and on 15.11.1980, the second consolidation proceedings were started and the order dated 23.03.2023, an order of remand, has been passed by DDC after about 43 years from initiation of second consolidation proceedings. Moreover, the parties to the litigation in the instant case are not required to adduce evidence, as appears from the impugned order. The DDC has not observed that the evidence on record is not sufficient to dispose of the matter or re-trial is required.

19. Taking note of the aforesaid including the power of DDC and the age of litigation between the parties, this Court is of the view that interference in the impugned order dated 23.03.2023 is required. Accordingly, the order impugned dated 23.03.2023 is hereby set-aside. The matter is remanded back to the Deputy Director of Consolidation to consider and decide all the issues including the issue(s) related to applicability of Section 11-A and 49 of the Act of 1953, after affording proper opportunity of hearing to the parties

to the litigation preferably within a period of six months from the date of production of certified copy of this order, if there is no other legal impediment in this regard. While conducting the proceedings, the Authority concerned is directed to avoid unnecessary adjournments to either party.

20. The writ petition is allowed in above terms.

(2023) 5 ILRA 1141
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 143 of 2021

Brahmanand Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Brahmanand Pandey (In Person)

Counsel for the Respondents:
 C.S.C., Sri Anand Prakash Srivastava

A. Constitution of India – Article 226 – Writ – Maintainability – Mutation proceeding – Scope of interference – Held, orders of mutation are passed on the basis of possession and since no substantive rights of the parties are decided, ordinarily a writ petition would not be entertainable against such orders unless the same are found to be wholly without jurisdiction or have the effect of rendering findings which are contrary to title already decided by a competent court. (Para 35)

B. Revenue Law – UP Land Revenue Act, 1901 – Sections 33, 39 & 225 – Mutation – Nature and Scope – Held, mutation proceedings is summary in nature – It does not have the effect of creating or

extinguishing the title nor has any presumptive value on title and it only enables the person concerned to pay land revenue – Mutation orders would not debar institution of any suit by any person having right in the holding in a competent court. (Para 36, 41 and 46)

C. Interpretation of Statute – General Clauses Act, 1897 – Section 2(42) – Word 'Person' – Whether St. include in it or not – Held, The definition of "person" is not exclusive but inclusive and considering the language used in the Statute with reference to the proceedings giving rise to the present case, in the opinion of the Court, the 'St.' would fall in the definition of 'person'. (Para 46 and 47)

D. Constitution of India, 1950 – Article 226 – Writ – Locus standi – Main party to be aggrieved by the impugned orders or by the nature of relief claimed in the original proceedings u/s 33/39 of the Act, 1901 is the 'St. of U.P' – However, the challenge was made by a stranger (petitioner) – Permissibility – Held, the petitioner have no locus in the matter. (Para 47, 48 and 49)

Writ petition dismissed of. (E-1)

List of Cases cited:

1. Rukmini Amma Saradamma Vs Kallyani Sulochana & ors.; (1993) 1 SCC 499
2. Hiya Associates & ors. Vs Nakshatra Properties Pvt. Ltd.; (2018) 18 SCC 358
3. Jaipal Vs Board of Revenue, U.P., Allahabad & ors.; AIR 1957 All 205
4. Sri Lal Bachan Vs Board of Revenue, U.P., Lucknow & ors.; 2002 (93) RD 6
5. Bindeshwari Vs Board of Revenue & ors.; 2002 (1) AWC 498
6. Vinod Kumar Rajbhar Vs St. of U.P. & ors.; 2021 (1) ADJ 792.
7. Buddh Pal Singh Vs St. of U.P. & ors.; 2012 (5) ADJ 266,

8. Bhimabai Mahadeo Kambekar Vs Arthur Import and Export Company & ors.; (2019) 3 SCC 191

9. Balwant Singh Vs Daulat Singh; (1997) 7 SCC 137

10. Narasamma Vs St. of Karn.; (209) 5 SCC 591

11. Faqrudin Vs Tajuddin; (2008) 8 SCC 12

12. Narain Prasad Aggarwal Vs St. of M. P.; (2007) 11 SCC 736

13. U.O.I.& ors. Vs Vasavi Cooperative Housing Society Ltd. & ors.; (2014) 2 SCC 269

14. Corpn. Of the City of Bangalore Vs M. Papaiah; (1989) 3 SCC 612

15. Guru Amarjit Singh Vs Rattan Chand (1993) 4 SCC 349

16. H.P. v. Keshav Ram; (1996) 11SCC 257

17. Sawarni (Smt.) Vs Inder Kaur (Smt.) & ors.; (1996) 6 SCC 223

18. Suraj Bhan & ors. Vs Financial Commissioner & ors.; (2007) 6 SCC 186

19. Harish Chandra Vs U.O.I.& ors.; 2019 (5) ADJ 212 (DB)

20. Mahesh Kumar Juneja & anr.Vs Additional Commissioner Judicial Moradabad Division & ors., 2020 (3) ADJ 104

21. Jitendra Singh Vs St. of M. P. & ors.; 2021 SCC OnLine SC 802

22. Suraj Bhan Vs Financial Commissioner; (2007) 6 SCC 186

23. Suman Verma Vs U.O.I.; (2004) 12 SCC 58

24. Faqrudin Vs Tajuddin; (2008) 8 SCC 12

25. Rajinder Singh Vs St. of J & K; (2008) 9 SCC 368

26. Municipal Corporation, Aurangabad Vs St. of Mah.; (2015) 16 SCC 689

27. T Ravi Vs B. Chinna Narasimha; (2017) 7 SCC 342

28. Bhimabai Mahadeo Kambekar Vs Arthur Import & Export Co.; (2019) 3 SCC 191

29. Prahlad Pradhar Vs Sonu Kumhar; (2019) 10 SCC 259

30. Ajit Kaur Vs Darshan Singh; (2019) 13 SCC 70

31. Smt. Kalawati Vs Board of Revenue & ors.; 2022 (4) ADJ 578

32. Alladin Vs St. of U.P. & ors.; 2023 (3) ADJ 41

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Brahmanand Pandey, the petitioner who has appeared in-person, learned Standing Counsel for the State-respondents and Shri Anand Prakash Srivastava, learned counsel for the respondent no.5-private respondent.

2. This writ petition has been filed by one Brahmanand Pandey S/o Rajmani Pandey, R/o Village-Sasna Vishwanathpur, Police Station-Maharajganj, Pargana Gopalpur, Tehsil-Sagadi, District-Azamgarh who has appeared in-person before this Court.

3 The reliefs claimed in the present writ petition are for quashing of the order dated 25.10.2017 passed by the Collector/District Magistrate-Azamgarh as well as the order dated 21.10.2020 passed by the Commissioner, Azamgarh, Division-Azamgarh.

4. The Collector/District Magistrate, Azamgarh has rejected the case filed by the petitioner under Sections 33/39/225 of U.P. Land Revenue Act-1901 (hereinafter referred to as "the Act-1901") (Brahmanand

Pandey v. State of U.P.) vide impugned order dated 25.10.2017 whereas vide impugned order dated 21.10.2020, the Commissioner, Azamgarh, Division Azamgarh has dismissed the revisions filed under Section 219 of the Act-1901.

5. A perusal of record shows that the petitioner filed a case under Sections 33/39/225 of the Act-1901 against the State of U.P. before the Collector/District Magistrate-Azamgarh alleging therein that certain land covered by Gata No.1149 (renumbered as Gata Nos.329 and 330) is recorded in the names of Ram Prakash, Rajpat Pandey and Hari Mohan as their 'bhumidhari' land. The allegations made in the memo of the said application/case are to the effect that various private persons (including the aforesaid) were obstructing the public passage and have succeeded to get wrongful entries made in their names contrary to the revenue/consolidation records. Three prayers were made in the said application/case:-

- (1). The Gata Nos.329 and 330 be declared as "*parti*/Government land";
- (2). Any other relief which may be found appropriate in favour of the petitioner be passed;
- (3). The cost of litigation be awarded to the petitioner from the opposite party (State).

6. The order of Collector dated 25.10.2017 shows that for the purposes of disposal of the case, reports from Sub Divisional Officer-Sagadi and Settlement Officer of Consolidation were called for and that the Settlement Officer of Consolidation, in his report dated 26.11.2015, has mentioned that land covered by Gata No.330 area 0.030 Kari has been recorded in the names of Rajpati and Radhika, heirs of Sadanand

vide order dated 12.11.1971 passed by the Consolidation Officer in Case No.10459 whereas in respect of Gata No.329 measuring 0.015, the aforesaid two names were continuing in the Khatauni since before. The order further indicates that the State and opposite parties were heard whereas nobody was present to argue the matter on behalf of the petitioner and, therefore, the allegations levelled by the petitioner were not proved and there were contrary reports in favour of the opposite parties, consequently, the case was dismissed.

7. Challenging the order of Collector/District Magistrate-Azamgarh dated 25.10.2017, the petitioner filed revision before the Commissioner, Azamgarh, Division-Azamgarh which was also dismissed vide order dated 20.10.2020.

8. The contention of the petitioner is to the effect that the aforesaid land continued to be recorded in the consolidation record as "Government land", however, the respondent no.5 and various other persons succeeded to get their names recorded in the revenue records and, therefore, the said fraudulent entries are liable to be expunged and the land should be declared as belonging to the "Government". The petitioner has referred to various revenue records and has tried to impress the Court that the private persons have usurped the Government land.

9. *Per contra*, learned Standing Counsel submits that the orders impugned are perfectly in accordance with law, based upon documentary evidence available with the courts below and, therefore, they do not require any interference.

10. Shri A.P. Srivastava, who has put in appearance on behalf of respondent no.5,

has argued that the writ petition arising out of the proceedings under Sections 33/39/225 of the Act-1901 is not maintainable as the same are 'summary in nature' and even otherwise, it has come on record that the names of the private persons including the respondent no.5 were recorded in the consolidation as well as revenue records on the basis of order dated 12.11.1971 passed by the Consolidation Officer in Case No.10459. Shri Srivastava has further argued that the petitioner has no locus in the matter as neither in his case under Sections 33/39/225 of the Act-1901 nor in the writ petition he has disclosed as to how he is affected by conferring of "Bhumidhari" rights on the contesting respondents and other persons. He further submits that this is not a writ petition in the nature of public interest where anybody can agitate any issue nor is there involvement of element of any public interest. Shri Srivastava further submits that pure findings of fact have been recorded by the revisional court in its order and, in any case, if the petitioner or other person is aggrieved by the entries in the revenue records which are based upon the decision by the competent court of law in statutory proceedings, he has a right to get his grievance redressed in appropriate proceedings of declaration of rights and Sections 33/39 of the Act -1901 is a provision which is meant only for correction of records, in which, the entries have been recorded by clerical mistake or omissions, which is not the case here. He further submits that the beneficiaries including the respondent no.5 continue in actual and physical possession over the land in dispute and the petitioner is trying to harass the "bhumidhars" and, hence, this writ petition is nothing but an abuse of the process of law.

11. Before this Court proceeds to examine this case either on the ground of

maintainability or on merits, it would be appropriate to reproduce Sections 33, 39 and 225 of the Act-1901, which are extracted as under :-

"33. The annual registers. - (1) *The Collector shall maintain the record-of-rights, and for that purpose shall annually, or at such longer intervals as the [State Government] may prescribe, cause to be prepared an amended [register mentioned in Section 32.]*

The [register] so prepared shall be called the annual register.

[(2) The Collector shall cause to be recorded in the annual register -

(a) all successions and transfers in accordance with the provisions of Section 35; or

(b) other changes that may take place in respect of any land ; and shall also correct all errors and omissions in accordance with the provisions of Section 39 :

Provided that the power to record a change under clause (b) shall not be construed to include the power to decide a dispute involving any question of title.]

(3) [No such change or transaction shall be recorded without the order of the Collector or as hereinafter provided, of the Tahsildar or [the Kanungo].]

[(4) The Collector shall cause to be prepared and supplied to every person recorded as bhumidhar, whether with or without transferable rights, assami or Government Lessee a Kisan Bahi (Pass book) which shall contain -

(a) such extract from the annual register prepared under sub-section (1) relating to all holdings of which he is so recorded (either solely or jointly with others);

(b) details of grants sanctioned to him; and

(c) such other particulars as may be prescribed :

Provided that in the case of joint holdings it shall be sufficient for the purpose of this sub-section of Kisan Bahi (Pass book) is supplied to such one or more of the recorded co-sharers as may be prescribed.

(4-A) The Kisan Bahi (Pass book) referred to in sub-section (4) shall be prepared in such manner and on payment of such fee, which shall be realisable as arrears of land revenue, as may be prescribed.

(5) Every such person shall be entitled, without payment of any extra fee, to get any amendment made in the annual register under sub-section (2) incorporated in his Kisan bahi (Pass book.)]

(6) The State Government may make rules to carry out the purposes of this section, including, in particular, rules, prescribing the mode of reception in evidence, and of proof in judicial proceedings, of entries in the [Kisan Bahi (Pass Book)], and the mode of its revision and authentication up-to-date and for issue of duplicate copies thereof, and the fees, if any, to be charged for any of the said purposes.

(7) In this section, 'prescribed' means prescribed by rules made by the State Government.

(8) Nothing in sub-sections (4) to (7) shall apply in relation to any area which is either under consolidation operations or under record operations."

39. Correction of mistakes in the annual register. - (1) An application for correction of any error or omission in the annual register shall be made to the Tahsildar.

(2) On receiving an application under sub-section (1) or any error or omission in

the annual register coming to his knowledge otherwise, the Tahsildar shall make such inquiry as appears necessary and then refer the case to the Collector, who shall dispose it of, after deciding the dispute in accordance with the provisions of Section 40.

[Provided that nothing in this sub-section shall be construed to empower the Collector to decide a dispute involving any question of title.]

(3) The provisions of sub-sections (1) and (2) shall prevail, notwithstanding anything contained in the U.P. Panchayat Raj Act, 1947.

225. Collector to have all powers of an Assistant Collector. - The Collector may exercise all or any of the powers of an Assistant Collector under this or any other Act for tire time being in force."

12. A bare perusal of aforesaid Sections makes it clear that under Section 33 of the Act-1901, entries on the basis of succession and transfer in accordance with Section 35 can be made and also correction of all errors and omissions can be made by the Collector. Section 39 is a provision for correction of mistakes in the actual register whereas Section 225 has nothing to do with the controversy involved in the present case, rather, it only speaks that "Collector may exercise all or any of the powers of an Assistant Collector under the Act".

13. Keeping in view the aforesaid provisions, averments made in the original case under Sections 33/39/225 of the Act-1901 would show that a declaration was sought from the Collector to the effect that land covered by Gata Nos.329 and 330 be declared as "parti/Government land", therefore, from the bare perusal of the memo of the case, it is found that it was not a case for correction of records rather the

petitioner had sought a declaration in favour of State Government and that is why he arrayed only 'State Government' as a 'party', though allegations upon private persons including the predecessors-in-interest of the private respondent no.5 were also levelled.

14. I find from the perusal of the record that during the pendency of the aforesaid case, the Collector-Azamgarh passed an order dated 19.10.2015 after taking into consideration the reports of Sub Divisional Officer and Settlement Officer of Consolidation concerned that in the revenue records, the names of Radhika, Ram Prakash, Santosh Kumar and Jhinka were recorded as "bhumidhar with transferable rights" and, therefore, the said persons shall be "affected parties" and hence, their impleadment in the proceedings is necessary. Accordingly, the Collector directed impleadment of the aforesaid persons and issued notices to them.

15. The Court finds that two revisions bearing nos.47/A C-205015000000037 of 2019-20 (Brahmanand Pandey v. District Magistrate, Azamgarh & Anr.) and Revision No.50/A C-201715001297 of 2017-20 (State of U.P. through District Magistrate-Azamgarh v. Ram Prakash & Ors.) were filed against the order dated 25.10.2017 passed by the Collector/District Magistrate-Azamgarh. From perusal of the aforesaid, it is clear that even the 'State of U.P.' was aggrieved by the order dated 25.10.2017 passed by the Collector/District Magistrate-Azamgarh.

16. The petitioner has drawn attention of the Court to the order passed by this Court in Writ C No.18613 of 2019 (Brahmanand Pandey v. State of U.P. & 4 Ors.) which was filed and decided at the

stage when, vide order dated 23.01.2019, the Commissioner had decided the revision filed by the petitioner but did not decide the revision filed by the State, though both the revisions were filed against the order 25.10.2017. Under the said circumstances, the writ petition was allowed by this Court vide order dated 02.07.2019 with the following directions:-

"Accordingly, the petition is allowed, the impugned order dated 23.01.2019, is set-aside to the extent it dismisses petitioners revision as, not maintainable. It is directed that petitioners revision be connected with, and be decided along with Revision No.306/A, State of U.P. Vs. Ram Prakash & others."

17. In pursuance of the aforesaid order of this Court dated 02.07.2019, both the revisions were clubbed and decided together by the Commissioner vide impugned order dated 21.10.2020.

18. During the course of arguments, a query was raised by the Court from the petitioner, Shri Srivastava and learned Standing Counsel as to whether against the impugned order dated 25.10.2020 passed by the Commissioner, the State has filed any writ petition or not. Answer to the said query was that nobody was aware about the filing of the writ petition by the State.

19. Under such circumstances, the Court has examined the counter affidavit 27.08.2021 filed by the State, the deponent whereof is one Vasudev Ji, the then Consolidation Officer, Azamgarh. Certain relevant paragraphs of the said counter affidavit are reproduced hereinbelow:-

"11. That the contents of paragraph 4 of the writ petition are not admitted as

stated, hence denied. In reply thereto it is submitted that the Respondent No. 1, Commissioner, Azamgarh Division, Azamgarh after affording due opportunity of hearing to the parties as well as after scrutinizing entire material available on record has passed the order dated 21.10.2020, which is perfectly just, legal and valid order and there is no illegality in it.

12. That the contents of paragraph 5 of the writ petition are not admitted as stated, hence denied. In reply thereto it is submitted that, in the enquiry report submitted before the District Magistrate, Azamgarh it has been mentioned that Gata No.329 Area 0.015 hectares had been registered in the name of Rajapati and Radhika sons Sadanand from the previous year Khatauni and on the basis of the same the District Magistrate and Commissioner Azamgarh Division, Azamgarh has also mentioned the same in their orders.

13. That the contents of paragraph 6 of the writ petition are not admitted as stated, hence denied. In reply thereto it is submitted that, in CH Form 41 Gata No. 329 area 0.015 hectare was carved out from Old Gata No. 1149/2 area 0.015 hectare. The names of Rajpati and Radhika sons of Sadanand were recorded in Khata No.78 of CH Form 45 which was excluded from the Consolidation proceedings, therefore, on that basis the same was recorded as "Parti/Rakba" in the Special Column. In view of above it is clear that, the aforesaid land belongs to tenure holder and is not the land of Gram Samaj or Parti account.

14. That the contents of paragraphs 7 and 8 of the writ petition are not admitted as stated, hence denied. In reply thereto it is submitted that, by means of order dated 12.11.1971 passed in the Case No. 10459 passed by the Consolidation Officer the

name of Sabhapati Panchanan was expunged and the name of Radhika and Rajpati sons of Sadanand were recorded over New Gata No. 330 area 0.030 Kari of Old Gata No. 1149/3 which is evident from the enquiry/inspection report dated 26.11.2015.

15. That the contents of paragraph 9 of the writ petition are not admitted as stated, hence denied. In reply thereto it is submitted that the orders passed by the authority concerned is perfectly just, legal and valid order and there is no illegality in it.

16. That the contents of paragraphs 10 and 11 of the writ petition are not admitted as stated, hence denied. In reply thereto it is submitted that the order passed by District Magistrate dated 25.10.2017 as well as by Commissioner, Azamgarh Division, Azamgarh dated 21.10.2020 perfectly, just, legal and valid order and there is no illegality or infirmity in it.

18. That the contents of paragraphs 17 to 19 of the writ petition need no comments being related to passing of the order in Civil Appeal No. 9996/2018 and passing of the orders by District Magistrate, Azamgarh as well as Commissioner, Azamgarh Division, Azamgarh which are perfectly just, legal and valid orders and requires no interference by this Hon'ble Court.

20. That the grounds taken in paragraph 21 of the writ petition are not sustainable in the eyes of law as such the writ petition as framed and filed by the petitioner being devoid of merit is liable to be dismissed."

20. Therefore, in view of the clear stand taken by the State in the counter affidavit which was filed on behalf of respondent nos.1 to 4 to the effect that the orders impugned have been passed on the basis of record of Arazis validly settled in

favour of the private respondents and other persons and that the impugned orders are perfectly in accordance with law, not calling for any interference, necessary inference can be drawn to the effect that the "State" is not aggrieved by the dismissal of its revision by the Commissioner vide order dated 21.10.2020. The consequence of such stand taken before this Court on oath is that the State, Commissioner, the Collector, the Settlement Officer of Consolidation as well as the Sub Divisional Officer consider the entire records in favour of the private persons who have been arrayed in a very strange capacity in the writ petition as "Hari Mohan Pandey (beneficiary and representatives of many other beneficiaries)".

21. In view of the above, once the original relief claimed in the proceedings under Sections 33/39/225 of the Act-1901 was to make a declaration of the land covered by Gata Nos.329 and 330 as "Government Land" and the Government has acquiesced to the merits of the impugned orders passed by the Commissioner, on the one hand by not challenging the same despite dismissal of its revision and, on the other hand, by taking a clear stand in the counter affidavit that the orders impugned are perfectly in accordance with law which do not call for any interference and that the rights in the aforesaid land have been settled in favour of the private persons on the basis of judicial/statutory proceedings, the Court does not find any good ground to entertain the claim made by stranger (petitioner), particularly, when absolutely no disclosure about the petitioner's personal grievance has been made either in the entire writ petition or in the pleadings exchanged between the parties.

22. The petitioner has tried to refer to the objections filed by the private respondents in the court of Commissioner and has submitted that "what was not stated before the Collector was not open to be stated before the Commissioner". He has also argued that Commissioner was not competent to reappreciate the evidence. He has further argued that the documents filed by the private respondents were not sufficient for holding their rights as valid. In support of his submissions, the petitioner has placed reliance upon the judgement of Supreme Court in the case of Rukmini Amma Saradamma v. Kallyani Sulochana & Ors. reported in (1993) 1 S.C.C. 499 with special reference to "paragraph 20" which is quoted hereinbelow:-

"20. We are afraid this approach of the High Court is wrong. Even the wider language of Section 20 of the Act cannot enable the High Court to act as a first or a second court of appeal. Otherwise the distinction between appellate and revisional jurisdiction will get obliterated. Hence, the High Court was not right in re-appreciating the entire evidence both oral or documentary in the light of the Commissioner's report (Exts. C-1 and C-2 mahazar). In our considered view, the High Court had travelled far beyond the revisional jurisdiction. Even by the presence of the word "propriety" it cannot mean that there could be a re-appreciation of evidence. Of course, the revisional court can come to a different conclusion but not on a re-appreciation of evidence; on the contrary, by confining itself to legality, regularity and propriety of the order impugned before it. Therefore, we are unable to agree with the reasoning of the High Court with reference to the exercise of revisional jurisdiction. "

23. He has also placed reliance upon another judgment of Supreme Court in the case of **Hiya Associates & Ors. v. Nakshatra Properties Private Limited reported in (2018) 18 S.C.C. 358** with special reference to "paragraph 19' which is quoted as below:-

"19. In our opinion, the documents sought to be filed by the defendants (revision petitioners) were neither relevant nor material for deciding the legality and correctness of the order impugned in the revision could be decided one way or the other without the aid of any additional document but on the basis of material already on record keeping in view the law laid down by this Court in several decided cases on the issue in question. Indeed, if the executing court could decide the issue finally at its level, the Revisional Court too could do the same at it level"

24. This Court is not inclined to give any benefit of the aforesaid decisions to the petitioner as the judgment in the case of **Rukmini (supra)** had been delivered in a case arising out of Kerala Buildings (Lease and Rent Control) Act -1965 where the Supreme Court was examining the scope of interference by the High Court in exercise of revisional jurisdiction with reference to "re-appreciation of evidence". Similarly in the case of **Hiya Associates & Ors. (supra)**, the Supreme Court was dealing with an issue as to whether a revisional court can decide the matter by taking additional evidence.

25. In the present case, a perusal of the impugned order dated 25.10.2017 passed by the Collector/District Magistrate-Azamgarh shows that the report dated 26.11.2015 submitted by the Settlement Officer of Consolidation was relied upon

by the Collector before deciding the matter. Similarly, the Commissioner has also placed reliance upon the same report. The findings recorded by the Collector in the impugned order dated 25.10.2017 to the aforesaid effect are as follows:-

"प्रकरण के न्यायसंगत निस्तारण हेतु उप जिलाधिकारी सगडी एवं बन्दोबस्त अधिकारी चकबन्दी से आख्या प्राप्त की गयी। बन्दोबस्त अधिकारी चकबन्दी की आख्या दिनांक 26.11.2015 में यह उल्लेख किया गया है कि गाटा सं० 330 क्षेत्र 0.030 कडी चकबन्दी अधिकारी के मु०न० 10459 आदेश दिनांक 12.11.1971 द्वारा सभापति ए पंचानन्द का नाम खारिज करके राजपति ए राधिका पुत्रगण सदानन्द का नाम आया है व गाटा सं० 329 क्षेत्र 0.015 पूर्व में राजपति ए राधिका पुत्रगण सदानन्द का नाम पूर्व खतौनी के आधार पर ही चला आ रहा है।"

26. The findings recorded by the Commissioner in its impugned order dated 21.10.2020 are as follows:-

"8- अवर न्यायालय की पत्रावली पर उपलब्ध बन्दोबस्त अधिकारी चकबन्दी की आख्या दिनांक 26.11.2015 के अवलोकन से स्पष्ट है कि आकार पत्र-11 के खाता सं० 154 सभापति, पंचानन्द पुत्रगण गजाधर के नाम अन्य गाटों के साथ 1149/3 रकबा/ 0.030 अंकित है। खाते पर चकबन्दी अधिकारी के मु०न० 10459 निर्णय दिनांक 12.11.1971 द्वारा गाटा सं० 1149/3 रकबा 0.030 से सभापति ए पंचानन्द का नाम खारिज करके राजपति ए राधिका पुत्रगण सदानन्द का नाम दर्ज होने का आदेश अंकित है। गाटा सं० 1149/3 रकबा 0.030 का नया नम्बर 330/0.030 हे० बन्दोबस्त बनाते समय कायम किया गया है एवं आकार पत्र.11 के खाता सं०.129 राजपति, राधिका पुत्रगण सदानन्द के नाम अन्य गाटों के साथ 1149/2 रकबा 0.020 हे० अंकित है बन्दोबस्त बनाते समय 1149/2 रकबा 0.020 का नया नम्बर 329/0.015 कायम किया गया है। इस प्रकार गाटा सं०. 330/0.030 चकबन्दी अधिकारी के मु०न०. 10459 निर्णय दिनांक 12.11.1971 द्वारा सभापति ए पंचानन्द का नाम खारिज करके राजपति, राधिका पुत्रगण सदानन्द का नाम आया है एवं गाटा सं० 329/0.015 में राजपति राधिका पुत्रगण

सदानन्द का नाम पूर्व के आधार वर्ष खतौनी से ही चला आ रहा है। यह भी उल्लेखनीय है कि उ०प्र० भू. राजस्व अधिनियम की धारा 33/39 के अन्तर्गत केवल लिपिकीय त्रुटि दुरुस्त किया जा सकता है। इस प्रकार विद्वान अवर न्यायालय ने पत्रावली पर उपलब्ध अभिलेखों के विधिवत अवलोकन व परीक्षणोपरान्त तथ्यात्मक विवेचना के आधार पर विधि सम्मत आदेश पारित किया है, जिसमें किसी प्रकार के हस्तक्षेप का कोई औचित्य व आधार नहीं पाया जाता है। दोनों निगरानियां निरस्त होने योग्य है। "

27. The aforesaid report dated 26.11.2015 has also been annexed at "page no.88" of the writ petition and reads as follows:-

" कृपया न्यायालय/जिलाधिकारी आजमगढ़ के पत्र सं. 278(1) पेशकार दिनांक 20.11.2015 का सन्दर्भ ग्रहण करने का कष्ट करें जिसके द्वारा प्रतिलिपि आदेश दिनांक 19.10.2015 में पत्र सं० 238(1) रीडर डी०एम० दिनांक 23.10.2015 द्वारा ग्राम ससना विश्वनाथपुर के वर्तमान खतौनी 1419 फसली से 1424 फसली में गाटा सं० 329/0.015 व 330/0.030 हे० राधिका, सदानन्द, रामप्रकाश, संतोष कुमार पुत्रगण राजपति व झिनका पत्नी राजपति के नाम संक्रमणीय भूमिधर दर्ज है, किन्तु यह किस आदेश दर्ज है अंकन सही अथवा गलत है बिन्दू पर आख्या उपलब्ध कराये जाने की अपेक्षा की गयी है।

प्रश्नगत प्रकरण में चकबन्दी अधिकारी सगड़ी नियम 109 से जांच करायी गयी। उन्होंने अपनी जांच आख्या में उल्लेख किया है कि ग्राम के अभिलेख अभिलेखागार में जमा है जिसमें आधार वर्ष खतौनी व जो०च०अ० आकार पत्र 2(क) उपलब्ध नहीं है तथा आकार पत्र 11 के खाता सं० 154 सभापति, पंचानन्द पुत्रगण गजाधर के नाम अन्य गाटों के साथ 1149/3 रकबा 0.030 अंकित है। खाते पर चकबन्दी अधिकारी मुकदमा नं० 10459 ता०फै० 12.11.1971 के द्वारा गाटा सं० 1149/3 रकबा 0.030 से सभापति, पंचानन्द का नाम खारिज करके राजपति राधिका पुत्रगण सदानन्द का नाम दर्ज होने का आदेश अंकित है। गाटा सं० 1149/3 रकबा 0.030 का नया नम्बर 330/0.030 हे० बन्दोबस्त बनाते समय कायम किया गया है व आकार पत्र 11 के खाता सं० 129 राजपति राधिका पुत्रगण सदानन्द के नाम अन्य गाटों के साथ 1149/2 रकबा 0.020 हे० अंकित है। बन्दोबस्त बनाते

समय 1149/2 रकबा 0.020 का नया नम्बर 329/0.015 कायम किया गया है। इस प्रकार गाटा सं० 330/0.030 चकबन्दी अधिकारी के मु०नं० 10459 ता०फै० 12.11.1971 द्वारा सभापति पंचानन्द का नाम खारिज करके राजपति राधिका पुत्रगण सदानन्द का नाम आया है व गाटा सं० 329/0.015 पूर्व में राजपति, राधिका पुत्रगण सदानन्द का नाम पूर्व के आधार वर्ष खतौनी से ही चला आ रहा है।

आख्या सेवा में सादर प्रेषिता
बन्दोबस्त अधिकारी चकबन्दी
आजमगढ़।"

28. Therefore, the Court finds that the entire record conferring "bhumidhari rights" upon private persons including the respondent no.5 is in their favour and, merely, because the petitioner, having no locus in the matter is trying to agitate the issue, which even otherwise, does not fall within the "zone of consideration" under Sections 33/39 of the Act-1901, the reliefs claimed cannot be granted.

29. Before arriving at the conclusion, it would be necessary to refer certain provisions of law as well as the authorities dealing with powers of the court in the matters arising out of proceedings for correction of revenue records.

30. Section 40-A of the Act-1901 provides for filing of suit in a competent court for relief on the basis of a right in a holding and the orders passed under Sections 33, 35, 39, 40, 41 and 54 of the Act-1901 would not create any bar in any such suit. Section 40-A is extracted as under:-

"[40A. Saving as to title suits. - No order passed under Section 33, Section 35, Section 39, Section 40, Section 41 or Section 54 shall bar any suit in a competent Court for relief on the basis of a right in a holding.]"

31. Since as of now, the provisions of U.P. Revenue Code-2006 have also come into operation, identical provision is found under Section 39 of the Code-2006 reads as follow:-

"39. Certain orders of revenue officers not to debar a suit. -No order passed by a Revenue Inspector under section 33, or by a Tahsildar under sub-section (1) of Section 35 or by a Sub-Divisional Officer under sub-section (3) of section 38 or by a Commissioner under sub-Section (4) of Section 38 shall debar any person from establishing his rights to the land by means of a suit under section 144."

32. The question of the maintainability of a writ petition against orders passed in mutation proceedings has come up before this Court earlier and it has consistently been held that normally the High Court in exercise of its discretionary jurisdiction does not entertain writ petitions against such orders which arise out of summary proceedings. In the case of **Jaipal Vs. Board of Revenue, U.P., Allahabad & Ors., Air 1957 ALL 205**, notice was taken of the consistent practice of this Court not to interfere with the orders made by the Board of Revenue in cases in which the only question at issue was whether the name of the petitioner should be entered in the record of rights. The observations made in the judgment in this regard are as follows:-

"3. ...It has however been the consistent practice of this Court not to interfere with orders made by the Board of Revenue in cases in which the only question at issue is whether the name of the petitioner should be entered in the record of rights.

That record is primarily maintained for revenue purposes and an entry therein has reference only to possession. Such an entry does not ordinarily confer upon the person in whose favour it is made any title to the property in question..."

33. The question with regard to the maintainability of a writ petition arising out of mutation proceedings fell for consideration in the case of **Sri Lal Bachan Vs. Board of Revenue, U.P., Lucknow & Ors.2 2002 (93) RD 6** and it was held that the High Court does not entertain a writ petition under Article 226 of the Constitution of India for the reason that mutation proceedings are only summarily drawn on the basis of possession and the parties have a right to get the title adjudicated by regular suit. The observations made in the judgment are extracted below:-

"11. This Court has consistently taken the view as is apparent from the decisions of this Court referred above that writ petition challenging the orders passed in mutation proceedings are not to be entertained. To my mind, apart from there being remedy of getting the title adjudicated in regular suit, there is one more reason for not entertaining such writ petition. The orders passed under Section 34 of the Act are only based on possession which do not determine the title of the parties. Even if this Court entertains the writ petition and decides the writ petition on merits, the orders passed in mutation proceedings will remain orders in summary proceedings and the orders passed in the proceedings will not finally determine the title of the parties."

34. Reiterating a similar view in the case of **Bindeshwari Vs. Board of**

Revenue & Ors., 2002 (1) AWC 498, it was stated that mutation proceedings do not adjudicate the rights of parties and orders passed in the said proceedings are always subject to adjudication by the competent Court and therefore a writ petition against an order in mutation proceedings would not be entertainable. It was observed as follows:-

"11. ...The present writ petition arising out of the summary proceeding of mutation under Section 34 of U.P. Land Revenue Act, cannot be entertained under Article 226 of the Constitution of India. The mutation proceedings do not adjudicate the rights of the parties and orders passed in the mutation are always subject to adjudication by the competent Court."

35. The settled legal position that orders of mutation are passed on the basis of possession and since no substantive rights of the parties are decided, ordinarily a writ petition would not be entertainable against such orders unless the same are found to be wholly without jurisdiction or have the effect of rendering findings which are contrary to title already decided by a competent court, was reiterated in the case of **Vinod Kumar Rajbhar Vs. State of U.P. and others, 2021 (1) ADJ 792**.

36. Taking note of the nature and scope of mutation proceedings which are summary in nature and also the fact that orders in such proceedings are passed on the basis of possession of the parties and no substantive rights are decided, this Court in **Buddh Pal Singh Vs. State of U.P. & Ors. reported in 2012 (5) ADJ 266**, restated the principle that ordinarily a writ petition in respect of orders passed in mutation proceedings is not maintainable. It was observed as follows:-

"7. It is equally settled that the orders for mutation are passed on the basis of the possession of the parties and since no substantive rights of the parties are decided in mutation proceedings, ordinarily a writ petition is not maintainable in respect of orders passed in mutation proceedings unless found to be totally without jurisdiction or contrary to the title already decided by the competent Court. The parties are always free to get their rights in respect of the disputed land adjudicated by competent Court."

37. The proposition that mutation entries in revenue records do not create or extinguish title over land nor such entries have any presumptive value on title has been restated in a recent decision in the case of **Bhimabai Mahadeo Kambekar Vs. Arthur Import and Export Company & Ors. (2019) 3 SCC 191**, placing reliance upon earlier decisions in **Balwant Singh Vs. Daulat Singh (1997) 7 SCC 137** and **Narasamma Vs. State of Karnataka (209) 5 SCC 591**. The observations made in the judgment are as follows:-

*"6. This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over such land nor has it any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. (See **Sawarni v. Inder Kaur, Balwant Singh v. Daulat Singh and Narasamma v. State of Karnataka**)."*

38. Reference may also be had to the judgment in **Faqruddeen Vs. Tajuddin (2008) 8 SCC 12**, wherein it was held that the revenue authorities cannot decide questions of title and that mutation takes place only for certain purposes. The

observations made in this regard are as follows:-

"45. Revenue authorities of the State are concerned with revenue. Mutation takes place only for certain purposes. The statutory rules must be held to be operating in a limited sense... It is well-settled that an entry in the revenue records is not a document of title. Revenue authorities cannot decide a question of title."

39. A similar observation was made in **Narain Prasad Aggarwal Vs. State of Madhya Pradesh, (2007) 11 SCC 736** wherein it was held as follows:-

"19. Record-of-right is not a document of title. Entries made therein in terms of Section 35 of the Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable..."

40. In **Union of India and others Vs. Vasavi Cooperative Housing Society Limited & Ors. (2014) 2 SCC 269**, the principle that entries in revenue records do not confer any title was reiterated and referring to the previous decisions in **Corpn. Of the City of Bangalore v. M. Papaiah, (1989) 3 SCC 612; Guru Amarjit Singh v. Rattan Chand (1993) 4 SCC 349 and H.P. v. Keshav Ram (1996) 11 SCC 257**, it was stated thus :-

"21. This Court in several judgments has held that the revenue records do not confer title. In Corpn. Of the City of Bangalore v. M. Papaiah this Court held that: (SCC p. 615, para 5)

"5. ...It is firmly established that the revenue records are not documents of title,

and the question of interpretation of a document not being a document of title is not a question of law."

In Guru Amarjit Singh v. Rattan Chand this Court has held that: (SCC p. 352, para 2) '

'2. ...that entries in the Jamabandi are not proof of title.

" In State of H.P. v. Keshav Ram this Court held that: (SCC p. 259, para 5)

"5. ...an entry in the revenue papers by no stretch of imagination can form the basis for declaration of title in favour of the plaintiffs."

41. A similar view was taken in the case of **Sawarni (Smt.) Vs. Inder Kaur (Smt.) and others, (1996) 6 SCC 223** and it was observed that the mutation of name in the revenue records does not have the effect of creating or extinguishing the title nor has any presumptive value on title and it only enables the person concerned to pay land revenue. It was stated thus :-

"7...Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question..."

42. The principle that an entry in revenue records is only for fiscal purpose and does not confer title on a person whose name appears in record-of-rights and title to the property can only be decided by a competent Civil Court was reiterated in the decision of **Suraj Bhan and others Vs. Financial Commissioner and others (2007) 6 SCC 186** and it was stated as follows :-

"9...It is well settled that an entry in revenue records does not confer title on a

person whose name appears in record-of-rights. It is settled law that entries in the revenue records or jamabandi have only "fiscal purpose" i.e. payment of land revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent Civil Court..."

43. The legal position that entries in revenue records do not confer any title has been considered and discussed in a recent decisions of this Court in **Harish Chandra Vs. Union of India & Ors., 2019 (5) ADJ 212 (DB) and Mahesh Kumar Juneja and another Vs. Additional Commissioner Judicial Moradabad Division and others, 2020 (3) ADJ 104** and it was restated that ordinarily orders passed by mutation courts are not to be interfered in writ jurisdiction as they are summary proceedings, and as such subject to a regular suit.

44. The settled legal position that an entry in revenue records does not confer title on a person whose name appears in record-of-rights and that such entries are only for "fiscal purpose" and no ownership is conferred on the basis thereof and further that the question of title of a property can only be decided by a competent Civil Court has again been restated in a recent decision of the Supreme Court in **Jitendra Singh Vs. State of Madhya Pradesh and others, 2021 SCC OnLine SC 802**; wherein after referring to the previous authorities on the point in **Suraj Bhan Vs. Financial Commissioner, (2007) 6 SCC 186, Suman Verma Vs. Union of India, (2004) 12 SCC 58, Faqrudin Vs. Tajuddin (2008) 8 SCC 12, Rajinder Singh Vs. State of J & K, (2008) 9 SCC 368, Municipal Corporation, Aurangabad Vs. State of Maharashtra, (2015) 16 SCC 689, T Ravi**

Vs. B. Chinna Narasimha, (2017) 7 SCC 342, Bhimabai Mahadeo Kambekar Vs. Arthur Import & Export Co.(2019) 3 SCC 191; Prahlad Pradhar Vs. Sonu Kumhar, (2019) 10 SCC 259 and Ajit Kaur Vs. Darshan Singh (2019) 13 SCC 70, it was observed thus :-

"8. In the case of Suraj Bhan v. Financial Commissioner (2007) 6 SCC 186, it is observed and held by this Court that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. Entries in the revenue records or jamabandi have only "fiscal purpose", i.e., payment of land revenue, and no ownership is conferred on the basis of such entries. It is further observed that so far as the title of the property is concerned, it can only be decided by a competent Civil Court. Similar view has been expressed in the cases of Suman Verma v. Union of India (2004) 12 SCC 58; Faqrudin v. Tajuddin (2008) 8 SCC 12; Rajinder Singh v. State of J&K, (2008) 9 SCC 368; Municipal Corporation v. State of Maharashtra, (2015) 16 SCC 689; T. Ravi v. B. Chinna Narasimha (2017) 7 SCC 342; Bhimabai Mahadeo Kambekar v. Arthur Import & Export Co. (2019) 3 SCC 191; Prahlad Pradhan v. Sonu Kumhar, (2019) 10 SCC 259; and Ajit Kaur v. Darshan Singh, (2019) 13 SCC 70."

45 The aforesaid proposition of law has recently been reiterated by this Court in the case of **Smt. Kalawati v. Board of Revenue & Ors.** reported in **2022 (4) ADJ 578**. Similar view has been taken in another recent decision of this Court in the case of **Alladin v. State of U.P. & Ors.** reported in **2023 (3) ADJ 41**.

46. Therefore, the orders impugned in the present writ petition would not debar

institution of any suit by any person having right in the holding in a competent court. The person can be private, individual or even the State. Here reference to the definition of "**person**" contained in the **General Clauses Act-1897** can also be made. Section 2(42) of the said Act defines "person" in the following terms:-

"2(42)- 'Person' shall include any company or association or body of individuals, whether incorporated or not."

47. The definition of "person" is not exclusive but inclusive and considering the language used in the Statute with reference to the proceedings giving rise to the present case, in the opinion of the Court, the "**State**" would fall in the definition of "**person**" who having failed to challenge the impugned orders by means of writ petition, on one hand, and accepting the same as valid as aforesaid, before this Court by means of the counter affidavit and advancing arguments, the challenge made to the impugned orders at the behest of a stranger (petitioner) having no concern with the property in dispute is liable to be discarded.

48. This Court is of the considered view that this is not a fit case where any of the exceptions stands attracted requiring interference in exercise of powers under Article 226 of the Constitution of India, particularly, when the **main party** to be aggrieved by the impugned orders or by the nature of relief claimed in the original proceedings under Sections 33/39 of the Act-1901 is the "**State of U.P.**" which, on the one hand, has not challenged the impugned orders and, on the other hand, has **acquiesced to the orders impugned** by terming them as based upon documentary

evidence and perfectly, in accordance with law.

49. The petitioner, apart from having no locus in the matter and even otherwise, having failed to make a case for interference in view of the record of "*bhumidhari rights*" settled in favour of the private respondents and other beneficiaries and further in the light of law laid down by the Apex Court and this Court, I am not inclined to interfere in the orders impugned.

50. The writ petition is, accordingly, dismissed. No order as to costs.

(2023) 5 ILRA 1155
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.05.2023

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE MANISH KUMAR, J.

Writ-C No. 2607 of 2023

Ram Kumari	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:
Vikas Chandra Dwivedi

Counsel for the Respondents:
C.S.C., Prachish Pandey

A. Civil Law – Registration Act, 1908 – Section 38 – UP Jail Manual, 2022 – Para 654 – Execution and registration of sale-deed – Vender, who want to sell the land, is in jail – Mandamus sought – High Court directed the Registrar/Sub-Registrar to act in accordance with Section 38 of the Registration Act, 1908 and himself go to Jail in which the convict is confined and

take appropriate steps for registration of the said sale deed. (Para 11)

Writ petition disposed of. (E-1)

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Manish Kumar, J.)

1. Let the Sub-Registrar, Malihabad, Lucknow be impleaded as an opposite party during course of the day.

2. Petitioner is the mother of Budhi Lal, who has been convicted of the offence under Section 302 read with 34 I.P.C. in Sessions Trial No. 471 of 2010 (Case Crime No. 577 of 2009), Police Station Malihabad, District Lucknow and is in prison.

3. Petition has been filed seeking following relief:-

"i) Issue a writ, order or direction in the nature of Mandamus thereby commanding and directing the opposite party no. 2 i.e. District Magistrate, Lucknow to decide the representation of the petitioner dated 29.08.2022 and permit to the petitioner to get execution of registered power of attorney from her son namely Budha Lal @ Budhi Lal in the interest of justice."

4. We had heard this matter at length on earlier date i.e. 06.4.2023 and passed the following order :-

"This petition has been filed seeking following main prayer:-

"(i) Issue a writ, order or direction in the nature of mandamus thereby commanding and directing the opposite party No.2 i.e. District Magistrate, Lucknow to decide the representation of the petitioner dated 29.08.2022 and permit to

the petitioner to get execution of registered power of attorney from her son namely Budha Lal @ Budhi Lal in the interest of justice."

Petitioner is mother of Budha Lal @ Budhi Lal, who has been convicted in S.T. No.471 of 2010 arising out of Case Crime No.577 of 2009, under Section 302 read with 34 IPC, Police Station- Malihabad, District- Lucknow and has been sentenced to death subject to its confirmation by the High Court. On account of which, he is in jail. Son of the petitioner, who is convict as of now, owns some land and he has not been able to challenge his conviction before the High Court on account of paucity of funds. The petitioner-mother says that if a Power of Attorney is executed by her son in her favour for selling of his land, then sale consideration can be used for contesting the judgement before the High Court. In these circumstances, this petition has been filed.

Learned counsel for the petitioner relies on Section 38 of the Registration Act, 1908, which reads as under:-

"38. Persons exempt from appearance at registration-office.?(1) (a) A person who by reason of bodily infirmity is unable without risk or serious inconvenience to appear at the registration-office, or

(b) a person in jail under civil or criminal process, or

(c) person exempt by law from personal appearance in Court, and who would but for the provisions next hereinafter contained be required to appear in person at the registration-office, shall not be required so to appear.

(2) In the case of every such person the registering officer shall either himself go to the house of such person, or to the jail in which he is confined, and examine him or issue a commission for his examination."

According to the said provisions, a person who by reason of bodily infirmity is unable without risk or serious inconvenience to appear at the registration-office or a person in jail under civil or criminal process, shall not be required so to appear, i.e., the appearance referred in Section 36 & 37 of the said Act, 1908 for the purposes of registration.

The contention is that Sub-Registrar may visit the son of the petitioner in jail for registration of the Power of Attorney. We are of the opinion that it is the son who has to decide as to whether he wants to execute a Power of Attorney in favour of his mother for the purpose preferred in the petition or not and if he does, then a power of attorney will have to be executed and will have to be signed by the son of the petitioner and such other persons as may be required in law. We find that exemption from appearance at the registration office is only for the purpose of registration but unless the Power of Attorney is executed as per the desire of the petitioner's son, who is in jail, there is no question of Sub-Registrar visiting the son in jail for the aforesaid purpose of registration. We find that as per Para 654 of U.P. Jail Manual, 2022 there is a provision, according to which every prisoner may at the discretion of the Superintendent be permitted to sign and attest a Power of Attorney or other statements, conveyances concerning his properties. If the said provision is operative, then, the Superintendent of Jail where the son of the petitioner is lodged should ask him as to whether he wants to execute any Power of Attorney and if he does, then, the opposite parties shall arrange for execution of such Power of Attorney and its signature by the son of the petitioner and thereafter, the Sub-Registrar with whom Power of Attorney is to be registered will have to be intimated by the

petitioner and the Jail Authorities concerned whereupon he shall exercise his powers under Section 38 of the Registration Act, 1908. Let this exercise be done and the Court be informed about the result on the next date.

Having said so we find that the reason for execution of Power of Attorney as noticed hereinabove is quite disturbing. If the son of the petitioner is in jail and he does not have requisite finances to file an appeal or to engage a private counsel, then, an appeal can be preferred from Jail itself and the Superintendent of Jail and other Authorities can give him proper advice in the matter.

We accordingly, direct that the District Legal Aid Services Authority and its Secretary at Lucknow shall look into the matter and do the needful in this regard. The District Judge, Lucknow is directed to verify facts in light of averments made in the writ petition and do the needful so far as provision of legal aid to the convict is concerned. The details of the criminal case in respect to which he is lodged in Jail, have been mentioned in this order and also in the memo of writ petition. The Superintendent of Jail where the son of the petitioner is lodged shall also do the needful and inform the Court accordingly.

The Senior Registrar of this Court at Lucknow to communicate this order to the District Judge, Lucknow and also Secretary, District Legal Aid Services Authority along with photo copy of this writ petition only for the aforesaid purpose.

Name of Shri Pracheesh Pandey, learned A.G.A. shall be printed whenever the case is next listed along with learned Chief Standing Counsel and he shall also apprise the Court about the result of the aforesaid exercise on the next date and communicate this order to the Jail Superintendent concerned for compliance.

Put up this case on 26th April, 2023."

5. Learned Standing Counsel does not have instructions as to what steps have been taken by the Secretary, District Legal Aid Services Authority and the District Judge, as was ordered.

6. As regards the other issue of registration of sale deed, petitioner counsel says that sale deed has been prepared and now it is to be signed by the son of the petitioner, who is in prison.

7. Record reveals that the Senior Registrar of this Court has communicated our order dated 06.04.2023 to Secretary, District Legal Aid Services Authority and District Judge, Lucknow, however, it is not clear as to what steps have been taken by them in this regard.

8. In view of our earlier order, the District Legal Aid Services Authority shall provide proper advise to the convict referred hereinabove as also assistance, if necessary, for filing an appeal against his conviction through an Advocate on the panel of said authority, unless off-course the convict wants to engage a private lawyer. If he is agreeable to file an appeal through a panel lawyer, then the Jail Superintendent shall inquire from him as to whether he still wants to sell his land for the purposes of filing the appeal, if he does not, then off-course, the matter shall rest and execution & registration of the sale deed, as suggested by the petitioner would not be required, however, if he says that he wants to sell the land, if it is recorded in his name, then, further action would be required. In this context, we find that there is a provision in para 654 in U.P. Jail Manual, 2022, which reads as under:-

" Permission to sign documents:-
Every prisoner may at the discretion of the Superintendent be permitted to sign and attest a power of attorney or other statements, conveyances concerning his properties."

9. Learned Standing Counsel says that the Jail Manual, 2022 is in operation.

10. We may also refer, in this regard, to the provisions of Section 38 of the Registration Act, 1908, which reads as under:-

"38. Persons exempt from appearance at registration-office:-

(1) (a) A person who by reason of bodily infirmity is unable without risk or serious inconvenience to appear at the registration-office, or

(b) a person in jail under civil or criminal process, or

(c) person exempt by law from personal appearance in Court, and who would but for the provisions next hereinafter contained be required to appear in person at the registration-office, shall not be required so to appear.

(2) In the case of every such person the registering officer shall either himself go to the house of such person, or to the jail in which he is confined, and examine him or issue a commission for his examination."

11. After the Jail authorities facilitate the execution & signing of the document of the sale deed as per para 654 of U.P. Jail Manual, 2022, the Jail Superintendent and the petitioner shall inform the Registrar/Sub Registrar for appropriate steps under Section 38 of the Registration Act, 1908 and the said Registrar/Sub-Registrar would act in accordance with

Section 38 of the Registration Act, 1908 and shall himself go to Jail in which the convict is confined and take appropriate steps for registration of the said sale deed.

12. Let the exercise of execution and signing of sale deed be completed within fifteen days of receipt of certified copy of this order, if the occasion so arises and, thereafter, for the purposes of registration of the said document, the Sub Registrar, Malihabad, Lucknow or whosoever is the the Sub Registrar having jurisdiction over the matter would visit the District Jail, Lucknow, where the son of the petitioner is said to be lodged within fifteen days so that the sale deed is registered in terms of the aforesaid provisions unless there is any legal impediment in this regard in which case, he shall inform the Jail Superintendent in writing, who in turn shall inform the son of the petitioner.

13. Ms. Shagun Srivastava, Holding Brief appearing for the State shall communicate this order to concerned for compliance.

14. The Senior Registrar of this Court at Lucknow shall communicate this order to the District Judge, Lucknow and Secretary, District Legal Aid Services Authority, Lucknow for compliance.

15. Petition is *disposed of* in the aforesaid terms.

(2023) 5 ILRA 1159
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 6183 of 2016

D.B. Kauser **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Ms. Rollie Kausar, Sri Ravi Kant, Ms. Seema Aggarwal, Sr. Advocate

Counsel for the Respondents:

C.S.C., Sri H.P. Singh, Sri Nisheeth Yadav, Not Known, Sri Prakash Chandra Srivastava, Sri Prakash Chandra Srivastava, S.C., Sri Sriprakash Singh

A. Civil Law - U.P. Urban Planning & Development Act-1973 - Section 41(3)-Once the Commissioner, in his order dated 02.05.1994, held the constructions raised by the respondent no.5 as unauthorized, illegal and contrary to law and the said order, though challenged by means of writ petition, but the challenge failed in terms of dismissal of the petition on 16.12.2005 and then order dated 30.01.2006 passed by the Commisisoner on review was further set aside by this Court on 14.05.2012 and was not interferred with by the Supreme Court while dismissing Special Leave Petition on 09.11.2012, there is nothing on record to show or establish that the constructions raised by the respondent no.5 were lawful. The effect of these orders cannot be ignored whether the order impugned is an order on merit or simply an order of remand-The dispute travelled from a personal tussle in between the private persons on the spot to the District Adminstration, then Police Authorities, then Development Authority, then Commissioner of the Division, then this Court in various writ petitions, then again the Commissioner, followed by another intervention by this Court, then Supreme Court and, thereafter, revision before the State Government giving rise to the present writ petition. Once, the land became disputed in this manner, then, even as per the Development Authority, compounding is not permissible-Insofar as the direction of remand is concerned,

certainly the Development Authority, being sub-ordinate to the State Government, as per the Scheme of 1973, would take up the matter of compounding of constructions and would deal with the same in one or the other way and such a decision would give rise to further rounds of litigation by either side-At this juncture, the legal maxim "*interest republicae ut sit finis litium*" which means that it is in the interest of State that there must be an end to the litigation-litigation once finalized, leaves no doubt that compounding is not permissible in the present case and, therefore, the impugned order remanding the matter to the Development Authority for deciding the compounding issue is unsustainable and contrary to factual and legal position well established on record.

The writ petition is allowed. (E-6)

List of Cases cited:

1. Dhananjaya Reddy Vs St. of Karn. (2001) 4 SCC 9 para 23
2. Commr. of Income Tax, Mumbai Vs Anjum M.H. Ghaswala (2002) 1 SCC 633
3. Captain Sube Singh & ors.. Vs L.G. of Delhi & ors. (2004) 6 SCC 440
4. Competent Authority Vs Barangore Jute Factory & ors.. (2005) 13 SCC 477
5. St. of Jhar. & ors. Vs Ambay Cements & anr.. (2005) 1 SCC 368 para 26
6. Dr. Santosh Dixit & anr.. Vs St. of U.P. & ors.. (2017) 3 ADJ 401 (DB)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. This writ petition has been filed challenging the order dated 07.01.2016 whereby the State Government, in exercise of powers under Section 41(3) of the U.P. Urban Planning & Development Act-1973 (hereinafter referred to as 'the Act-1973'), has decided a Revision No.33/12 (Smt.

Lakshmi Singh v. Allahabad Development Authority & Ors.) remanding the matter to the Allahabad Development Authority with a direction to dispose off the compounding map submitted by the revisionist (Lakshmi Singh) in 2005, after providing opportunity of hearing to all the parties and in the light of Rules, Bye-laws and Government Orders relating to compounding.

2. The petitioner has also claimed quashing of all proceedings pursuant to the application filed by the respondent no.5 for compounding of unauthorized constructions with a further prayer to direct the Development Authority to demolish the unauthorized constructions allegedly raised by the respondent no.5 allegedly over the petitioner's plot.

Facts of the case.

3. The Secretary of Anant Avas Sahkari Samiti Limited (in short 'Society') purchased free-hold land covered Arazi Nos. 91, 92, 93, 125 and 126/1, Mauja Muirabad, Allahabad from one Mr. Theodere Hughes, vide registered sale deeds dated 22.10.1986 and 28.01.1987. The petitioner purchased a plot bearing No.12-A over Arazi Nos.91 and 126/1 measuring 25' x 70', vide registered sale deed 16.07.1987 from the Society. It is stated that Mr. Shiva Mohan Singh Advocate, husband of respondent no.5 (Lakshmi Devi), committed a criminal trespass over the petitioner's plot on 12.01.1990 and, thereafter, again on 14.04.1990 in association with one Mr. Rama Shanker Misra, although the said persons neither had any contract for sale in their favour nor any sale deed executed by the Society. Description of various plots transferred by the Society in favour of other persons has also been given in the writ

petition. It is pleaded that name of the petitioner was mutated in the revenue records pursuant to the sale deed dated 16.07.1987 and that it was only in the year 1996 that the Allahabad Development Authority included the aforesaid land under the master plan for construction of residential houses.

4. It is pleaded that land of Arazi No.126-अ belonging to one Minhazuddin was 19 Biswa since 1913 A.D. onwards and his rights, after his death, were succeeded by Smt. Shaiyma Begum, Smt. Asma Bibi and Mr. Shamim Ahmad and, thereafter, the said persons, in collusion with the concerned Lekhpal of Tehsil Sadar, Chail, Allahabad, tempered the revenue records in the year 1982 and illegally got the area of Plot No.126-अ increased from 19 Biswa to 33 Biswa. It is pleaded that Arazi No.126-अ is adjacent to the land covered by Arazi Nos.126/1 and 91. It is further pleaded that husband of respondent no.5 and Mr. Rama Shankar Mishra committed criminal trespass over the petitioner's land on 12.01.1990 at the strength of muscle power and dug foundation with an intent to usurp the petitioner's land alongwith the adjoining land belonging to other plot-holders and this act of the aforesaid persons led the petitioner to move complaints before the District Magistrate as well as police authorities who, by order dated 12.01.1990 stopped the act of encroachment and digging exercise. It is pleaded that second time criminal trespass over the petitioner's land was committed on 14.04.1990 which was also complained of to the district authorities and because of their intervention, the act of trespass could be restrained. Necessary documentary evidence regarding the aforesaid acts has been annexed alongwith the writ petition. It is further pleaded that later on, a contract

for sale was got executed in respect of two plots having dimensions 20' X 57' and 50' X 57' on 29.05.1990 and 16.06.1990 in favour of Smt. Mangla Mishra D/o Mr. Rama Shanker Mishra and the respondent no.5 showing the land covered by the said agreements to be situated in Arazi No.126-अ. It is pleaded that on the dates of trespass i.e. 12.01.1990 and 14.04.1990, the said persons did not had any legal deed/agreement in their favour.

5. It is further pleaded that on 27.06.1990, the petitioner approached the Vice-Chairman of the Allahabad Development Authority requesting demolition of unauthorized constructions raised by the aforesaid persons and, consequently, the Development Authority issued a demolition notice dated 25.09.1990 under Section 27(1) of the Act-1973. Apprehending demolition, two sale deeds were executed respectively in favour of Mangla Mishra and respondent no.5 on 29.05.1990 and 16.06.1990. Various proceedings on administrative side have been referred by the petitioner in the writ petition, however, since the matter relates to validity of constructions raised by respondent no.5 vis-a-vis an issue of compounding of the said constructions, I would deal with only those aspects which are relevant for pronouncing the judgement on the said issue.

6. It is further pleaded that apprehending demolition, a sale deed was executed in favour of respondent no.5 on 18.01.1991 through Attorney Aftab Ahmad and that the State filed a case under Sections 33/39 of the U.P. Land Revenue Act-1901 against the aforesaid legal heirs Smt. Shaiyma Begum, Smt. Asma Bibi and Shamim Ahmad, in which, the Sub Divisional Officer, Sadar, Chail, Allahabad

by order dated 12.03.1991 restored back the area of Arazi No.126-अ to its original figure i.e. 19 Biswas which was entered into the revenue records. It is further pleaded that since the sale deed dated 18.01.1991 executed through the attorney was in relation to the 22 biswas, pursuant to the order dated 12.03.1991, the power of attorney executed in the year 1989, the contracts for sale executed in the year 1990 and the sale deed executed in the year 1991 rendered non-est in the eyes of law. It is further pleaded that pursuant to the demolition notice issued by the Development Authority, partial constructions raised by the respondent no.5 were demolished on 18.03.1991 and 21.03.1991 and against demolition orders two appeals were filed before respondent no.2, being Appeal Nos.19/1991 and 24/1991.

7. The aforesaid appeals were dismissed by the Commissioner, Allahabad, Division-Allahabad vide order dated 02.05.1994 and the following conclusion was drawn:-

“विद्वान अधिवक्ताओं की बहस को सुनने तथा पत्रावली पर उपलब्ध कागजातों को देखने के बाद में इस निष्कर्ष पर पहुँचता हूँ कि अपीलकर्ता द्वारा प्रस्तुत मानचित्र अस्वीकृत कर दिया गया था तथा उसके द्वारा बिना मानचित्र स्वीकृत कराये हुए अनाधिकृत निर्माण किया गया था जिसका आंशिक रूप ध्वस्तकरण कर दिया गया था। उसके पश्चात उसके द्वारा प्रस्तुत अपील पर इस न्यायालय द्वारा स्थानादेश दिया गया था। अपीलकर्ता के विद्वान अधिवक्ता यह सिद्ध करने में असमर्थ रहे कि एतद् कार्यवाही विकास प्राधिकरण द्वारा की गयी है। अपीलकर्ता के पति पर बाकायदा नोटिस तामील है क्योंकि उन्हीं के द्वारा मकान का निर्माण कार्य कराया जा रहा था। नियमों में भी ऐसे व्यक्ति पर नोटिस तामील मान्य है। अपीलकर्ता द्वारा कराया गया निर्माण कार्य अनाधिकृत सिद्ध हो चुका है। अतः संयुक्त सचिव द्वारा पारित आदेश दिनांक 25.9.90 तथा 21.3.91 में कोई अनियमितता या अवैधानिकता नहीं है। दोनो अपीलें बलहीन हैं जिसे एतद्वारा निरस्त किया जाता है।”

8. The Commissioner, as such, held that the demolition orders passed on 25.09.1990 and 21.03.1991 were in accordance with law and that the constructions raised by the respondent no.5 had proven to be unauthorized.

9. Challenging the order dated 02.05.1994, the respondent no.5 filed writ petitions being Writ C Nos.21024 of 1994 and 21025 of 1994, in which, an interim order was passed on 06.07.1994 but despite the said interim order, the respondent no.5 raised constructions of three-storeyed building on the spot. The aforesaid writ petitions remained pending and the petitioner being person aggrieved by the unauthorized raising of constructions over his plot, filed an impleadment application as well as certain affidavits. However, the respondent no.5 being petitioner in the aforesaid writ petitions, got the same dismissed as withdrawn on 16.12.2005.

10. After withdrawing the aforesaid writ petitions, the respondent no.5 filed a review application before the Commissioner who, by order dated 30.01.2006, directed that the matter of compounding of constructions be examined by the Development Authority in accordance with law at the rates which were applicable in 2005-2006. Even in the said order, it was clearly recorded that unauthorized constructions were raised by the respondent no.5 and her husband-Shiv Mohan Singh.

11. The petitioner challenged the order dated 30.01.2006 by filing Writ C No.22184 of 2006 (D.B. Kauser & Anr. v. Shiv Mohan Singh & Ors.). This Court, by order dated 14.05.2012, allowed the writ petition and quashed the order dated 30.01.2006 by observing that the

compounding map submitted by the respondent no.5 was rejected in the year 1991, against which two appeals were filed before the Commissioner, which were dismissed on 02.05.1994 and, thereafter, writ petition filed against the said order was dismissed as withdrawn on 16.12.2005. The Court further observed that Commissioner had no power to review his previous order and, consequently, it was held that the order dated 30.01.2006 was wholly without jurisdiction.

12. The dismissal order dated 14.05.2012 was challenged by the petitioner of the said writ petition before the Supreme Court by filing Special Leave Petition which was dismissed on 09.11.2012.

13. Thereafter, the respondent no.5 preferred a Revision No.33 of 2012 (Smt. Lakshmi Singh v. Allahabad Development Authority & Ors.) on 21.06.2012 under Section 41(3) of the Act-1973 challenging the order dated 02.05.1994 passed in Appeal Nos.19/1991 and 24/1991. The said revision has been decided by order dated 07.01.2016 which has been impugned in the present writ petition. There is no dispute about the fact that the petitioner was initially not impleaded in the revision, however, impleadment was allowed by the State Government by order dated 15.07.2015 and, consequently, the petitioner was heard by the State Government.

Foundation of the writ petition.

14. The petitioner has assailed the order impugned by taking various factual and legal grounds which shall be dealt with while discussing the rival contentions of the parties. In sum and substance, the writ

petition is founded on the premise that once the Development Authority and, thereafter the Commissioner held the constructions raised by the respondent no.5 as illegal and unauthorized and the compounding map was also rejected, against which writ petition was filed which was dismissed as withdrawn and, thereafter, a review application was allowed by the Commissioner but the said order was quashed in petitioner's writ petition by order dated 14.05.2012 which was further affirmed by the Supreme Court, nothing remained to be decided at the level of State Government and it was a simple case where no direction for consideration of compounding issue could be issued by the State Government.

Counter affidavits

15. A counter affidavit has been filed by the respondent no.5 making averments regarding her title pursuant to the Agreement for sale of 1990 and sale deed of 1991 and it is pleaded that dispute regarding ownership of the land cannot be decided by the Development Authority but by civil or revenue court. The allegations of trespass have been denied in the counter affidavit and the order impugned has been supported.

16. A counter affidavit has been filed on behalf of the Allahabad Development Authority as well as its Zonal Officer, stating that the order impugned is an order of remand and the title of the property would be looked into at the time of deciding the issue relating to compounding. Compounding Byelaws of 2009 which came into force w.e.f. 14.01.2010 have been annexed alongwith the said counter affidavit.

17. Various affidavits have been exchanged in the matter, however, I find that their contents are repetitive in nature. Nevertheless, it is necessary to refer to an affidavit dated 08.12.2021 filed by the petitioner alongwith which a report dated 15.09.2021 of Lekhpal, Tehsil-Sadar, Prayagraj has been annexed which reads as follows:-

“महोदय,

सलम प्रार्थना पत्र द्वारा रौली कौसर पुत्री D.B. कौसर निवासिनी - 100 H.I.G. कालोनी ममफोर्डगंज तहसील सदर जिला प्रयागराज की पुनः जांच की गई जाचोंपरान्त बिन्दु संख्या - 5(A), B, C, के सम्बन्ध में जांच आख्या निम्नलिखित है.

5(A)= मकान नं० 18 B /2 और मकान नं० 18B/3 आराजी संख्या 91 व 126/1 ग्राम म्योराबाद में स्थित है।

5(B)= मकान नं० 18B/2 श्रीमती लक्ष्मी सिंह द्वारा बनवाया गया है तथा मकान नं० 18B/3 श्रीमती मंगला मिश्रा द्वारा बनवाया गया है।

5(C)= श्रीमती लक्ष्मी सिंह और श्रीमती मंगला मिश्रा द्वारा आराजी संख्या 126(अ) में शायमा बेगम व शमीम अहमद व आसमा बीबी से क्रय किया था परन्तु इन लोगो द्वारा क्रय की गई जमीन पर निर्माण न करके आराजी संख्या -91 व 126/1 में कर लिया गया है। जब कि उक्त जमीन अनन्त सहकारी समिति की थी।

रिपोर्ट सेवार्थ प्रेषित है।

Sd.

15.09.21 “

Contention of the petitioner

18. The contention of the petitioner is that the order impugned has given unbridled license to the Development Authority to act recklessly, capriciously and arbitrarily at its will to compound constructions raised by the law-breakers in defiance of the provisions of the Act-1973; the order impugned ignores the order dated 02.05.1994, passed by the Commissioner, Allahabad, Division-Allahabad, orders dated 16.12.2005 and 14.05.2012 passed by

this Court, order dated 09.11.2012 passed by the Supreme Court and has been passed in ignorance of the fact which is established on record that at the time of raising of unauthorized constructions, the respondent no.5 was not having any title over the land and, even otherwise, it stands established that the constructions have been raised during the pendency of the writ petition filed in the year 1994 and over the land of the petitioner which has been fraudulently usurped by the violaters of law. Further argument is that once the constructions have already been found to be illegal and said orders have attained finality, compounding is not permissible. It has been further argued that matter has been unnecessarily remanded to the Development Authority, reopening a closed chapter. The petitioner has referred to various documents to the Court which include the action taken at the level of district administration, police authorities as well as revenue authorities to establish that the respondent no.5 has not only grabbed the petitioner's plot but also raised unauthorized constructions over the land of the petitioner which are contrary to the provisions of the Act-1973.

Contention of the respondent no.5

19. It has been argued on behalf of respondent no.5 that the petitioner is raising a title dispute which is beyond the jurisdiction of the Development Authority and since by the order impugned, the matter of compounding of constructions is yet to be examined, the order impugned needs no interference and, insofar as, title issue is concerned, the petitioner is at liberty to approach civil/revenue court.

Contention of respondent-Development Authority

20. Shri Nisheeth Yadav, learned counsel has vehemently argued that as on today, no decision has been taken by the Development Authority compounding the constructions of respondent no.5 and pursuant to the order of remand, the said aspect would be examined. Shri Yadav has, by referring to Clause 3.2 of the Compounding Byelaws of 2009, argued that no compounding of constructions raised over the **disputed plot** is permitted and, therefore, while considering the compounding issue, this aspect would also be examined. For a ready reference, relevant portion of Clause 3.2 of the Compounding Byelaws is reproduced hereinbelow:-

“3.2 निम्नलिखित अपराध शमनीय नहीं होंगे:-

3.2.1 सार्वजनिक व अर्ध – सार्वजनिक सुविधायों, सेवाओं एवं उपयोगिताओं यथा – सड़क, रेलवे लाइन, पार्क, ग्रीनवर्ज आदि हेतु आरक्षित अथवा उनसे सम्बन्धित भूमि पर किया गया निर्माण।

3.2.2. महायोजना या जोनल डेवलपमेन्ट प्लान या ले-आउट प्लान या लीज में निर्धारित भू-उपयोग के विपरीत किया गया निर्माण।

3.2.3 अवैध भू-उपविभाजन जिसका नियमितीकरण नहीं हुआ है, के अन्तर्गत स्थित भूखण्ड पर अथवा भवन में किया गया निर्माण।

3.2.4 सरकारी या सार्वजनिक भूमि पर बिना सम्बन्धित विभाग की अनुमति से किया गया निर्माण।

3.2.5 विवादित भूमि पर किया गया निर्माण।”

Contention of learned Standing Counsel

21. It has been argued on behalf of the State that the order impugned is non-injurious to all the parties as the State Government has directed consideration of matter of compounding with a clear stipulation that all the parties shall be provided opportunity of hearing and that an

order would be passed by the Development Authority in the light of the relevant Rules, Regulations, Bye-laws and Government Orders.

22. I have heard Ms. Rollie Kausar, petitioner in person who has been substituted after death of her father, i.e. the sole petitioner, Shri C.B. Singh, learned Standing Counsel appearing on behalf of respondent nos.1 and 2, Shri Nisheeth Yadav, learned counsel appearing on behalf of A.D.A. i.e. respondent nos.3 and 4, Shri Prakash Chandra Srivastava, learned counsel appearing on behalf of respondent no.5 and perused the records.

23. Since the issue involved in the writ petition is as to whether the compounding of constructions raised by the respondent no.5 can be considered pursuant to the order of remand and as to whether order of remand is in accordance with law, I would deal with basic concept of compounding of constructions in the light of judicial pronouncements and the provisions contained in the Act-1973.

24. The Act of 1973 does not contain any provision for compounding of constructions. However, there is a provision for composition of offences under Section 32 of the Act 1973 which reads as follows:-

“32. Composition of Offences.- (1)
Any offence made punishable by or under this Act may either before or after the institution of proceedings, be compounded- by ¹[the Vice-Chairman (or any officer authorised by him in that behalf by General or Special order)] on such terms, including any terms as regards payment of a composition fee, as ²[the Vice-Chairman] (or such officer) may think fit.

(2) Where an offence has been compounded, the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of the offence compounded.”

25. The offences arising out of unlawful or unauthorized constructions are described in Section 26 of the Act-1973 which reads as follows:-

“**26. Penalties.**- (1) Any person who whether at his own instance or at the instance of any other person or any body (including a department of Government) undertakes or carries out development of any land, in contravention of the Master Plan or Zonal Development Plan or without the permission, approval or sanction referred to in Section 14 or in contravention of any condition subject to which such permission approval or sanction has been granted, shall be punishable with fine which may extend to ¹[Fifty thousand rupees], and in the case of a continuing offence, with further fine which may extend to ²[Two thousand five hundred rupees] for every day during which such offence continues after conviction for the first commission of the offence.

(2) Any person who uses any land or building in contravention of the provisions of Section 16 or in contravention of any terms and conditions prescribed by regulations under the proviso to that section shall be punishable with fine which may extend to ³[twenty-five thousand rupees] and in the case of a continuing offence, with further fine which may extend to ⁴[One thousand, two hundred and fifty rupees] for every day during which such offence continues after conviction for the first commission of the offence.

(3) Any person who obstructs the entry of a person authorised under Section 25 to enter into or upon any land or building or molests such person after such entry shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”

26. Further there is a provision of realisation of fine as per Section 31 of the Act-1973 which reads as follows:-

“**31. Fines when realised to be paid to the Authority.**-All fines realised in connection with prosecutions under this Act shall be paid to the Authority.”

27. Therefore, the offences which can be compounded are the offences of prosecution/fine and there is no provision, under which, unauthorized constructions can be compounded at least under the Act. However, at the same time, the effect of Compounding Bye-laws would also be examined but one thing is clear that even in the Bye-laws of 2009 relied upon by the Development Authority as quoted hereinabove, the word “constructions” has not been mentioned, rather the word “अपराध” (“offence”) has been used, meaning thereby, that even the Bye-laws speak of composition of “offences” and not compounding of “constructions”.

28. This Court finds that there is no provision under the Act, 1973 which entitles the Authority to go for profiteering on an illegal act of encroachment or unauthorized construction in the name of compounding. The compounding contemplated in Section 32 is certainly in respect to offences punishable under the Act. It nowhere provides that once an offence is compounded, an act, which is in

violation of Plan, shall also stand regularized or become valid. The effect of compounding is provided in Sub-section (2) of Section 32 that an offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect to the "offence" compounded. This is with regard to the criminal liability fastened upon the person for committing an offence under the Act, 1973. But the prohibition contained in the Act and statutory obligation upon Authorities to set right a person who has faulted/breached such provision by taking appropriate action, e.g. demolition of building by exercising power under Section 27 has not been made un-operated when an offence is compounded. The proceeding prevented as a result of compounding an "offence" relates to offence and illegality/irregularity so prohibited/controlled under another provision. It may also be noticed that by U.P. Act No. 3 of 1997 (hereinafter referred to as "Act, 1997"), certain other offences have been provided vide Sections 26D and 28A. However, removal of any construction raised in contravention of Plan and removal of encroachment etc. are governed by a different procedure and steps which would remain unaffected by such compounding. **In other words, the compounding under the Act, 1973 is to avoid the criminal liability and punishment on conviction but not to regularize a construction prohibited under the Act for which no relaxation is permissible except when the plan is amended in accordance with Section 13 of the Act.**

29. In ***Dhananjaya Reddy v. State of Karnataka 2001 (4) SCC 9*** in para 23 of the judgment, the Supreme Court held :-

"It is a settled principle of law that where a power is given to do a certain

thing in a certain manner, the thing must be done in that way or not at all."

30. In ***Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala 2002 (1) SCC 633***, it was held :-

"It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself."

31. The judgments in ***Anjum M.H. Ghaswala*** (supra) and ***Dhananjaya Reddy*** (supra) laying down the aforesaid principle have been followed in ***Captain Sube Singh & Ors. v. Lt. Governor of Delhi & Ors., 2004 (6) SCC 440***.

32. In ***Competent Authority v. Barangore Jute Factory & Ors., 2005 (13) SCC 477***, it was held :-

"It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning."

33. In ***State of Jharkhand & others v. Ambay Cements & another, 2005 (1) SCC 368*** in para 26 of the judgment, Supreme Court held : -

"It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way."

34. This Court in the case of ***Dr. Santosh Dixit & Anr. v. State of U.P. & Ors. 2017 (3) ADJ 401 (DB)*** has

elaborately dealt with the issue of compounding of unauthorized constructions and it has been held that the violators of law cannot be benefitted under the garb of something which the law does not permit. It has been held that a deviation or violation from a Scheme or Plan cannot be made a means of profiteering by collecting huge amount from offenders/ violators and permitting them to continue to enjoy such deviation. If this stand is sustained, it would mean that the Statute is being read in a manner so as to confer an immunity upon the resourceful people to violate law and permit them to continue to enjoy such violation for all times to come by paying some amount to the Authority. These violators basically come from elite class. They find it easier vis-a-vis their status to part away any amount of money so as to retain the information of plan. It adds to their status also. Most of the builders have made it a part of their business. Simultaneously, the Development Authority also stands financially (officially and privately) benefited in allowing contravention of plan and violation of a statutory embargo without exercising its power of restoration by taking action of demolition etc. If such an interpretation is upheld, it would not only encourage corruption and element of extraneous consideration but would also create two classes; one those who are bound to suffer in their efforts of making any deviation from Master Plan since they lack financial resources to pay the so called compounding fees for continuing to enjoy the illegal and unlawful deviation; and, those who are rich, resourceful and capable to do so.

35. While making certain observations in respect to corruption prevailing in the Society, this Court in **Smt. Mithilesh Kumari v. State of U.P. and**

others, 2011(1) ADJ 40 has observed that such creation and classification which encourages corruption, is discriminatory and also against human rights. The Court observed that in the last 60 years of independence, if there is one field we can boast of a national allround development and that too multifold, it is the field of corruption. It has various shades. It is not confined to only one field of bribery, cash and kind, but has different colours and nuances.

36. It has further been observed that though in a civilised society, corruption has always been viewed with particular distaste to be condemned and criticised by everybody but still one loves to engage himself in it if finds opportunity, ordinarily, since it is difficult to resist temptation. It is often, a kind, parallel to the word ""bribery"", meaning whereof in the context of the politicians or bureaucrats, induced to become corrupt.

37. The Greek Philosopher Plato, in 4th Century BC said, "in the Republic that only politicians who gain no personal advantage from the policies they pursued would be fit to govern. This is recognised also in the aphorism that those who want to hold power are most likely those least fit to do so.

38. While giving speech before the House of Lords William Pitt in the later half of 18th Century said, "Unlimited power is apt to corrupt the minds of those who possess it." Lord Acton in his letter addressed to Bishop Creighton is now one of the famous quotation, "Power tends to corrupt and absolute power corrupts absolutely.

39. Corruption is a term known to all of us. Precise meaning is illegal, immoral

or unauthorized act done in due course of employment but literally it means "inducement (as of a public official) by improper means (as bribery) to violate duty (as by committing a felony)." It is an specially pernicious form of discrimination. Apparently its purpose is to seek favourable, privileged treatment from those who are in authority. No one would indulge in corruption at all if those who are in authority, discharge their service by treating all equally.

40. Corruption violates human rights. It discriminates against the poor by denying them access to public services and preventing from exercising their political rights on account of their incapability of indulging in corruption, of course on account of poverty and other similar related factors. Corruption is, therefore, divisive and makes a significant contribution to social inequality and conflict. It undermines respect for authority and increases cynicism. It discourages participation of individuals in civilised society and elevates self interest as a guide to conduct. In social terms we can say that corruption develops a range bound field of behaviour, attitude and beliefs. Corruption is antithesis of good governance and democratic politics. It is said, that when corruption is pervasive, it permeates every aspect of people's lives. It can affect the air they breathe, the water they drink and the food they eat. If we go further, we can give some terminology also to different shades of corruption like, financial corruption, cultural corruption, moral corruption, ideological corruption etc. The fact remains that from whatever angle we look into it, the ultimate result borne out is that, and the real impact of corruption is, the poor suffers most, the poverty groves darker, and rich become richer."

41. Further this Court in the case of **Mr. G.S.J. Shapoorjee v. Allahabad Development Authority & Ors., 2016 11 ADJ 524** has held in paragraph 45, 46, 56, 57 and 58 as under:-

45. Mere fact that map was sanctioned and thereafter constructions were raised, would make no difference for the reason that all transactions were void ab initio. The petitioners had no right over land, they were unauthorised occupants, hence question of making construction by getting a map sanctioned by ADA does not arise at all. Any act of ADA would not create any legal right in favour of petitioners which otherwise they also do not possess.

46..... A trespasser is not entitled to get sanction and raise constructions on a land over which it has no right,so as to create right over land. The entire things are illegal and void ab initio.

56. There is another contention that since compounding charges have been paid and therefore, construction whatsoever raised by petitioners must be taken to be valid construction, also has no force for the same reason that petitioners have no right over the land at all. Even otherwise, we are of the view that unauthorized construction would not stand regularized on payment of compounding charges, since concept of compounding charges is not to regularize unauthorized construction but to compound an offence so that otherwise punishment in the Court of law in a trial may not be inflicted.

57. We may also admit to consider another limb of argument that during pendency of writ petition in continuation of interim order, petitioners have further completed constructions and ADA be directed to regularise same by accepting payment of compounding fee. In our view,

neither any such direction can be issued nor such relief can be granted and the entire argument in respect of alleged compounding and regularization is thoroughly misconceived.

58. We find from the Statute that compounding a building is permissible in the Statute under Uttar Pradesh Urban Planning & Development Act, 1973(hereinafter referred to as "Act, 1973") but if an illegal or unauthorized construction has been raised, Development Authority is not empowered to continue such illegal unauthorized constructions by realizing some amount.

42. In view of the above discussion, I find that once the Commissioner, in his order dated 02.05.1994, held the constructions raised by the respondent no.5 as **unauthorized, illegal and contrary to law** and the said order, though challenged by means of writ petition, but the challenge failed in terms of dismissal of the petition on 16.12.2005 and then order dated 30.01.2006 passed by the Commisisoner on review was further set aside by this Court on 14.05.2012 and was not interferred with by the Supreme Court while dismissing Special Leave Petition on 09.11.2012, there is nothing on record to show or establish that the constructions raised by the respondent no.5 were lawful. **The effect of these orders cannot be ignored whether the order impugned is an order on merit or simply an order of remand.**

43. Insofar as, the contention of State as well as Development Authority to the effect that the compounding has not been ordered but it will be considered and that the constructions raised on the disputed land would not be compounded, this Court finds that the said stand supporting the order impugned is liable to be discarded.

There are various reasons behind forming this opinion. First of all, as explained hereinabove, the Bye-laws of 2009 speak of compounding of **"offence"** and not **"constructions"**. Secondly, if the same are stretched to compounding of constructions, though I do not find any justification for this, it would be a case where, according to the Development Authority, the matter would be examined in reference to the constructions which were raised on a **disputed land.**

44. Shri Nisheeth Yadav, learned counsel for the Development Authority has vehemently argued that there is no title dispute in between the petitioner and respondent no.5 and, therefore, the land over which, the constructions have been raised is not **"विवादित" (disputed)**. The insistence of learned counsel for the respondent-Authority is that, insofar as, the title dispute is concerned, the same should be left to be decided by civil/revenue court and such adjudication would have no bearing upon the merits/demerits of compounding of the constructions.

45. I am not in a position to accept the said argument. It appears that word **"विवादित"** (disputed) is being understood by the respondents as the one which is a subject matter of civil or revenue litigation. However, considering the entire Scheme of the Act 1973 and even Bye-laws of 2009, I am of the opinion that word **"विवादित "** (disputed) has to be understood as per its soul and intent and not to be misunderstood by the one which is engaging the attention of civil/revenue court or which may become a subject matter of such litigation.

46. As per Black's Law Dictionary, the word **"dispute"** has been defined as a **"conflict or controversy"** and as per the

New Lexicon Webster's Dictionary, word **"dispute"** has been defined as **"to quarrel, to argue, to question the truth, to fight hard, a controversy."**

47. The record of the writ petition narrates that right from the first action of taking possession or raising constructions on the spot in January 1990, the land became disputed in between the petitioner, respondent no.5, her husband and other associates, description whereof is contained in the initial portion of this judgment. The dispute travelled from a personal tussle in between the private persons on the spot to the District Administration, then Police Authorities, then Development Authority, then Commissioner of the Division, then this Court in various writ petitions, then again the Commissioner, followed by another intervention by this Court, then Supreme Court and, thereafter, revision before the State Government giving rise to the present writ petition. Once, the land became disputed in this manner, then, even as per the Development Authority, compounding is not permissible.

48. Insofar as, the order impugned is concerned, State Government has observed that the contention raised by the petitioner relates to title dispute which can be decided only by the civil/revenue court and the petitioner may institute a suit before such court. I find that in view of the above discussion, in a matter relating to compounding of constructions, this finding is not based upon critical analysis of the material available on record which was very much there before the State Government also while deciding the revision nor is it according to the very concept of compounding of constructions/offences, as elaborately discussed hereinabove.

49. Insofar as the direction of remand is concerned, certainly the Development Authority, being sub-ordinate to the State Government, as per the Scheme of 1973, would take up the matter of compounding of constructions and would deal with the same in one or the other way and such a decision would give rise to further rounds of litigation by either side. At this juncture, I want to refer to the legal maxim **"interest reipublicae ut sit finis litium"** which means that it is in the interest of State that there must be an end to the litigation. This Court and the Supreme Court has also, time and again, held that judicial/quasi judicial authorities should avoid unnecessary remand, therefore, whenever it is found that remand is factually and/or legally unlawful and illegal, the same should be interfered with.

50. During the course of arguments, this Court also got a clear picture in its mind, as also argued from both sides that the petitioner's plot purchased by a registered sale deed dated 16.07.1987 is not in her possession because of the constructions raised by respondent no.5 on the spot in the aforesaid manner.

51. The old British concept that a "Judge" is a neutral passive umpire has undergone a perceptible change. In ***S.P. Gupta v. Union of India, 1981 Suppl. S.C.C. 87***, His Lordship, P.N. Bhagwati J. found that the British approach shall not be suited to Indian conditions and held that the judiciary cannot be a mere **by-stander or spectator** but it must become an active participant in the judicial process ready to use law in the service of social justice through a 'pro-active goal-oriented approach'.

52. In view of the above discussion, I am satisfied that the litigation once

finalized, leaves no doubt in my mind that compounding is not permissible in the present case and, therefore, the impugned order remanding the matter to the Development Authority for deciding the compounding issue is unsustainable and contrary to factual and legal position well established on record.

53. The writ petition, therefore, succeeds and is *allowed*.

54. The order impugned dated 07.01.2016 passed by the State Government in Revision No.33 of 2012 (Smt. Lakshmi Singh v. Allahabad Development Authority & Ors.) is hereby quashed.

55. Necessary consequences pursuant to the quashing of the said order would follow.

(2023) 5 ILRA 1172
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2023

BEFORE

THE HON'BLE SURYA PRAKASH
KESARWANI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ-C No. 7127 of 2023

Akhilesh Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Ajay Pandey

Counsel for the Respondents:
 C.S.C., Sri Narendra Kumar Tiwari

A. Civil Law – Electricity Act, 2003 – Section 164 – Indian Telegraph Act, 1885 – Sections

10 & 16 – Installation of 33 KV electric line – Threat to life and personal liberty – Demand of Rs. 29,77,848/- by the respondent for removal of the electric line – Legality challenged – No compensation for installation of the electric line was paid to the owners of the land – Effect – Held, since no compensation was paid to the owners of the land for installation of the electric line in question, therefore, no amount was required to be deposited by the petitioners or other affected persons in terms of Section 17 of the Act, 1885 for removal of the electricity line in question – Demand of Rs. 29,77,848/- or revised demand of Rs. 3578595/- issued by the respondent no. 2 for removal of the electricity line in question, was without authority of law. (Para 17 and 18)

B. Constitution of India, 1950 – Article 226 – Writ – Nature and Scope – Alternative remedy – Exceptions – When writ power can be exercised even when alternative remedy is available – Held, Article 226 of the Constitution of India confers very wide powers on High Court to issue writs but this power is discretionary and the High Court may refuse to exercise the discretion, if it is satisfied that the aggrieved person has adequate or suitable remedy elsewhere. It is a rule of discretion and not rule of compulsion or the rule of law – High Court laid down eight exception to the rule of alternative remedy: (i) Where there is complete lack of jurisdiction in the officer or authority to take the action or to pass the order impugned; (ii) Where vires of an Act, Rules, Notification or any of its provisions has been challenged; (iii) Where an order prejudicial to the writ petitioner has been passed in violation of principles of natural justice; (iv) Where enforcement of any fundamental right is sought by the petitioner; (v) Where procedure required for decision has not been adopted; (vi) Where Tax is levied without authority of law; (vii) Where decision is an abuse of process of law; (viii) Where palpable injustice shall be caused to the petitioner, if he is forced to adopt remedies under the statute for enforcement of any fundamental rights guaranteed under the Constitution of India. (Para 20)

Writ petition allowed. (E-1)**List of Cases cited:**

1. Civil Misc. Writ Petition (Tax) No. 255 of 2012; M/s Shree Bhawani Paper Mills Ltd. Vs St. of U.P. & anr. decided on 10.09.2015

2. Himmatlal Harilal Mehta Vs St. of M. P., AIR 1954 SC 403

3. Collector of Customs Vs Ramchand Sobhraj Wadhvani; AIR 1961 SC 1506

4. Collector Of Customs & Excise ,Cochin & ors. Vss A. S. Bava; AIR 1968 SC 13

5. Dr. Smt. Kuntesh Gupta Vs Management Of Hindu Kanya Mahavidyalaya

6. L.K. Verma Vs HMT Ltd. & anr.; (2006) 2 SCC 269

7. M.P. St. Agro Industries Development Corpn. Ltd. & anr. Vs Jahan Khan; (2007) 10 SCC 88

8. Dhampur Sugar Mills Ltd. Vs St. of U.P. & ors.; (2007) 8 SCC 338

9. BCPP Mazdoor Sangh Vs NTPC; (2007) 14 SCC 234 (para 19)

10. Rajasthan St. Electricity Board Vs U.O.I.; (2008) 5 SCC 632 (para 3)

11. Mumtaz Post Graduate Degree College Vs University of Lucknow; (2009) 2 SCC 630 (para 22 and 23)

12. Godrej Sara Lee Limited Vs Assistant Commissioner (AA); (2009) 14 SCC 338. 14

13. U.O.I.Vs Mangal Textile Mills (I) (P) Ltd.; (2010) 14 SCC 553 (paras 6,7,10 and 12)

14. U.O.I.Vs Tantia Construction (P) Ltd.; (2011) 5 SCC 697

15. Southern Electricity Supply Co. of Orissa Ltd. Vs Sri Seetaram Rice Mill, (2012) 2 SCC 108 (paras 79,80,81,82,86,87 and 88)

16. St. of M.P. Vs Sanjay Nagaich; (2013) 7 SCC 25 (para 34,35,38,39)

17. St. of H.P. Vs Gujarat Ambuja Cement Ltd.; (2005) 6 SCC 499 (para 11 to 19)

18. Star Paper Mills Ltd. Vs St. of U.P. & ors.; JT (2006) 12 SC 92

19. St. of Tripura Vs Manoranjan Chakraborty; (2001) 10 SCC 740 (para 4)

20. Paradip Port Trust Vs Sales Tax Officer & ors.; (1998) 4SCC 90

21. Feldohf Auto & Gas Industries Ltd. Vs U.O.I.(1998) 9 SCC 710

22. Isha Beebi Vs Tax Recovery Officer; (1976) 1 SCC 70 (para 5)

23. Whirlpool Corporation Vs Registrar of Trademarks; (1998) 8 SCC 1

24. Guruvayur Devasworn Managing Committee Vs C.K. Rajan; (2003) 7 SCC 546 (para 67,68)

25. U.O.I. & ors. Vs Major General Shri Kant Sharma; (2015) 6 SCC 773

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Ajay Pandey, learned counsel for the petitioners, Sri Rajiv Gupta, learned Additional Chief Standing Counsel for the respondent Nos. 1 & 3 and Sri Narendra Kumar Tiwari, learned counsel for the respondent no.2.

2. This writ petition has been filed praying for the following relief :

"(I) Issue, a writ order or direction in the nature of mandamus and commanding the respondent no.2 to remove the electricity cable of 33 K.V. feeder from the houses of the petitioners situate at

Manjhanpur District Kaushambi in compliance of order dated 18.07.2018 passed by respondent no.2."

3. On 06.04.2023, this court passed a detailed order and directed the respondent no.2 to file a counter affidavit by means of his personal affidavit. The respondent no.2 was further directed to answer specifically the following questions:

(i) Whether any compensation was paid to land owners while erecting the electric line in question?

(ii) If answer to the question no.(i) is in affirmative, then the amount of compensation paid, be disclosed.

(iii) Under what authority of law, the respondent no.2 has demanded a sum of Rs.35,78,595/- as a shifting charge to shift 33 KV Electric line in question?

4. Despite time granted the respondent nos. 1 & 3 have neither filed counter affidavit nor prayed for further time.

5. In compliance to the aforesaid order dated 06.04.2023, the respondent no.2 has filed today the counter affidavit by means of his personal affidavit dated 12.04.2023, which is taken on record.

Facts :

6. Briefly stated undisputed facts of the present case are that the petitioners are the owner of the land over which a 33 KV electric line was installed by the respondent no.2. As per own case of the respondents, total 81 persons including the petitioners are affected by the aforesaid 33 KV electric line which according to the respondent no.2 was installed in the year 1995, without payment of any compensation in terms of

the provisions of Section 164 of the Electricity Act, 2003 read with Sections 10 and 16 of the Indian Telegraph Act, 1885 (hereinafter referred to as "the Act, 1885"). Grievance of the petitioners is that the aforesaid electricity line running between Osha Crossing and District Hospital, is passing over the land/houses of 81 persons including the petitioners causing serious threat to life and property. The petitioners and other affected persons have moved an application before the respondents for shifting of the line. An order dated 18.07.2018 was passed by the respondent no.3 on the basis of estimate of Rs.29,77,847/- as shifting charges for shifting of the aforesaid electricity line. However, by order dated 26.05.2022 the respondent no.2 i.e. Executive Engineer revised the estimate and required deposit of Rs.35,78,595/- for shifting of the aforesaid electric line. The petitioners and two other affected persons under compulsion, deposited the proportionate amount while remaining persons did not deposit the amount. Under the circumstances, the aforesaid electric line has not been shifted due to non deposit of shifting charges.

7. Aggrieved, the petitioners have filed the present writ petition praying for the relief aforequoted.

Submissions :

8. Learned counsel for the petitioners submits that the petitioners are not liable to deposit any amount, as no compensation was paid to the land owners while erecting the electric line in question. He submits that once the respondents have themselves passed the order for shifting of the line, they can not delay shifting of electric line until the demand of charges for shifting of electric line is paid by all the affected

persons. He submits that action of the respondents is in breach of the provisions of the Electricity Act, 2003 read with the Indian Telegraph Act, 1885.

9. Sri Narendra Kumar Tiwari, learned counsel for the respondent no.2 submits that the respondents are ready to shift the electric line provided all affected persons deposit the demanded amount of Rs.35,78,595/-. He submits that in the event petitioners are aggrieved, they have an alternative remedy to challenge the order of the District Magistrate, dated 18.07.2018 read with communication of the Executive Engineer, dated 26.05.2022, under Rule 3(3) of the Works of Licensees Rules, 2006.

10. We have carefully considered the submissions of learned counsels for the parties and perused the record of the writ petition and counter affidavit by means of personal affidavit filed today by the respondent no.2. In paragraphs 4 to 9 of the counter affidavit, the respondent no.2 has stated as under :

*"4. That, before giving parawise reply it is pertinent to point out certain facts that the 33 KV Electricity line has been installed in year 1995. **No compensation has been paid to the land owners in respect to installation of Electricity overhead lines.***

*5. That, the Electricity line has been installed and poles were erected upon the land of bhumidhars. The survey of installation was done but no objection was raised by any of the land owners. **The licensee has exercised the power conferred under section 164 of the Electricity Act, 2003 read with the provisions of Indian Telegraph Act, 1885 to install the overhead Electricity line. The Copy of The***

*Indian Telegraph Act, 1885 is being filed herewith and marked as **ANNEXURE NO.CA-1** to this affidavit.*

*6. That, no objection has been filed by any of the land owners against installation of electricity line and erecting of poles since 1995. The section 3 (1) of the Works and licensing Rules 2006 provides that in case of objection of any of the land owner/occupier during survey or carrying out of work of installation of Electricity line, the licensee will take permission in writing from District Magistrate subject of payment of compensation or rent as the case may be. In present case prayer of shifting of 33 KV Electricity line has been requested. It is under jurisdiction of the district magistrate to consider such request. The Copy of the Works and licensing Rules 2006 is being filed herewith and marked as **ANNEXURE NO.CA-2** to this affidavit.*

7. That, answering respondent has not demanded any amount from any of residents but communicated to them in pursuance to the order dated 18-07-2018 passed by the district Magistrate while considering their representation. None of the residents has challenged the legality of the aforesaid order of the District Magistrate. The houses have been constructed in recent years while electricity line was installed in year 1995.

8. That, the District Magistrate Kaushambi passed speaking order on 18-07-2018 directing answering respondent to prepare list of residents and direct them to deposit estimated cost in proportion to remove the 33 KV Electricity line. The list of residents was jointly prepared by the Tehsildar and Junior Engineer of the Corporation jointly on 10-05-2022.

9. That, the order of District Magistrate could not be complied as the proportional amount directed to deposit has not been deposited in the joint account

of Tehsildar and answering respondent.

The District Magistrate has directed by speaking order on 18-07-2018 that list of affected person be prepared and further directed such residents to proportionally deposit the estimated cost of shifting."

11. From perusal of the own stand taken by the respondent no.2, it is undisputed that 33 KV electricity line was installed in the year, 1995 without payment of any compensation to the land owners. It has also been admitted by the respondent no.2 that the licensee has exercised the powers conferred under Section 164 of the Electricity Act, 2003 read with the provisions of the Indian Telegraphic Act, 1885 to install the overhead electric line in question. Averment made in paragraph 7 of the counter affidavit filed by the respondent no.2 that he has not demanded any amount but communicated them in pursuance of the order dated 18.07.2018, passed by the District Magistrate, Kaushambi, is incorrect and contrary to own stand taken by the respondent no.3 that the residents have deposited process fees of Rs.1,000/- on 21.03.2017 and thereafter the Executive Engineer vide letter no.3686, dated 11.08.2017 apprised them that for shifting of the electric line in question, as per rules and conditions, a sum of Rs.29,77,848/- be deposited with the department so that shifting work may be completed.

12. The aforesaid facts are incorporated in the order of the District Magistrate dated 18.07.2018. That apart, it has also been mentioned in the aforesaid order of the District Magistrate that the electric line in question is liable to be shifted in public interest, otherwise, it may cause loss of life at any time. The order dated 18.07.2018, passed by the District Magistrate, Kaushambi, is reproduced below :

न्यायालय जिलाधिकारी कौशाम्बी

संख्या - सन् 2018

अन्तर्गत धारा - विविध

शत्रुघन मिश्र पुत्र नागेश दत्त मिश्र

निवासी- मंझनपुर जनपद कौशाम्बी
बनाम

1- उप खण्ड अधिकारी (विद्युत)

मंझनपुर जनपद कौशाम्बी

2- अधिभाषी अभियन्ता (विद्युत)
कौशाम्बी।

"आदेश"

परिवादी ने विविध प्रार्थना पत्र प्रस्तुत करते हुए कहा है कि ओसा स्थित मण्डी परिषद के सामने आवासीय भवनों के ऊपर से खिची 11000 बोल्ट के विद्युत तारों का जनहित में हटाना आवश्यक है। अन्यथा किसी भी समय कोई घटना घटित हो सकती है, क्योंकि विद्युत तारों के नीचे लगभग 50 से अधिक आवास निर्मित है।

आवेदक के प्रार्थना पत्र के क्रम में विपक्षी को नोटिस भेजी गयी। बाद तामीला विपक्षी हाजिर अदालत आकर कहा कि आवेदक शिफ्टिंग राशि बावत प्रासेस फीस के रूप में 1000/- कार्यालय में जमा कर, जिससे हटाने में आने वाली सम्भावित खर्च का आकलन विभाग कर सके। आवेदक ने दिनांक 21.03.2017 को 1000/- रु० प्रासेस फीस जमा कर दिया, जिसके पश्चात दिनांक 11.08.17 को अधिशाषी अभियन्ता ने अपने पत्रांक - 3686 के माध्यम से अवगत कराया गया कि प्रश्रुगत 33 के०वी० लाइन हटाने में नियम व शर्तों के आधार पर 2977848.00 रु० विभाग में आवेदक जमा करे, ताकि को कार्य को पूर्ण किया जा सके।

आवेदक ने दिनांक 01.06.2018 को प्रार्थना पत्र प्रस्तुत करते हुए कहा कि लम्बे अरसे से मामला विचाराधीन है। मामले को गुणदोष पर निस्तारण शीघ्र किया जाय। प्रार्थना पत्र का संज्ञान लेते हुए सुनवाई की गयी। सुनवाई के दौरान विपक्षी के विभागीय पैरोकार भी उपस्थित रहे।

प्रकरण में पूर्व में भी दिनांक 28.4.2017 को प्रबन्ध निदेशक पूर्वांचल विद्युत वितरण निगम लिमिटेड वाराणसी को न्यायालय द्वारा पत्र प्रेषित करते हुए यह राय व्यक्त की गयी थी कि प्रश्रुगत मामले में आवासीय भवनों के सामने राजकीय अतिथिगृह स्थित है जहां पर शासन के प्रतिनिधी व उच्चाधिकारी प्रायः निवास करते हैं। नव सृजित जनपद में ऐसे बहुतायत आवासीय भवन प्रभावित हैं। जनहित व लोकहित में

स्वयमेव कार्यवाही करना आपेक्षित है। अन्यथा किसी भी समय जनहानि हो सकती है। किन्तु विपक्षी द्वारा कोई कार्यवाही आज तक अग्रेतर संचालित नहीं की गयी। आवेदक के अनुसार विपक्षी द्वारा तैयार की गयी प्राक्कलन रिपोर्ट में जो स्टीमेट के अनुसार धन जमा करना है, जो अत्यधिक है और किसी एक व्यक्ति द्वारा इतनी लम्बी धनराशि नहीं जमा किया जा सकता। आवेदक के तर्कों में बल प्रतीत होता है। ऐसी स्थिति में विपक्षी को चाहिए था कि प्राक्कलन रिपोर्ट के अनुसार जो भी धनराशि जमा होना है उसे प्रश्रुत विद्युत पारेषण लाइन के नीचे स्थापित भवन स्वामियों से हिस्सानुसार धनराशि जमा कराकर निर्माण किया जा सकता था।

अतः मैं इस निष्कर्ष पर पहुँचता हूँ कि प्राक्कलन रिपोर्ट में प्रस्तावित धनराशि मु० 2977848.00 रु० जमा कराने हेतु जिला चिकित्सालय कौशाम्बी से ओसा चौराहा तक के प्रभावित भवन स्वामियों का चिन्हीकरण करते हुए सूचीबद्ध पर समानुपातिक दृष्टि से धनराशि जमा कराना उचित होगा।

अतः आदेश हुआ कि अधिशाषी अभियन्ता (विद्युत) कौशाम्बी को आदेशित किया जाता है कि जिला चिकित्सालय कौशाम्बी से ओसा चौराहा तक 33 के०वी० फीडर को पारेषित विद्युत लाइन के नीचे स्थित भवन स्वामियों का चिन्हीकरण कराया जाय। सूचीबद्ध करने के पश्चात् इन भवन स्वामियों से आनुपातिक सिद्धान्त से प्राक्कलन रिपोर्ट में प्रस्तावित धनराशि को 30 दिन के अन्दर जमा कराकर विद्युत लाइन को समुचित स्थल पर स्थापित किया जाय, जिससे किसी भी प्रकार की जन - धन हानि से बचा जा सके। प्रगति आख्या दिनांक 07.08.2018 तक अधोहस्ताक्षरी के पास प्रेषित की जाय।

दिनांक 18.7.2018

Sd.
(मनीष कुमार वर्मा)
जिलाधिकारी
कौशाम्बी"

13. After the District Magistrate, Kaushambi, passed the aforequoted order, dated 18.07.2018, the respondent No.2 passed the revised estimate and intimated it to the respondent no.3 by his letter No.2916, dated 26.05.2022 as under :

"उपरोक्त के सम्बन्ध में आपको अवगत कराना है कि तहसील दिवस मंझनपुर में दिनांक 16.4.2022 को प्रस्तुत प्रार्थना पत्र में अधोहस्ताक्षरी को निर्देशित किया गया था कि दिनांक 18.07.2018 को मा० न्यायालय जिलाधिकारी कौशाम्बी के आदेश के अनुपालन में प्राक्कलन आख्या में प्रस्तावित धनराशि

रु० 2977847.00 पुनः संशोधित धनराशि रु० 3578595.00 वसूली हेतु 33 के०वी० लाइन के नीचे ओसा चौराहे से जिला अस्पताल के बीच प्रभावित भूखण्ड स्वामी व भवन स्वामियों को चिन्हीत किया गया मा० तहसीलदार महोदय मंझनपुर की आख्या के अनुसार कुल 81 भूखण्ड एवं भवन स्वामी है। (सूची संलग्न है)

आपको सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित है।"

14. Compelled with the situation, each of the petitioners have deposited the proportionate sum of Rs.44200/- with the respondent no.2 on 15.06.2022 and 24.08.2022 respectively. However, electric line could not be shifted for the reason that some of the residents have not deposited the amount.

15. On the admitted facts of the case and in the light of the relevant provisions of law, grievance of the petitioners need to be examined. Therefore, for ready reference the provisions of Section 164 of the Electricity Act, 2003 and Section 17 of the Indian Telegraph Act, 1885 are reproduced below :

Electric Act, 2003

"164. Exercise of powers of Telegraph Authority in certain cases.-The Appropriate Government may, by order in writing, for the placing of electric lines or electrical plant for the transmission of electricity or for the purpose of telephonic or telegraphic communications necessary for the proper co-ordination of works, confer upon any public officer, licensee or any other person engaged in the business of supplying electricity under this Act, subject to such conditions and restrictions, if any, as the Appropriate Government may think fit to impose and to the provisions of the Indian Telegraph Act, 1885, any of the powers which the telegraph authority possesses under the Act with respect to the placing of

telegraph lines and posts for the purposes of a telegraph established or maintained, by the Government or to be so established or maintained."

Indian Telegraph Act, 1885

17. Removal or alteration of telegraph line or post on property other than that of a local authority.-(1) *When, under the foregoing provisions of this Act, a telegraph line or post has been placed by the telegraph authority under, over, along, across, in or upon any property, not being property vested in or under the control or management of a local authority, and any person entitled to do so desires to deal with that property in such a manner as to render it necessary or convenient that the telegraph line or post should be removed to another part thereof or to a higher or lower level or altered in form, he may require the telegraph authority to remove or alter the line or post accordingly:*

Provided that, if compensation has been paid under section 10, clause (d), he shall, when making the requisition, tender to the telegraph authority the amount requisite to defray the expense of the removal or alteration, or half of the amount paid as compensation, whichever may be the smaller sum.

(2) If the telegraph authority omits to comply with the requisition, the person making it may apply to the District Magistrate within whose jurisdiction the property is situate to order the removal or alteration.

(3) A District Magistrate receiving an application under sub-section (2) may, in his discretion, reject the same or make an order, absolutely or subject to conditions, for the removal of the telegraph line or post to any other part of the property or to a

higher or lower level or for the alteration of its form; and the order so made shall be final."

16. In paragraph 4 of the counter affidavit, the respondent No.2 has specifically admitted that no compensation was paid to the land owners in respect of the installation of 33 KV overhead electric line. Thus, it is admitted to the respondents that while installing the electric line in question, no compensation was paid to the owners. It is also admitted to the respondents that the aforesaid electric line was installed in exercise of powers conferred under Section 164 of the Electricity Act, 2003 read with the Act, 1885. Section 17 of the Act, 1885 provides for removal or alteration of telegraph line or post on property other than that of a local authority. Sub section (1) of Section 17 of the Act, 1885 specifically provides that under the provisions of the Act, 1885 a telegraph line or post has been placed by the telegraph authority under, over, along, across, in or upon any property, not being property vested in or under the control or management of a local authority, **and any person entitled to do so desires to deal with that property in such a manner as to render it necessary or convenient that the telegraph line or post should be removed to another part thereof or to a higher or lower level or altered in form,** he may require the telegraph authority to remove or alter the line or post accordingly.

17. Thus, while making requisition for the removal of the electricity line in question, the petitioners were required to deposit the requisite amount to defray the expenses of the removal or alteration or half of the amount paid as compensation, whichever may be the smaller sum. **Since, as per admitted case of the respondent**

no.2, no compensation was paid to the owners of the land for installation of the electric line in question, therefore, no amount was required to be deposited by the petitioners or other affected persons in terms of Section 17 of the Act, 1885 for removal of the electricity line in question. Under the circumstances, the demand of Rs.29,77,848/- or revised demand of Rs.3578595/- issued by the respondent no.2 for removal of the electricity line in question, was without authority of law.

18. Under the circumstances, the order of the District Magistrate, dated 18.07.2018 to the extent enforcing the demand of Rs.29,77,848/- by the respondent no.2 for removal of the electric line in question, was wholly without authority of law.

19. The submissions of learned counsel for the respondent no.2 that the petitioners have an alternative remedy under Rule 3 of the Works of Lincensees Rules, 2006, has no substance inasmuch as the demand made by the respondents of Rs.29,77,848/- or the revised demand of Rs.35,78,595/- for removal of the electricity line in question is without authority of law. The jurisdiction of this Court under Article 226 of the Constitution of India is not barred merely on account of availability of an alternative remedy. The law in this regard is well settled. Suffice is to refer a judgment of this Court dated 10.09.2015 in **Civil Misc. Writ Petition (Tax) No. 255 of 2012 (M/s Shree Bhawani Paper Mills Ltd. Vs. State Of U.P. and Another)**.

20. Article 226 of the Constitution of India confers very wide powers on High Court to issue writs but this power is discretionary and the High Court may

refuse to exercise the discretion, if it is satisfied that the aggrieved person has adequate or suitable remedy elsewhere. It is a rule of discretion and not rule of compulsion or the rule of law. Even though, there may be an alternative remedy, yet the High Court may entertain a writ petition depending upon the facts of each case. It is neither possible nor desirable to lay down inflexible rule to be applied rigidly for entertaining a writ petition. Some exceptions to the rule of alternative remedy, as settled by the Hon'ble Supreme Court; are as under:-

(i) Where there is complete lack of jurisdiction in the officer or authority to take the action or to pass the order impugned.

(ii) Where vires of an Act, Rules, Notification or any of its provisions has been challenged.

(iii) Where an order prejudicial to the writ petitioner has been passed in violation of principles of natural justice.

(iv) Where enforcement of any fundamental right is sought by the petitioner.

(v) Where procedure required for decision has not been adopted.

(vi) Where Tax is levied without authority of law.

(vii) Where decision is an abuse of process of law.

(viii) Where palpable injustice shall be caused to the petitioner, if he is forced to adopt remedies under the statute for enforcement of any fundamental rights guaranteed under the Constitution of India.

(ix) Where a decision or policy decision has already been taken by the Government rendering the remedy of appeal to be an empty formality or futile attempt.

(x) Where there is no factual dispute but merely a pure question of law or interpretation is involved.

21. The above principles are supported by law laid down by the Hon'ble Supreme Court in **Himmatlal Harilal Mehta v. State of Madhya Pradesh**, AIR 1954 SC 403, **Collector of Customs v. Ramchand Sobhraj Wadhwani**, AIR 1961 SC 1506, **Collector Of Customs & Excise ,Cochin & Ors. vs A. S. Bava**, AIR 1968 SC 13, **Dr. Smt. Kuntesh Gupta vs Management Of Hindu Kanya Mahavidyalaya, L.K. Verma v. HMT Ltd. and anr.**, (2006) 2 SCC 269, Paras 13 and 20, **M.P. State Agro Industries Development Corpn. Ltd. & Anr. vs. Jahan Khan** (2007) 10 SCC 88 para 12, **Dhampur Sugar Mills Ltd. v. State of U.P. and others** (2007) 8 SCC 338, **BCPP Mazdoor Sangh Vs. NTPC** (2007) 14 SCC 234 (para 19), **Rajasthan State Electricity Board v. Union of India**, (2008) 5 SCC 632 (para 3), **Mumtaz Post Graduate Degree College Vs. University of Lucknow**, (2009) 2 SCC 630 (para 22 and 23), **Godrej Sara Lee Limited v. Assistant Commissioner (AA)**, (2009) 14 SCC 338. 14, **Union of India v. Mangal Textile Mills (I) (P) Ltd.**, (2010) 14 SCC 553 (paras 6,7,10 and 12), **Union of India v. Tania Construction (P) Ltd.**, (2011) 5 SCC 697, **Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill**, (2012) 2 SCC 108 (paras 79,80,81,82,86,87 and 88), **State of M.P. Vs. Sanjay Nagaich** (2013) 7 SCC 25 (para 34,35,38,39), **State of H.P. vs. Gujarat Ambuja Cement Ltd.**, (2005) 6 SCC 499 (para 11 to 19), **Star Paper Mills Ltd. Vs. State of U.P. and others**, JT (2006) 12 SC 92, **State of Tripura vs. Manoranjan Chakraborty**, (2001) 10 SCC 740 para 4; **Paradip Port Trust vs**

Sales Tax Officer and Ors. (1998) 4 SCC 90, **Feldohf Auto & Gas Industries Ltd. Vs. Union of India** (1998) 9 SCC 710; **Isha Beebi Vs. Tax Recovery Officer** (1976) 1 SCC 70 (para 5); **Whirlpool Corporation Vs. Registrar of Trademarks** (1998) 8 SCC 1; **Guruvayur Devasworn Managing Committee Vs C.K. Rajan** (2003) 7 SCC 546 (para 67,68) .

22. In the case of **Union of India & others Vs. Major General Shri Kant Sharma**, (2015) 6 SCC 773 Hon'ble Supreme Court has held that it is a settled canon of law that the High Court should not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available but it is equally settled that this canon of law is not free of exceptions. The Courts, including the Supreme Court, have taken the view that statutory remedy, if provided under a specific law, would impliedly oust the jurisdiction of the civil courts. The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India can entertain writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged.

23. In view of the settled law, as discussed above, we do not find any substance in the preliminary objection raised by learned counsel for the respondent no.2 regarding the availability of alternative remedy and, consequently, the objection raised by learned counsel for the respondent no.2 is rejected.

24. Respondent no.2 is directed to remove the electricity line in question pursuant to their own decision, expeditiously, preferably within three months from the date of production of a certified copy of this order, without demanding any amount from the petitioners or other affected persons towards removal/shifting charges of the electricity line in question. Liberty is granted to the petitioners to apply before the respondent No.3 for refund of the amount in terms of this judgment.

25. With the aforesaid directions, the writ petition is **allowed** to the extent indicated above.

(2023) 5 ILRA 1181
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2023

BEFORE
THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 10419 of 2023
 and
 Writ-C No. 23212 of 2021

M/s Jagran Prakashan Ltd. ...Petitioner
Versus
Shri Amar Kumar Singh & Ors.
...Respondents

Counsel for the Petitioner:
 Sri Chandra Bhan Gupta, Sri Sanjay Kaushal (Sr. Advocate)

Counsel for the Respondents:
 C.S.C., Sri Man Mohan Singh, Sri Nikhil Agarwal

A. Labour law – Working Journalists and Other Newspaper Employees (Condition of Service) and Miscellaneous Provisions Act, 1955 – Sections 2(d), 9, 13, 13-A, 13-C & 16 – Wages, emoluments & ors. benefits – Entitlement of Non-journalist newspaper

employees – Not extending the other benefits, which is provided to working Journalists, to the Non-journalist newspaper employees – Legality challenged – Enforceability of agreement, extent of – Held, on a conjoint reading of Section 13 and 16 of the Act, it is clear that any agreement or contract of service, inconsistent with the provisions of law will not govern the rights in between the parties – The benefits that flow from the Act, namely 'wages' as defined under the Act, can be modified by an agreement only if the same are better than the one prescribed under the Act and in no case, any agreement which prescribes the benefits of wages or emoluments less than the one notified and prescribed by the Board is barred by virtue of Section 13 of the Act. (Para 27, 28 and 29)

B. Interpretation of Statute – Rules of Harmonious Construction – Applicability – Socio beneficial legislation – It's manner of interpretation – The Act, a piece of socio beneficial legislation enacted with a view to give reasonable working conditions to the employees of the newspaper establishment, needs to be interpreted in a manner, which leads to achieve the purpose for which the Act was enacted. (Para 31 and 32)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Kasturi and Sons (Pvt.) Ltd. Vs Salivateswaran, AIR 1958 SC 507
2. Abp Pvt. Ltd. Vs U.O.I. & ors.; (2014) 3 SCC 327
3. Avishek Raja Vs Sanjay Gupta (2017) 8 SCC 435
4. Commissioner Of Income Tax Vs M/S. Hindustan Bulk Carriers; (2003) 3 SCC 57

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. After hearing the matter, this Court had called for the records of Writ-C

No.23212 of 2021. As the issue raised in both the writ petitions is common, both the writ petitions are being decided by means of this common order. For the sake of brevity, Writ-C No.10149 of 2023 is being decided as a leading case.

2. The present petition has been filed challenging the orders dated 11.10.2022, 07.11.2022 and 04.01.2023 whereby total of 57 references have been consolidated and decided.

3. The facts, in brief, are that the petitioner is a newspaper establishment as defined under section 2(d) of the Working Journalists and Other Newspaper Employees (Condition of Service) and Miscellaneous Provisions Act, 1955 (herein after referred to as 'WJ Act'). The petitioner is situated at Noida and is engaged in the business of printing of newspaper in the name and style of 'Dainik Jagran'. In addition to the said, the petitioner is also engaged in the news through electronic media and website etc.

4. It is claimed that the respondent no.1 of Writ Petition No.10419 of 2023 was appointed on the post of Dispatcher on probation basis w.e.f. 01.11.2007 with the petitioner. Similarly the other claimants in the fifty six references were also employed in a similar capacity.

5. It is argued that the Central Government in compliance of the mandate of the 'WJ Act', constituted two Wage Boards for journalist and non-journalist employees under section 9 and 13-C of the 'WJ Act'. The said wage boards gave its recommendations which were notified by the Central Government on 11.11.2011. It is argued that the recommendations so made by the Majithia Wage Board

(hereinafter referred to as 'Wage Board') were challenged along with the vires of the Act of 1955, which was decided by the Supreme Court vide order dated 07.02.2014. It is argued that in terms of the recommendations made by the Wage Board, para 20-J of the said recommendations specifically provided as under :

20(J) The revised pay scales shall become applicable to all employees with effect from the 1st of July 2010. However, if an employee within three weeks from the date of publication of the Government Notification u/s 12 of the Act enforcing these recommendations exercises his / her option for retaining his existing pay scales and existing emoluments, he/she shall be entitled to retain his / her existing scales and such emoluments".

6. It is argued that as no alternation was made by the Central Government to the recommendations of the Wage Board, as such the provision of Clause 20(J) also stood notified. It is argued that in terms of the mandate of para 20(J) of the recommendations as notified by the Central Government, the respondent no.1 along with other persons, who are covered in the awards, gave an option to retain the existing wages and existing emoluments through a voluntary undertaking. It is argued that despite giving an undertaking in terms of the clause 20(J) of the Wage Board, the respondent no.1 with a group of 198 persons filed a claim under section 17(1) of the Act before the office of the Deputy Labour Commissioner, New Delhi. As the issue of jurisdiction arose finally, in terms of the order of the High Court, Delhi passed in Writ Petition No.5606 of 2016, the matters were relegated to be agitated before the authorities at Noida and

thereafter a fresh applications under section 17(1) were filed before the Deputy Labour Commissioner, Noida on 01.02.2018 claiming an amount of Rs.36,28,430/- in respect of the respondent no.1 (Annexure no.7). Similar applications were filed by the other employees also. The petitioner filed their reply / objection to the said applications under section 17(1) on 17.04.2018 (in respect of opposite party no.1).

7. The petitioners filed their objection to the application filed by the employees and denied their liability to pay any amounts mainly on the foundation of clause 20 (j) of the Wage Board read with voluntary undertaking by the employees. It was also objected that without decision on dispute as provided under Section 17(2) no orders could be passed under Section 17.

8. It is argued that the Assistant Labour Commissioner (Noida) made a reference dated 07.08.2018 by framing two issues (Annexure no.10). In response to the summons from the Labour Court, the petitioner put in appearance and the matter was adjourned to 01.11.2018 on which date, the petitioners filed their preliminary submissions and both the parties have exchanged their pleadings. It is on record that on 26.08.2019, two issues were framed with regard to the maintainability and the jurisdiction to the following effect :

i. *Whether this Hon'ble Court has jurisdiction to adjudicate the present issues of Industrial Dispute, particularly in context of issue No.2 if so, its effect ?*

ii. *Whether the claimant had exercised his option to retain existing pay scale and existing emoluments and has given his undertaking under para 20(J) of the Majithia Wage Board Recommendations,*

notified vide notification No. SO532, dated 11.11.2011 of Central Government, as alleged. If so, its effect ?

9. It is argued that on the next date fixed in the matter i.e. 06.07.2021, all the similar matters were consolidated. The petitioner filed an application seeking recall of the order of consolidation mainly on the ground that all the claims were different on facts and could not be consolidated. It is on record that the Labour Court had earlier decided the issue of jurisdiction in a leading case being ADJ Case No.584 of 2018 on 02.03.2021 and vide order dated 16.07.2021 decided the issue no.1 framed by the Labour Court on jurisdiction and followed the order dated 02.03.2021. It is argued that in all 62 cases were consolidated and in the leading case being case no 584 of 2018, an order was passed on 01.07.2021. The petitioners challenged the order dated 02.03.2021 whereby the preliminary issue was decided in ADJ Case No.584 of 2018 by filing a Writ Petition No.23212 of 2021. This court vide order dated 17.09.2021 stayed the proceedings of Case No.584 of 2018 mainly placing the reliance on the judgment of the Supreme Court in the Case of **Kasturi and Sons (Private) Ltd. v. Salivateswaran, AIR 1958 SC 507**. As the cases were consolidated by the Assistant Labour Commissioner, the petitioner moved an application bringing on record the said order passed by this court and requested that the other cases which were consolidated with the leading case no.584 of 2018 may also be adjourned, as the issue was subjudice before the High Court. The said adjournment application was rejected with a cost of Rs.10,000/- (Ten Thousand) vide order dated 06.06.2022 and proceeded to hear the matter. The Assistant Labour Commissioner vide order dated 11.10.2022

decided all the fifty seven pending cases. Challenging the said order, the present writ petition has been filed.

10. Heard Sri Sanjay Kaushal, Senior Advocate, assisted by Sri Chandra Bhan Gupta, learned counsel for the petitioner, Sri Man Mohan Singh and Sri Nikhil Agarwal the counsel for the respondents.

11. The counsel for the petitioner argues that the order impugned in the present writ petition is bad in law for the reasons more than one. He firstly argues that in view of an order passed by this court in the leading case, the labour court has erred in deciding the cases when the preliminary issue was subjudice before the court. He next argues that the employees/respondent no.1 had given an undertaking accepting the option of retaining the existing pay-scale and existing emoluments in terms of the mandate of Clause 20(J) of the Wage Board and thus, they could not have raised a claim by filing an application under section 17 of the Act.

12. The learned Senior Advocate argues that benefits of service is much broader concept and includes within its sweep a whole array of benefits which are other than wages and emoluments, for example, the benefits of working in a particular area, etc.

13. During the course of arguments, learned Senior Advocate has taken me through the statements given by the management witnesses and cross examination to argue that it was well established that the respondents and the other similarly placed persons had voluntarily accepted for retaining the existing pay-scale, existing emoluments and benefits of service under Clause 20(J)

of the Wage Board and thus, in view of the overwhelming evidence on record, the labour court has erred in granting the relief by means of the impugned order. He further argues that after the decision in respect of the challenge before the Supreme Court, a contempt petition was filed before the Supreme Court and in the said contempt petition, a status report was forwarded, which indicated that most of the persons had accepted the existing emoluments in furtherance of Clause 20(J) of the Wage Board.

14. The counsel for the petitioner draws my attention to the option exercised by the respondents including the respondent no.1. He further argues that along with the claim made by the respondent no.1, they also claimed the benefits of interim wages in terms of the mandate of Section 13-A for the period prior to the recommendations made by the Wage Board without clarifying and quantifying the claims. He draws my attention to the mandatory provisions of the Act and in particular relies on Section 17 to argue that the claim under section 17 can be made by filing an appropriate application, however, if any dispute arise, the same is to be referred to by the labour court under section 17(2) of the Act, which is to decide, being an issue of fact, after following the process of law and after looking into the evidence and the gist of the cross examination, which according to the petitioner, has not been done in the manner in which the labour court has decided the issue. He argues that the issue with regard to undertaking in terms of mandatory clause contained in Clause 20(J) is sacrosanct and binding in between the party and once the said option has been exercised, it is not open to the employee to take recourse to Section 17 of the Act.

15. The counsel for the petitioner further argues that the labour court has erred in treating the newspaper establishment, which is specifically defined under section 2(d) of the Act, as the company and based upon the documents downloaded from the internet with regard to financial position of the company, it has treated the financial data of the company to be that of the newspaper establishment and thus, has erred in passing the order treating the newspaper establishment in category-I solely based upon the gross revenue of the company and ignoring the revenue of the newspaper establishment which is a separate and distinct from the Company. He argues that although the newspaper establishment i.e. the petitioner works under one umbrella company, there is a distinction between the company and the establishment.

16. Sri Nikhil Agarawal appearing on behalf of the respondents, on the other hand, argues that this Court while passing the order in Writ Petition had only stayed the further proceedings of ADJ Case No.584 of 2018 and thus, no error of law has been committed by the Assistant Labour Commissioner in deciding the other cases. He argues after the rejection of the adjournment application, the petitioner had the right to approach this Court for extending the scope of the stay order dated 17.09.2021 to the other cases also, which, for the reasons best known to the petitioner was not done. He argues that the issue with regard to the applicability of Clause 20(J) of the Wage Board, should be interpreted by this Court by keeping in view the provisions of the Act and specifically Section 16 of the Act. He argues that once the challenge to the award in Writ Petition filed under Article 32 of the Constitution of India was dismissed on 07.12.2014 in **Abp**

Private Limited vs. Union of Indian and others; (2014) 3 SCC 327, the scope and intent of the Act had to be made applicable. He further argues that while dismissing the writ petition, the Supreme Court itself directed that the wages as revised/determined shall be payable from 11.11.2021, the date when the recommendations of the Board were notified along with the arrears up to March 2014 in four equal instalments within a period of one year, whereas the respondents failed to do so.

17. He next argues that the reliance made in respect of the observations in the contempt petition (**Avishek Raja vs Sanjay Gupta (2017) 8 SCC 435**), can be of no avail to the petitioner as the Supreme Court itself records in paragraph no.24 that the issue is not being decided.

18. In reply to the contention of the counsel for the petitioner with regard to definition of newspaper establishment, he argues that in terms of the definition of section 2(d) and clarified under clause 11 of the Wage Board read with the schedule to the Act, the arguments of the counsel for the petitioner deserves to be rejected. He further argues that in any event, the labour court has not erred in downloading the revenue of the company as the petitioner never submitted any papers to be contrary before the labour court. He further argues that in case, the argument of the petitioner are accepted, the whole purpose of the enactment of the Act would stand frustrated. He argues that clause 20(J) of the Wage Board Act has to be read harmoniously with Section 13 and 16 of the Act, which specifically bars that in no situation, the wages of the newspaper employee could be lesser than Board recommendation as approved by the

Central Government in terms of the Section 12 of the Act. He further argues that the argument of the counsel for the petitioner in respect of the power under section 17(1) and 17(2) of the Act are liable to be rejected inasmuch as the Supreme Court itself had clarified that the non-implementation of the recommendations of the wage board have to be dealt with in terms of the mandate of Section 17 of the Act. In support of the said submissions, he places reliance on the judgment of the Madhya Pradesh High Court in Writ Petition No.18372 of 2018 .

19. In view of the submissions made and recorded above between the parties, what emerges is that the sheet anchor of the argument of the petitioner is that once Clause 20(J) of the Wage Board is in existence and has been notified as such, any claim over and above the undertaking given by the employees would not be maintainable. I propose to decide this issue prior to going into the other issues in respect of the manner of decision making, as argued by the counsel for the petitioner.

20. The 1955 Act, although now repealed by virtue of the Occupational Safety, Health and Working Conditions Code, 2020 by virtue of Section 143(2) of the Code, 2020 would continue to deal with the obligations flowing from the said Act. Brief legislative history of the WJ Act is that the said Act was enacted in the year 1955 being Act No.45 of 1955 on 20th December, 1955 with the object of providing benefits to the working journalists working with the newspaper establishment. The benefit as contemplated under the Act included the benefits as specified under Sections 4 to 13 and 13-A. Subsequently, the Act was amended by virtue of Amending Act No.70 of 1974

whereby for the first time, the Central Government amended the Act to bring within its fold the benefit that could flow in favour of the non-working journalists employee of a newspaper establishment. The amending Act did not extend all the benefits which were provided for in the 1955 Act in respect of the working journalists under the newspaper establishment and confined the benefits which could flow in favour of the non-working journalists to the extent as specified under Chapter-2A. Thus, a clear cleavage in the Act exists in between the benefits that flow in favour of the working journalists and ones that flow in favour of the non journalists employees of the newspapers establishment. A reading of Chapter-2-A clearly demonstrates that the benefits extended for the non-working journalists include the benefit of fixation or revision of rate of wages through the constitution of a Board for determining the wages in respect of the non journalists newspaper employee. The other benefits such as the ones enumerated under Sections 4, 5, 5A, 6 and 7 to 9 were not extended to the non-journalists newspaper employees.

21. Section 2-A defines the Board to mean a Board constituted under section 9 in relation to working journalist and Wage Board constituted under section 13-C in respect of employees who are working as non-journalist newspaper employees. In the present case, we are concerned with the recommendations of the Wage Board in respect of the non-journalist newspaper employees.

22. Section 2(d) defines 'newspaper establishment' as under :

"(d) "newspaper establishment" means an establishment under the control of any

person or body of persons, whether incorporated or not, for the production or publication of one or more newspapers or for conducting any news agency or syndicate; 4[**and includes newspaper establishments specified as one establishment under the Schedule.** Explanation. For the purposes of this clause,-

(a) different departments, branches and centres of newspaper establishments shall be treated as parts thereof;

(b) a printing press shall be deemed to be a newspaper establishment if the principal business thereof is to print newspaper;

The schedule to the Act further clarifies as to how the 'newspaper establishment' under the common control are to be treated as 'newspaper establishment' defined under the Act.

23. Section 2(eee) defines 'wages' as under :

(eee) "wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a newspaper employee in respect of his employment or of work done in such employment, and includes-

(i) such allowances (including dearness allowance) as the newspaper employee is for the time being entitled to;

(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food-grains or other articles;

(iii) any travelling concession,

but does not include-

(a) any bonus;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the newspaper employee under any law for the time being in force;

(c) any gratuity payable on the termination of his service.

Explanation. In this clause, the term "wages" shall also include new allowances, if any, of any description fixed from time to time."

24. Section 13-C, mandates for constitution of the Wage Board in respect of non-journalist newspaper employees by the Central Government comprising of the persons specified under section 13-C. By virtue of Section 13-D, the provisions of Section 10 to Section 13-A have been made applicable to and in relation to, the Board constituted under section 13-C. Section 12 confers the power on the Central Government to enforce the recommendations of a Wage Board constituted under section 13-C of the Act. Section 13, of the Act which is applicable to the non-journalist newspaper employees by virtue of Section 13-D, provides as under :

13. Working journalists entitled to wages at rates not less than those specified in the order - On the coming into operation of an order of the Central Government under Section 12, every working journalist **shall be entitled to be paid by his employer wages at the rate which shall in no case be less than the rate of wages specified in the order.**

25. Section 13-A, which is also applicable to the non-journalist newspaper employees confers the power on the Government to fix the interim wages till the

recommendations of the Wage Board are notified under section 12 of the Act.

26. It is essential to note that Section 16 of the Act further clarifies the situation in respect of laws and agreements inconsistent with this Act. Section 16 is quoted herein below :

16. Effect of laws and agreements inconsistent with this Act-(1) *The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of this Act:*

Provided that where under any such award, agreement, contract of service or otherwise, a newspaper employee is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act the newspaper employee shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act.

(2) Nothing contained in this Act shall be construed to preclude any newspaper employee from entering into an agreement with an employer for granting him rights or privileges in respect of any matter which are more favourable to him than those to which he would be entitled under this Act.

27. It is essential to note as to what benefits flow in favour of non-journalist newspaper employees, by virtue of the Act, they are 'wages' alone as Chapter II-A inserted by amending Act no.60 of 1974 only gives the protection of wages, the other benefits which flow from section 4, 5, 6 and 7 in favour of working journalists

have not been extended to non-journalist newspaper employees.

28. On a conjoint reading of Section 13 and 16 of the Act, it is clear that any agreement or contract of service, inconsistent with the provisions of law will not govern the rights in between the parties. In fact, the proviso to Section 16(1) specifically clarifies that the terms and conditions which are more favourable, would continue to govern the entitlement of the employees of the newspaper establishment. The intent is further clarified by virtue of Section 16(2) which confers a power on the employee to enter into an agreement for granting him rights or privileges in respect of any matter which are more favourable to the employee than the one as prescribed under the Act.

29. On a harmonious consideration of the two provisions of Section 13 and 16 of the Act, in respect of non journalist employees, the inescapable conclusion is that the benefits that flow from the Act, namely 'wages' as defined under the Act, can be modified by an agreement only if the same are better than the one prescribed under the Act and in no case, any agreement which prescribes the benefits of wages or emoluments less than the one notified and prescribed by the Board is barred by virtue of Section 13 of the Act. In fact the provisions of the Majithia Wage Board itself clarified the meaning of a word 'existing emoluments' in the explanation to Clause 20, which reads as under :

j. The revised pay-scales shall become applicable to all employees with effect from 1st July 2010. However, if an employee within three weeks from the date of publication of Government Notification under Section 12 of the Act enforcing these

recommendations exercises his option for retaining his existing pay scale and "existing emoluments", he shall be entitled to retain his existing scale and such emoluments.

Explanation :

(1) The "existing emoluments of an employee shall mean his basic pay, variable dearness allowance at the All India average Consumer Price Index Number for Industrial Workers (Base 2001-100) at 167 during the period July 2009 to June 2010, convertible to CPI-IW (Base 1982-100) by the conversion factor of 4.53, and interim relief of 30% of basic pay sanctioned vide notifications 5.0, No. 2524 (E) and 2525 (E) dated 25 August 2008 as applicable for working journalists and non-journalists newspaper employee respectively.

(2) The additional emoluments" of an employee shall mean emoluments other than the "existing emoluments" described in Clause (1) granted by newspaper establishments, as a result of collective bargaining, agreement or award, as increase in basic wage, dearness allowance or interim relief.

(3) The "additional allowances" of an employee shall mean any monthly payments, by whatever name called, not related to a specific purpose nor agreed to be adjusted against any revision of pay or dearness allowance."

30. The argument of the counsel for the petitioner is that once the respondents have accepted the wages, emoluments and benefits as were existing by giving an undertaking, they are precluded from raising a claim under section 17 of the Act, merits rejection for the sole reason that the Clause 20(J) of the Wage Board has to be

read in context with the explanation under Clause 20(J) read with Section 13 and Section 16 of the Act.

31. It is well settled that the Act , a piece of socio beneficial legislation enacted with a view to give reasonable working conditions to the employees of the newspaper establishment, needs to be interpreted in a manner, which leads to achieve the purpose for which the Act was enacted. The provisions of Clause 20(J) read with Section 13 and 16 have to be interpreted harmoniously to ensure that none of the provisions are rendered otiose.

32. The rule of harmonious construction, considered by the Supreme Court in the leading case of **Commissioner Of Income Tax vs M/S. Hindustan Bulk Carriers; (2003) 3 SCC 57** laid down the principles as under :

14. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat* i.e. a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties.

15. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable.

16. The courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used.

17. If the choice is between two interpretations, the narrower of which

would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

18. The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.

19. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with other parts of the law and the setting in which the clause to be interpreted occurs. (See *R.S. Raghunath v. State of Karnataka* [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81] .) Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty of the court to avoid a head-on clash between two sections of the same Act.

20. Whenever it is possible to do so, it must be done to construe the provisions which appear to conflict so that they harmonise. It should not be lightly assumed that Parliament had given with one hand what it took away with the other.

21. The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus a construction that reduces one of the provisions to a "useless lumber" or "dead letter" is not a harmonised construction. To harmonise is not to destroy."

33. The argument of the counsel for the petitioner in the light of the provisions of Clause 20(J), if accepted, would render the entire Act inapplicable and if the said argument is accepted, the same would be in clear violation of the mandate of Section 12, 13, 13-C, 13-D and Section 16 of the Act.

34. In the present case the grievances raised under Section 17 by the employees could be referred for adjudication under Section 17(2) only in respect of disputes of quantum of benefits as prescribed by the wage board. The defence of the petitioner that the undertaking given by the employees would override the recommendations of wage board could be entertained only if it could be demonstrated *prima facie* that the 'wages and emoluments' (alone) being paid in terms of undertaking, to the employees, were more than the one prescribed and payable under the notified recommendations of the wage board. No such defence appears to be taken by the Petitioners.

35. It is further inconceivable as to why the employee would agitate for wages and emoluments by instituting proceedings under Section 17 if he was getting more amounts than what was prescribed by the wage board, it is equally inconceivable as to why any news paper establishment would contest such proceedings if they felt that the wages and emoluments paid to an employee under an agreement are more than the recommendations of the board.

36. The only issue of dispute in between the parties that is conceivable is that if the category of the newspaper establishment as prescribed by the wage board, if wrongly determined, can lead to adverse financial effect. In the present case

the definition of news paper establishment under the Act read with the explanation and schedule to the Act leaves no room for interpretation that it is the Petitioner Company which is the 'newspaper establishment' for the purposes of this matter. As there is no dispute that the revenues of the petitioner company are more than rupees one thousand crores, the petitioner as 'newspaper establishment' would fall under Clause-I of the classification criteria provided under Clause 6 of the Wage Board.

37. In view of the interpretation of the provisions as recorded above and the facts as narrated, I do not find any error in the order passed by the authority being the order dated 04.01.2023, both the writ petitions lack merit and are *dismissed*. Further steps shall be taken in respect of claims which is subject matter in W.P. No.23212 of 2021 expeditiously.

38. The cost of litigation as incurred by the respondent, to be paid by the petitioner is assessed at Rs.25,000/- (Twenty Five Thousand), which shall be paid by the petitioner company to the respondent no.1 of Writ-C No.10419 of 2023.

(2023) 5 ILRA 1191
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.04.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ-C No. 30088 of 2022

Smt. Sabita Sharma & Ors. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Raj Narayan Tiwari

Counsel for the Respondents:
 C.S.C., Sri Alok Mishra, Sri Kaushlendra Nath Singh

A. Acquisition Law – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Section 24 (1) (a) – Land Acquisition Act, 1894 – Section 11 – Compensation – Date of determination of market value – Whether it would be the date of enforcement of the Act of 2013, i.e. 1.1.2014 or the date of publication of the notification u/s 4(1) of the Act, 1894 – Making of award – Relevance – Held, when no award has been made u/s 11 of the Act, 1894, all the provisions of the RFCTLARR Act, 2013 relating to the determination of compensation shall apply – In a case where award u/s 11 had been made before commencement of the RFCTLARR Act, 2013, all subsequent proceedings shall continue under the provisions of the Act, 1894. (Para 16 and 17)

B. Acquisition Law – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Section 113 – Award – Computation of compensation – Date of determination of market value – Direction issued by Central Govt., how far binding on St. Govt. – Held, directions issued by the Central Government being in exercise of the power u/s 113 of the Act, 2013 have statutory force and are binding on all the St. Government – In view of the statutory character of the D.O. letter dated 26th October, 2015, it is evident that the reference date for calculation of market value u/s 24(1)(a) should be 01.01.2014 – High Court issued direction to re-determine the market value of land as on 01.01.2024 by making fresh award. (Para 21, 22, 25 and 29)

Writ petition allowed. (E-1)

List of Cases cited:

1. Indore Development Authority Vs Manoharlal & ors.; (2020) 8 SCC 129
2. Writ C No. 44731 of 2016; Hori Lal Vs St. of U.P. & ors. decided on 09.03.2017
3. Writ C No. 15804 of 2016; Prahlad Singh & ors. Vs St. of U.P. & ors.
4. Writ C No. 44720 of 2016; Krishna Autar & ors. Vs St. of U.P & ors.
5. Writ C No. 60276 of 2015; Ishan International Educational Society Thru' Director Vs St. of U.P. & ors. decided on 09.05.2017
6. Special Leave to Appeal (C) No. 17660 of 2017; Ghaziabad Development Authority Vs Ishan International Educational Society & ors. decided on 19.7.2017
7. Special Leave Petition (Civil) Diary No. 26271 of 2017; Moradabad Development Authority Vs Krishna Autar & ors. decided on 14.11.2017
8. Civil Appeal No. 1462 of 2019; Hori Lal Vs St. of U.P. & ors. decided on 05.02.2019
9. IA No. 4 of 2016 in Civil Appeal No. 4821 of 2016; Aligarh Development Authority Vs Megh Singh & ors. decided on 12.02.2019

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

1. Heard Sri Raj Narayan Tiwari learned counsel for petitioners and Sri Ambarish Shukla learned Additional Chief Standing Counsel appearing for the State-respondent. Shri Alok Mishra, learned Advocate has received notices on behalf of the respondent-NOIDA.

2. By means of the present writ petition, the petitioners herein, who are heirs and legal representatives of Raghunath Rai Sharma son of Sri Munshiram Sharma, resident of 85 Model New Colony, Filmistan, New Delhi, the

original tenure holder of Khasra No. 39M. area 0-14-0 Bigha situated in revenue Village Gejha Tilpatabad, Pargana and Tehsil Dadari, District Gautam Budh Nagar, the acquired land under the Land Acquisition Act, 1894 vide notifications dated 13.1.1995 and 21.9.1995 under Sections 4 and 6 of the Land Acquisition Act, 1894; respectively, seek the following relief:-

*"(i) a writ, order or direction in the nature of **MANDAMUS** commanding and directing the respondents authorities to make payment of compensation award for the acquired land in the year 1995 bearing Khasra No. 39M Area-0-14-0 bigha situated in Village Gejha Tilpatabad, Pargana, Tehsil Dadari, District Gautam Budh Nagar belonging to petitioner's ancestors namely Raghunath Rai Sharma as per the prevailing market rate in the light of Section - 24 (1) (a) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 within stipulated period otherwise to vacate the land in question forthwith along with suitable damages compensation.*

*(ii) a writ, order or direction in the nature of **MANDAMUS** commanding and directing the respondent no. 2 to consider and decide the pending representation dated 18.2.2021 within stipulated period.*

(iii) Issue any other writ, order or direction, which this Hon'ble Court may deem, just and proper in the circumstances of the case.

(iv) Issue the award cost of this petition petitioner."

3. The assertions in the writ petition are that the symbolic possession of an area 44.312 acres of the acquired land was taken on 6.2.1998, however, possession of the

remaining area of 76.848 acres could not be taken on account of the pendency of the writ petitions filed by one Maharshi Ved Vigyan Vidyapeeth and other tenure holders wherein interim order was granted by this Court. The writ petitions were dismissed on 7.4.2004 and Special Leave Petition Nos. 21130/2004 and 21143/2004 were dismissed on 21.4.2006. After dismissal of the Special Leave Petitions, the possession memo of 76.848 acres of acquired land was prepared on 31.5.2006, whereunder the possession of Khasra No. 39 area 2-9-0 Bigha had been taken. A copy of the possession memo is appended as Annexure "4" to the writ petition.

4. It is stated in the writ petition that Khasra No. 39 area 1-15-0 Bigha (0.4430 hectares) was recorded in the name of Maharshi Ved Vigyan Vidyapeeth and Khasra No. 39M. area 0-14-0 Bigha was recorded in the name of Raghunath Rai Sharma, the predecessor-in-interest of the petitioners herein. The copy of the revenue record of Khasra No. 39, being in the name of Maharshi Ved Vigyan Vidyapeeth is appended as Annexure "5" to the writ petition. However, the record of entry of Khasra No. 39M. in the name of predecessor-in-interest of the petitioners namely Raghunath Rai Sharma has not been appended with the writ petition.

5. Be that as it may, the dispute raised in the present writ petition is with regard to the determination of compensation of Khasra No. 39M. area 0-14-0, i.e. 0.1771 hectares.

6. On the presentation of the writ petition, on the written instructions provided by the learned Standing Counsel dated 17.12.2022 under the signature of the Additional District Magistrate (Land

Acquisition), Gautam Budh Nagar addressed to the learned Chief Standing Counsel, High Court, Allahabad, taking note of the stand of the respondent-State therein, the order dated 10.1.2023 had been passed by this Court. The contents of the written instructions has been extracted in the order dated 10.1.2023, which reads as under:-

"In the written instructions supplied by the Additional District Magistrate (Land Acquisition), Gautam Buddh Nagar, it is indicated that total area 2-9-0 Bigha of Khasra no. 39 was acquired by acquisition notifications dated 13.1.1995 and 21.9.1995 under Sections 4 and 6 of the Land Acquisition Act, 1894; respectively. It is sought to be submitted that the possession of the acquired land has been handed over to NOIDA on 31.5.2006. At the time of acquisition, over the area 1-15-0 of Khasra No. 39, Khata No. 306, the name of Maharishi Ved Vigyan Peeth Maharishi Ghaziabad was recorded in the revenue records whereas over the remaining area 0-14-0 of Khasra No. 39, Khata No.372 name of Raghunath Rai Sharma son of Munshi Ram Sharma, resident of 85 Model Nai Basti Philmistan, New Delhi was recorded. It is further recorded that compensation has not been received by the landowners. The award under the 'Karar Niyamawali' has been declared for those landowners who have given their consent. However, for the remaining area, there is no award. The contention is that proceeding for declaration of award to pay compensation under Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013(in short "Act, 2013") is under way."

It may be noted that in the written instructions submitted on behalf the State,

it was admitted that the name of Sri Raghunath Rai Sharma, the predecessor-in-interest of the petitioners herein was recorded over Khasra No. 39 area 0-14-0. It was also admitted that the tenure holders of Gata No. 39 in two Khata Nos. 306 and 372 did not receive compensation. It was also stated that the possession of the acquired land was handed over to the acquiring body namely NOIDA on 31.5.2006. The award for the acquired land under "Karar Niyamawali" had been passed, but for the remaining area, no award had been declared and the proceedings for declaration of the award under Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (in short "the RFCTLARR Act, 2013") was underway.

Pursuant to the directions issued by this Court in the order dated 10.1.2023, an affidavit dated 6.2.2023 has been filed wherein a copy of the award dated 4.2.2023 declared by the Deputy Collector, Land Acquisition Department/the Additional District Magistrate (Land Acquisition), Gautam Budh Nagar under Section 11(1) of the Land Acquisition Act, 1894 has been placed on record. The said award dated 4.2.2023 has been made with respect to Gata No. 39M. area 0-14-0 bigha or 0.1771 hectares, purportedly under the order dated 10.1.2023 passed by this Court.

7. It may further be noted that the possession memo dated 31.5.2006 appended as Annexure '4' to the writ petition, noted above, shows that the possession of an area 2-9-0 of Gata No. 39, shown as Park, had been handed over to NOIDA on 31.5.2006. It is noted in the possession memo itself that the acquisition of total area 121.16 acres of revenue Village Gejha Tilpatabad, Pargana and Tehsil Dadari, District Gautam Budh Nagar

had been made by the acquisition notifications mentioned above. The possession of 44.312 acres was handed over to the Development Authority on 6.2.1998 and for the remaining area of 76.848 acres, the proceedings for delivery of possession could not be drawn on account of the pendency of the writ petitions, noted therein. After decision of this Court and the Apex Court dated 7.4.2004 and 21.4.2006; respectively, in the aforesaid challenge, the possession memo of 76.848 acres was drawn and possession was handed over to the Development Authority on 31.5.2006.

8. It is an admitted fact of the matter that Khasra No. 39 was recorded in the name of two persons namely Maharshi Ved Vigyan Vidyapeeth on an area of 1-15-0 Bigha (0.4430 hectares) and Khasra No. 39M. area 0-14-0 bigha, 0.1771 hectares in the name of Raghunath Rai Sharma, the predecessor-in-interest of the petitioners. It is, thus, evident that the total area of plot no. 39, which comes to 2-9-0, was handed over to the Development Authority after the decision of this Court in the challenge to the acquisition proceedings. It is also an admitted fact of the matter that award for the remaining area, compensation of which was not accepted by the tenure holders had not been declared and the only award under the "Karar Niyamawali" of the acquired land had been declared.

The award dated 4.2.2023 declared under the order dated 10.1.2023 of Khasra No. 39 area 0-14-0 bigha (0.1771 hectares) further indicates that for determination of the market value of the plot in question, the cut-off date has been determined as the date of Section 4(1) notification under the Land Acquisition Act, 1894, in view of a Government Order dated 1st June, 2015,

reference of which finds place in the award itself. The copy of the Government Order dated 1st June, 2015 has been provided by the learned counsel for the petitioners in the compilation supplied by them.

9. A perusal thereof indicates that it was issued with reference to a communication dated 18th March, 2015 of the Commissioner and Director, Land Acquisition Directorate, Board of Revenue, U.P., Lucknow, seeking clarification with reference to the determination of cut-off date for determination of market value, in such matters where acquisition notification under Section 4(1) of the Act, 1894 had been issued prior to 1.1.2014. It was clarified therein that the cut-off date for determination of market value in such matters would be treated as the date of publication of the notification under Section 4(1), under the Act, 1894.

10. Learned counsel for the petitioners, however, relied on a notification dated 26th October, 2015 issued by the Government of India, Department of Land Resources, Ministry of Rural Development under Section 113 of the RFCTLARR Act, 2013.

11. The submission is that the said notification clarifies doubt and settles the dispute relating to the reference date for calculation of market value under Section 24(1)(a) of the RFCTLARR Act, 2013 and provides that 1.1.2014 shall be the date for calculation of market value in view of Section 24(1)(a) of the RFCTLARR Act, 2013. The dispute, thus, pertains to the cut-off date under the RFCTLARR Act, 2013 for applying the provisions of Section 24(1)(a) of the RFCTLARR Act, 2013.

12. In the rival submissions, both the counsels for the petitioners and the State

Government and NOIDA, relied upon the above noted notifications issued by the Central Government and the State of U.P., to assert their stand with regard to the date of determination of date for computation of market value in cases where the award is made after enforcement of the RFCTLARR Act, 2013 though proceedings for acquisition had been commenced under the Land Acquisition Act, 1894.

13. To appreciate the arguments of the learned counsel for the parties, we are first required to go through the object and purpose of the RFCTLARR Act, 2013 and the relevant provisions thereof.

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 had been enacted with the objective to provide fair compensation to those whose land is taken away, to bring transparency to the process of acquisition of land for infrastructural projects, to set up factories or buildings and to assure rehabilitation of those affected. In the statement of objects and reasons of the RFCTLARR Act, 2013, it was noted that the provisions of the Land Acquisition Act, 1894, relating to acquisition of land for public purpose and also for companies and for determining the amount of compensation to be made on account of such acquisition, have been found to be inadequate in addressing certain issues relating to the exercise of the statutory powers of the State for involuntary acquisition of private land and property, the issues of rehabilitation and resettlement to the affected persons and, their families. In order to provide a unified legislation dealing with acquisition of land, to provide for just and fair compensation and to make adequate provisions for rehabilitation and resettlement mechanism

for the affected persons and their families, the bill for repealing and replacing the Land Acquisition Act, 1894, to seek the above objectives, had been introduced in the Lok Sabha on 7th September, 2011 and received assent of the President in 2013. The RFCTLARR Act, 2013 was passed by both the Houses of Parliament, received assent of President on 27th September, 2013 and has been brought into force on 1.1.2014. Section 24 of the RFCTLARR Act, 2013 relevant for our purposes is noted hereunder:-

"Section 24. Land acquisition process under Act No. 1 of 1984 shall be deemed to have lapsed in certain cases.

(1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894,--

(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

Section 113 and Section 114 of the RFCTLARR Act, 2013 are also relevant to be noted hereunder:-

"Section 113. Power to remove difficulties.

(1) If any difficulty arises in giving effect to the provisions of this Part, the Central Government may, by order, make such provisions or give such directions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for the removal of the difficulty:

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

Section 114. Repeal and saving.

(1) The Land Acquisition Act, 1894 (1 of 1894) is hereby repealed.

(2) Save as otherwise provided in this Act the repeal under sub-section (1) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeals."

A conjoint reading of the above noted provisions indicates that with the coming into force of the RFCTLARR Act, 2013 w.e.f. 1.1.2014, the Land Acquisition Act, 1894 stood repealed.

14. Section 24(1), however, deals with certain situations which arose on

account of repeal of the Land Acquisition Act, 1894.

15. It starts with a non-obstante clause and sub-section (1) of Section 24 provides certain contingencies in which the land acquisition proceedings initiated under the Land Acquisition Act, 1894 were to be continued. Clause (a) of sub-section (1) deals with the contingencies where award under Section 11 of the Act, 1894 had not been made in the proceedings initiated under the Act, 1894 and states that all provisions of the RFCTLARR Act, 2013 relating to the determination of compensation shall apply.

We may further note that clause (b) of sub-section (1) of Section 24 saves the entire proceedings of acquisition of land initiated under the Land Acquisition Act, 1894 where award under Section 11 of the said Act had already been made. It is provided therein that the such proceedings shall continue under the Land Acquisition Act, 1894, as if the said Act has not been repealed.

Sub-section (2) of Section 24 deals with the situation where neither the compensation had been paid nor the possession of the acquired land under 1894 Act had been taken. The interpretation of sub-section (2) of Section 24 has been made by the Apex Court in the case of **Indore Development Authority vs. Manoharlal and others**¹ and the dispute pertaining to the interpretation of the said provision, from various angles has been set at rest. For the issues raised herein, the provisions of sub-section (1)(a) of Section 24 are relevant.

16. The question is as to where no award has been made under Section 11 of the Land Acquisition Act, 1894, while

making an award by applying the provisions of the RFCTLARR Act, 2013 relating to the determination of compensation, what would be the date for determination of market value, whether it would be the date of enforcement of the RFCTLARR Act, 2013, i.e. 1.1.2014 or the date of publication of the notification under Section 4(1) of the Act, 1894 as provided in Section 23(1) of the Act, 1894.

17. From the provisions of Section 24 read with section 114 of the RFCTLARR Act, 2013, it can be discerned that the provisions pertaining to determination of compensation under Section 23 of the Land Acquisition Act, 1894, providing for determination of amount of compensation to be awarded for land acquired under the Act, 1894, stood repealed. The provision as contained in sub-section (1) of Section 23, for determination of the market value of the land at the date of publication of the notification under Section 4(1) of the Act, 1894, therefore, cannot be applied. The only saving to the land acquisition proceedings initiated under the Land Acquisition Act, 1894 is under clauses (a) and (b) of sub-section (1) of Section 24 of 2013 Act. The general application of sub-section (6) of the General Clauses Act, 1894 with regard to the effect of repeals, as provided in sub-section (2) of Section 114 of the RFCTLARR Act, 2013 is not applicable to the proceedings for determination of compensation in the land acquisition proceedings initiated under the Land Acquisition Act, 1894.

The result is that as per clause (a) of sub-section (1) of Section 24, when no award has been made under Section 11 of the Act, 1894, all the provisions of the RFCTLARR Act, 2013 relating to the determination of compensation shall apply.

In a case where award under Section 11 had been made before commencement of the RFCTLARR Act, 2013, all subsequent proceedings shall continue under the provisions of the Act, 1894 as if the Act has not been repealed.

18. Now the question remains as to what would be the procedure applicable for determination of compensation under the provisions of the RFCTLARR Act, 2013.

19. We may note the provisions of Section 26 of the RFCTLARR Act, 2013, which provides the criteria to be adopted by the Collector in assessing and determining the market value of the land, the relevant clauses (a), (b) and (c) and the proviso to sub-section (1) of Section 26 are extracted hereunder:-

"26. Determination of market value of land by Collector.-

(1) The Collector shall adopt the following criteria in assessing and determining the market value of the land, namely:--

(a) the market value, if any, specified in the Indian Stamp Act, 1899 (2 of 1899) for the registration of sale deeds or agreements to sell, as the case may be, in the area, where the land is situated; or

(b) the average sale price for similar type of land situated in the nearest village or nearest vicinity area; or

(c) consented amount of compensation as agreed upon under sub-section (2) of section 2 in case of acquisition of lands for private companies or for public private partnership projects, whichever is higher:

Provided that the date for determination of market value shall be the date on which the notification has been issued under section 11."

As per the proviso to sub-section (1), the date of determination of market value for acquisitions under the RFCTLARR Act, 2013 is the date on which the notification has been issued under Section 11 of the RFCTLARR Act, 2013, which provides for publication of preliminary notification, notifying the intention of the appropriate Government to acquire land in any area for any public purpose. Section 11 of 2013 Act is *pari materia* to Section 4 of the Act, 1894 in the matter of issuance of declaration of preliminary notification of proposal of acquisition. Thus, in a case where acquisition is made after enforcement of the RFCTLARR Act, 2013, i.e. on or after 1.1.2014, there cannot be a dispute about the date of determination of market value for the purposes of computation of compensation. However, there remained an ambiguity with regard to the transitional phase on the applicability of Section 24(1)(a) of the RFCTLARR Act, 2013.

20. On the ambiguity of the date of determination of market value in the land acquisition proceedings initiated under the Land Acquisition Act, 1894, where no award had been made under Section 11 of the Act, 1894 before enforcement of the RFCTLARR Act, 2013, the Central Government had issued a notification dated 26th October, 2015, on the similar issue raised by the Government of Maharashtra. In the D.O. No.13013/01/2014-LRD(Pt), dated 26.10.2015 issued by the Joint Secretary (LR), Government of India, Department of Land Resources, Ministry of Rural Development, copy of which was forwarded to all Principal Secretaries of the States/UTs for information and necessary action, the issues raised by the Government of Maharashtra for calculation of market value under Section 24(1)(a) has been resolved as under:-

S.No.	Issues raised by the Government of Maharashtra	Opinion of the DoLR			htra Governm ent.
1.	While determining the amount of compensation under Section 27 of the RFCTLA R&R Act, 2013 of Hon'ble Supreme Court's orders are followed or cost of assets have to be separately computed in addition to cost of land?	Under Section 26 of the RFCTLA R&R Act, 2013 market value of land is determined while under section 27, value of all assets attached to the land is added to the market value to determine the amount of compensation. Thus, it is not contradictory to the Supreme Court's orders quoted in the letter of Maharas	2.	Under Section 24(1), the reference date for calculating 12% interest should be date of preliminary notification under Land Acquisition Act, 1894.	Under section 24(1), the reference date for calculating 12% interest should be date of preliminary notification under Land Acquisition Act, 1894. Department of Land Resources agrees to this, as there is no other reference date, that can be treated as equivalent to date of SIA notification under the RFCTLA R&R Act, 2013.
			3.	For calculation of market value, under	<u>The reference</u>

	Section 24(1)(a), reference date should be 01.01.2014 (commencement of RFCTLA R&R Act, 2013) or date of issuing preliminary notification under Land Acquisition Act, 1894?	<u>date for calculation of market value, under Section 24(1)(a) should be 01.01.2014 (commencement of RFCTLA R&R Act, 2013), as the Section reads "in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act</u>			<u>relating to the determination of compensation shall apply. Under section 26 reference date is date of preliminary notification, but section 24 is a special case of application of the Act in retrospective cases, and a later date of determination of market value is suggested (i.e. 01.01.2014) with a view to ensure that the land owners/farmers/affected families</u>

		<u>get enhanced compensation under the provisions of the RFCTLA R&R Act, 2013 (as also recommended by Standing Committee in its 31st report).</u>

21. From a perusal of the D.O. letter dated 26th October, 2015, issued by the concerned Ministry of the Central Government forwarded to the Principal Secretary of the State of U.P., for information and necessary action, it is evident that the said direction was made in order to remove difficulty arose in giving effect to the provisions of the RFCTLARR Act, 2013, in the matter of calculation of market value under Section 24(1)(a), in the land acquisition proceedings initiated under the Act, 1894. The said directions issued by the Central Government being in exercise of the power under Section 113 of the RFCTLARR Act, 2013 have statutory force and are binding on all the State Government being in view of the power conferred on the Central Government to make such provision or give such directions which are not inconsistent with the provisions of the RFCTLARR Act, 2013, for removal of any difficulty arising in giving effect to the provisions of the RFCTLARR Act, 2013.

22. In view of the statutory character of the D.O. letter dated 26th October, 2015, it is evident that the reference date for calculation of market value under Section 24(1)(a) should be 1.1.2014, the date of commencement of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The said D.O. letter dated further clarifies that under Section 26 of the RFCTLARR Act, 2013 though the reference date is the date of preliminary notification but Section 24 is the special case of application of the Act, 2013 in retrospective cases and a later date of determination of market value, i.e. 1.1.2014 is suggested with a view to ensure that the land owners/farmers/affected families get enhanced compensation under the provisions of the RFCTLARR Act, 2013, in terms of the recommendation of the Standing Committee in its 31st report.

(emphasis supplied)

23. In view of the directions contained in the D.O. letter dated 26th October, 2015 issued by the concerned Ministry of Central Government, the reliance placed on the notification dated 1st June, 2015 issued by the Government of U.P. is wholly misplaced.

24. In any case, the said notification of the State Government lost its efficacy with the clarification given by the Central Government by issuing directions under Section 113 of the RFCTLARR Act, 2013 by means of D.O. letter dated 26th October, 2015. This aspect of the matter has not been looked into while making computation of compensation by the Collector in the award made on 4.2.2023, wherein the date of determination of market value had been treated as 13.1.1995, the date of publication of the notification

under Section 4/17 of the Act, 1894, in accordance with the provisions of Section 11 of the Act, 1894 read with Section 26(1) of the RFCTLARR Act, 2013. The direction issued by the Central Government under Section 113 of the RFCTLARR Act, 2013 has been completely ignored.

25. We may further note the decisions of the Division Benches of this Court in **Hori Lal vs. State of U.P. and 3 others**²; **Prahlad Singh and 6 others vs. State of U.P. and 2 others**³; **Krishna Autar and 5 others vs. State of U.P. and 3 others**⁴ and **Ishan International Educational Society Thru' Director vs. State of U.P. & 3 others**⁵ which have taken the same view by considering the directions contained in D.O. letter dated 26th October, 2015 under Section 113 of 2013 Act, noted above, in holding that the date of determination of the market value of the land in the matters falling under Section 24(1)(a) shall be treated as 1.1.2014 in terms of the directions issued by the Central Government. The Special Land Acquisition Officer had been directed therein to redetermine the market value of the land in question as on 1.1.2014 by making fresh award.

26. The **Special Leave to Appeal (C) No(s). 17660 of 2017 (Ghaziabad Development Authority vs. Ishan International Educational Society & others)** challenging the judgment and order dated 9.5.2017 in **Ishan International Educational Society** (supra) has been dismissed on 19.7.2017 by the Apex Court holding that there was no legal and valid ground for interference. Similar is the position with regard to the decision of this Court in the case of **Krishna Autar** (supra) where **Special Leave Petition (Civil) Diary No(s). 26271 of 2017**

(Moradabad Development Authority vs. Krishna Autar & Ors) had been dismissed on 14.11.2017. The review petition filed in **Special Leave Petition (Civil) No. 17660 of 2017 [in the matter of Ishan International Educational Society** (supra)] had also been dismissed on 5th December, 2017.

In **Hori Lal** (supra), the issue raised before the Division Bench of this Court was about the date of determination of compensation in the land acquisition proceedings initiated under the Act, 1894. It was argued on behalf of the writ petitioners therein that the date for determination of the market value of the land should be the date on which awards were made by the Special Land Acquisition Officer in the year 2015-16 and it cannot be 1.1.2014, which was turned down by the Division Bench relying on the D.O. letter dated 26.10.2015 issued under Section 113 of the RFCTLARR Act, 2013 and the provisions of 2013 Act in the matter of determination of compensation. The judgment and order dated 9.3.2017 of the Division Bench in **Hori Lal** (supra) was challenged in **Special Leave Petition (C) No. 14820 of 2017** by the writ petitioner therein. On conversion into **Civil Appeal No. 1462 of 2019**, with the grant of leave, the appeal had been dismissed by the Apex Court vide judgment and order dated 5th February, 2019.

27. A perusal of the judgment of the Apex Court in **Civil Appeal No. 1462 of 2019 (Hori Lal vs. State of U.P. and others)**, makes it evident that the challenge before the Apex Court was with regard to the date for determining the compensation and it was contended that it should be the date on which the Land Acquisition Officer had passed the award. The Apex Court has

rejected the said arguments in the following manner:-

"20. We, therefore, find no good ground to accept the submission of the learned counsel for the appellant when he contended that the date for determining the compensation should be the date on which the Land Acquisition Officer passed the award. This argument does not have any basis and is, therefore, not acceptable for the simple reason that such date is not provided either in the old Act, 1894 or in the Act, 2013.

21. Indeed, how the compensation is required to be determined and with reference to what date, is provided under the Act and admittedly the date suggested by the learned counsel is not the date prescribed either in the old Act or the new Act. This submission has, therefore, no merit and deserves to be rejected. It is accordingly rejected.

22. We, therefore, find no good ground to take a different view than what was taken by the High Court in the impugned order"

The view taken by the Division Bench in **Hori Lal (supra)** with respect to the date of determination of compensation being 1.1.2014, in land acquisition proceedings initiated under the Act, 1894 after commencement of the RFCTLARR Act, 2013 has, thus, been affirmed.

28. In another decision dated 12th February, 2019, in **Civil Appeal No. 4821 of 2016**, in **Interlocutory Application No. 4 of 2016 (Aligarh Development Authority vs. Megh Singh and others)**, the Apex Court has held that the date of determination of market value should be recorded as 1.1.2014 in view of the Central Government orders under Section 113 of the Act. The above noted decision in the

case of **Hori Lal (supra)**, the judgment of this Court dated 9.5.2017 in **Ishan International Educational Society (supra)** have been relied upon to issue direction to the Special Land Acquisition Officer, Aligarh therein to redetermine the compensation as per the market value as on 1.1.2014, by setting aside the award dated 5.11.2016 therein.

Various other orders of the Apex Court in the review applications filed in the above noted cases have been placed before us in the compilation supplied by the counsel for the petitioners to assert that the issue relating to determination of market value as on 1.1.2014 in a case falling under Section 24(1)(a) of the RFCTLARR Act, 2013 is no longer res integra.

29. In view of the above discussion, the award dated 4.2.2023 passed by the Additional District Magistrate (Land Acquisition), Gautam Budh Nagar is found to be contrary to the legal position stated above and, hence, it cannot be given effect to. The concerned officer namely the Additional District Magistrate (Land Acquisition), Gautam Budh Nagar is directed to make a fresh award by determining the market value of the land in Gata No. 39M. area 0-14-0 or 0.1771 hectares, by considering the market value of the land in question as on 1.1.2014. It would be open for the petitioners herein/land owners to place the exemplars before the Additional District Magistrate (Land Acquisition), Gautam Budh Nagar/Special Land Acquisition Officer to determine the market value. The officer concerned shall be under obligation to determine just and fair market value of the land in question and compute compensation by including all elements of compensation, strictly in accordance with the provisions of

determination of compensation under the RFCTLARR Act, 2013, as expeditiously as possible, preferably, within a period of six weeks from the date of receipt of copy of this order.

The amount of compensation determined under the award shall be released by the competent authority within a further period of two weeks, thereafter, in favour of the tenure holders/persons interested after due determination of their share of entitlement and verification of their identity.

With the above directions, the writ petition is **allowed**.

(2023) 5 ILRA 1204

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 01.05.2023

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Writ-C No. 3000051 of 1999

Preetam Singh		...Petitioner
	Versus	
State of U.P.		...Respondent

Counsel for the Petitioner:
Avadhesh Kumar

Counsel for the Respondents:
C.S.C.

A. Ceiling Law – UP Imposition of Ceiling on Land Holdings Act, 1960 – Section 29 – UP Imposition of Ceiling on Land Holdings(Amendment) Act, 1972 – Earlier notice, declaring certain area as surplus land, was issued – Principle of res judicata – Applicability – Amended provision of S. 29 permit re-determination of ceiling area on certain circumstances – Effect – Held, in case the unirrigated land became irrigated, the proceedings could have been

held as per Section 29 of the Act of 1960 – High Court rejected the plea of applicability of res judicata. (Para 14)

B. Ceiling Law – UP Imposition of Ceiling on Land Holdings (Amendment) Act, 1960 – Section 13-A – Surplus land – Declaration in term of irrigation and capability of growing two crops – Finding of fact – Scope of interference – No cogent evidence to controvert the finding was filed – Effect – Held, all the land of the petitioner, except abadi and Groveland of petitioner has been found irrigated on the basis of Khasra of the relevant year, material and evidence on record, and the factual finding recorded by the prescribed authority is unchallenged and no material contrary to it has been produced, therefore the factual finding cannot be interfered by this Court. (Para 21 and 35)

Writ petition dismissed of. (E-1)

List of Cases cited:

1. St. of U.P. Vs Mukh Ram Singh & anr.; 1991 (9) LCD 232
2. Badi Bahu Vs St. of U.P. & ors.; 1997(15) LCD 1265
3. Vibhuti Kumar Bajpai Vs St. of U.P. & ors.; 2008 (26) LCD 832
4. Bal Krishna Vs St. of U.P. & ors.; 1984 LCD 115
5. Ram Sagar Vs Civil Judge, Bahraich & ors.; 1984(2) LCD 300
6. S Ram Chandra Rao Vs Nagabhushana Rao & ors.; 2023 (41) LCD 1
7. Bhagwan Singh & anr. Vs St. of U.P. & ors.; 1996(14) LCD 387
8. Raj Bahadur Vs St. of U.P. & ors.; 1996(14) LCD 248
9. Raja Mahipal Singh Vs St. of U. P. & ors.; 2007(25) LCD 1196

10. Kaushlender Bahadur Singh Vs St. of U.P.; 2022(40) LCD 765

11. Adi Kumar Jain Vs Additional Commissioner (Admn) Faizbad & ors.; 2016(34) LCD 699

12. Smt. Binda Gupta & ors. Vs St. of U. P. & ors.; 2003(21) LCD 511

13. Rajendra Prasad Tiwari Vs St. of U.P. & ors.; 2022 (40) LCD 1836

14. Kunwar Bahadur Singh Vs Prescribed Authority/A.D.M. Ceiling, Unnao & anr.; 2022(40) LCD 891

15. Shantanu Kumar Vs St. of U.P. & ors.; 1979 AWC(F.B.) 585

16. St. of U.P. Vs The Additional Commissioner Judicial & ors.; MANU/UP/2168/2022

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

1. Heard Sri Avadhesh Kumar, learned counsel for the petitioner and Sri S.K. Khare, learned Standing Counsel.

2. The petitioner Preetam Singh has approached this Court, by means of the present petition, challenging the order dated 11.04.1997 passed by the Prescribed Authority(Ceiling/Upper Collector, Kheri) contained in Annexure No.2 to the petition and the order dated 12.01.1999 passed by the Additional Commissioner (Administration), Lucknow Division, Lucknow, contained in Annexure No.4 to the petition.

3. The brief facts of the case, for adjudication of the present case, are that in respect of the land in dispute, the petitioner was served with a notice as per Section 29 of the UTTAR PRADESH IMPOSITION OF CEILING ON LAND HOLDINGS ACT, 1960(hereinafter referred to as the Act of 1960) proposing 19.682 acres

irrigated land as surplus giving benefit of 18.03 acres irrigated land to the petitioner. In response thereof, the petitioner submitted the objections dated 06.03.1995 on the ground that the notice is barred by res-judicata and it is time barred. The petitioner also took an objection that the land of the petitioner is un-irrigated and he is entitled for the maximum benefit. A plea was also taken that holdings have wrongly been shown. On the basis of the pleadings, the following 7 issues were framed:

वाद बिन्दु

1. क्या पुर्ननिर्गत नोटिस में आपत्तिकर्ता की जोत का विवरण गलत दिखाया गया है, यदि हाँ तो उसका प्रभाव?

2. क्या आपत्तिकर्ता के विरुद्ध सीलिंग अधिनियम के अंतर्गत वाद चलकर अन्तिम रूप से निर्णीत हो चुका है, जो पक्षकारों के मध्य रेसज्यूडीकेटा का -- रखता है, यदि हाँ तो उसका प्रभाव?

3. क्या आपत्तिकर्ता के विरुद्ध पुर्ननिर्गत नोटिस कालबाधित है, यदि हाँ तो उसका प्रभाव?

4. क्या आपत्तिकर्ता की समस्त भूमि असिंचित है तथा इस आशय हेतु पूर्व निर्णीत अभिमत पक्षकारों के मध्य रेसज्यूडीकेटा का प्रभाव रखता है, यदि हाँ तो उसका प्रभाव?

5. क्या आपत्तिकर्ता अ०जो०सी० अधिनियम के अन्तर्गत प्रदत्त अधिकतम लाभ पाने का अधिकारी है, यदि हाँ तो उसका प्रभाव?

6. क्या आपत्तिकर्ता के विरुद्ध पुर्ननिर्गत नोटिस धारणीय नहीं है, यदि हाँ तो उसका प्रभाव?

7. आपत्तिकर्ता किस सहायता का अधिकारी है?

4. The oral evidence of Area Lekhpal Sri Hussain Ali, Sri Awdhesh Kumar, Lekhpal who prepared the file and Assistant Registrar Kanoongo Sri Krishna were produced in oral evidence on behalf of the State and CH Form 45 and three Intekhab Khatauni of the 1399-1404 Fasli and Intekhab Khasra of 1402 Fasli were filed. The petitioner produced the oral

evidence of Sri Himachal son of Moti Lal and himself. In documentary evidence, petitioner filed the mutation State versus Preetam Singh under Section 10(2) and copy of the order dated 18.07.1985 passed by the Additional District Judge, Kheri in Appeal 36 of 1985; Preetam Singh versus State of U.P.

5. After hearing learned counsel for the parties and considering the material and evidence on record, the prescribed authority declared 19.682 acres irrigated land as surplus as no choice was given by the petitioner and the benefit of 18.03 acres was given to the petitioner. The details of the land declared surplus is given below:-

विवरण भूमि					
जिला	तहसील	परगना	ग्राम	गा०सं०	क्षेत्रफल
खीरी	निघासन	पलिया	बालपुर	117 10-69	एकड़ सिंचित

112 7-43

118मि० 1-562

19-682 एकड़ सिंचित अर्थों में

6. The petitioner preferred an appeal No. 253 of 1996-97 against the order passed by the prescribed authority, which has been rejected by means of the order dated 12.01.1999 after considering the grounds raised by the petitioner. Hence the present petition has been filed by the petitioner challenging the aforesaid orders.

7. Learned counsel for the petitioner submitted that in the consolidation proceedings, two sons of the petitioner, who had become major were allotted separate chaks but no notice was given to them, whereas the notice was required to be given to them being the tenure holder under Section 3(17) of the Act of 1960. He further

submitted that the notice under Section 10(2) of the Act of 1960 was given to the petitioner beyond the prescribed period of 2 years, which was in violation of Section 13A of the Act of 1960 which is to be read together with Section 29 of the Act of 1960. He also submitted that the notice was barred by res judicata because earlier twice notices were given and when second time notice was given, though the prescribed authority had declared certain area as surplus but the said order was set aside in appeal by the District Judge. Lastly, learned counsel for the petitioner submitted that the impugned orders have been passed on the basis of presumption and assumption without any proof by the State and considering the provisions of Section 4A of the Act of 1960, while declaring the land of the petitioner as surplus as irrigated. Therefore the impugned orders are not tenable in the eyes of law and liable to be quashed by this Court.

8. Learned counsel for the petitioner relied on **State of U.P. versus Mukh Ram Singh and another; 1991(9)LCD 232, Badi Bahu versus State of U.P. and others; 1997(15) LCD 1265, Vibhuti Kumar Bajpai Versus State of U.P. and others; 2008(26) LCD 832, Bal Krishna versus State of U.P. and others; 1984 LCD 115, Ram Sagar versus Civil Judge, Bahraich and others; 1984(2) LCD 300, S Ram Chandra Rao versus Nagabhushana Rao and others; 2023 (41) LCD 1, Bhagwan Singh and another versus State of U.P. and others; 1996(14) LCD 387, Raj Bahadur versus State of U.P. and others; 1996(14) LCD 248, Raja Mahipal Singh versus State of Uttar Pradesh and others; 2007(25) LCD 1196, Kaushlender Bahadur Singh versus State of U.P.; 2022(40) LCD 765, Adi Kumar Jain versus Additional Commissioner(Admn)**

Faizabad and others; 2016(34) LCD 699, Smt. Binda Gupta and others versus State of Uttar Pradesh and others; 2003(21) LCD 511, Rajendra Prasad Tiwari versus State of U.P. and others; 2022 (40) LCD 1836, Kunwar Bahadur Singh versus Prescribed Authority/A.D.M. Ceiling, Unnao and another; 2022(40) LCD 891 and Shantanu Kumar versus State of U.P. and others; 1979 AWC(F.B.) 585.

9. Per contra, learned Standing Counsel submitted that the notice was given to the petitioner on the basis of Section 29 of the Act of 1960 in view of the unirrigated land became irrigated land therefore the contention of learned counsel for the petitioner regarding bar of res-judicata and limitation does not arise and is misconceived and not tenable. He further submitted that the petitioner had never taken a plea either before the prescribed authority or before the appellate court or this Court in the petition that the sons of petitioner have become major and they have been allotted separate chaks in the consolidation proceedings, therefore it is not tenable. Even otherwise, it appears that the sons of the petitioner have been recorded as tenure holders after passing of the orders, and during lifetime of petitioner therefore the petitioner is not entitled for any benefit on this ground. He further submitted that on the basis of the oral as well as documentary evidence adduced before the prescribed authority, the prescribed authority found that there is tube well in the land in dispute by which all the land is being irrigated. The crops such as wheat and sugar cane etc. are being sown, which are not possible without water. The land is also domat aaval and capable of two crops and of higher quality. The petitioner has failed to contradict the findings recorded by the prescribed authority, which

are recorded on the basis of material available on record. He also submitted that before the appellate authority or this Court also the petitioner has failed to show that his land is unirrigated.

10. On the basis of above, learned Standing Counsel submitted that the impugned orders have rightly been passed in accordance with law. There is no illegality or error in the impugned orders. The writ petition has been filed on misconceived and baseless grounds which is liable to be dismissed with cost. Learned Standing Counsel relied on ***State of U.P. versus The Additional Commissioner Judicial and Ors.; MANU/UP/2168/2022.***

11. I have considered the submissions of learned counsel for the parties and perused the records.

12. The notice was given to the petitioner in the year 1995 on the basis of Section 29 of the Act of 1960 proposing 19.682 acres irrigated land as surplus giving benefit of 18.03 acres irrigated land to the petitioner. The petitioner submitted a reply dated 06.03.1995. After submission of reply by the petitioner, the evidence was adduced by the parties. After affording opportunity of hearing to the parties, the prescribed authority passed the order dated 11.04.1997, considering the evidence and material on record and declared 19.682 acres of land of the petitioner as surplus in irrigated terms and 18.038 acres of land has been given to the petitioner for use. The petitioner challenged the said order in appeal, which has been dismissed. Hence the present petition has been filed.

13. The first contention of learned counsel for the petitioner is that the notice issued in the year 1995 is barred by

limitation under Section 13 A of the Act of 1960 as well as res-judicata. Section 29 of Act of 1960, on the basis of which, the notice was issued provides that where after the date of enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 any unirrigated land becomes irrigated land as a result of irrigation from a State irrigation work or any grove-land loses its character as grove-land or any land exempted under this Act ceases to fall under any of the categories exempted, the ceiling area shall be liable to be redetermined and accordingly the provisions of this Act, except Section 16, shall mutatis mutandis apply. Section 29 is extracted here-in-below:-

29. Subsequent declaration of further land as surplus land- *Where after the date of enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972-*

(a) one land has come to be held by a tenure-holder under a decree or order of any Court, or as a result of succession or transfer, or by prescription in consequence of adverse possession, and such land together with the land already held by him exceeds the ceiling area applicable to him; or

(b) any unirrigated land becomes irrigated land as a result of irrigation from a State irrigation work or any grove-land loses its character as grove-land or any land exempted under this Act ceases to fall under any of the categories exempted,

the ceiling area shall be liable to be redetermined [and accordingly the provisions of this Act, except Section 16, shall mutatis mutandis apply].

14. In view of above, where after the date of enforcement of the Uttar Pradesh

Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, the unirrigated land becomes irrigated land or any grove-land loses its character as grove-land or any land exempted under this Act ceases to fall under any of the categories exempted, the ceiling area was liable to be re-determined and for the said purpose all the provisions of the Act, except Section 16 were applicable mutatis mutandis. Therefore the contention of learned counsel for the petitioner, on the basis of earlier proceedings against the petitioner that it is barred by res judicata is mis- conceived and not tenable and liable to be rejected because in case the unirrigated land became irrigated the proceedings could have been held as per Section 29 of the Act of 1960.

15. The Hon'ble Supreme Court, in the case of **S.Ramchandra Rao versus S. Nagabhushana Rao and others(supra)**, has held that the doctrine of res judicata, having a very ancient history, embodies a rule of universal law and is a sum total of public policy reflected in various maxims like "res-judicata pro veritate occipitur", which means that a judicial decision must be accepted as correct and "nemo debet bis vexari pro una et eadem causa", which means that no man should be vexed twice for the same cause. This case is not applicable in the present case because in the present case the action has been taken under statutory provision on the basis of changed circumstances, under Section 29 of the Act of 1960 therefore it is not barred by res-judicata.

16. So far as the plea of limitation in view of Section 13A is concerned, the said provision is for rectifying any mistake apparent on the face of the record within a period of two years from the date of notification under sub-section (4) of

Section 14. Section 13-A and Section 14(4) of the Act of 1960 are extracted below:-

[13A. Redetermination of surplus land in certain cases. -(1) *The Prescribed Authority may, at any time, within a period of two years from the date of the notification under[sub-section (4) of Section 14], rectify any mistake apparent on the face of the record :*

Providing that no such rectification which has the effect of increasing the surplus land shall be made, unless the Prescribed Authority has given notice to the tenure-holder of its intention to do so and has given him a reasonable opportunity of being heard.

(2) The provisions of Sections 10, 11, 12, 12-A, 13, 14, [15 and 16]shall mutatis mutandis apply in relation to any proceeding under sub-section (1), and for purposes of application of Section 10, the notice under the proviso to sub-section (1), shall be deemed to be a notice under Section 9.]

14(4) The Prescribed Authority shall, as soon as may be after the date mentioned in clause (a), clause (b) or clause (c), as the case may be, of sub-section (1), notify in the Official Gazette every surplus land determined under this Act, or under Section 9 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1974 or under Section 31 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1976.

17. In view of above also, the action taken under Section 29 of the Act of 1960 cannot be said to be barred by res-judicata or beyond limitation in view of Section 13A of the Act of 1960 because both the provisions are for different situations/contingencies.

18. The next contention of learned counsel for the petitioner is that the sons of the petitioner had become major and after consolidation proceedings, they were allotted separate holdings, therefore notice was required to be given to them also but the notice was not given to them, therefore the impugned order is not tenable. Perusal of the objection filed by the petitioner on 06.03.1995 against the notice indicates that no such plea was taken by the petitioner. Even in the appeal filed by the petitioner against the order passed by the prescribed authority before the appellate authority on 11.04.1997, this plea was not taken. Even in this petition and the rejoinder affidavit, the petitioner has not taken this plea. For the first time in the supplementary affidavit filed on 23.11.2022, it has been stated that both the sons of the petitioner have got separate chaks, they are major and separate tenure holders and are entitled to get 7.30 hectare each under the Ceiling Act. This plea has been taken without disclosing as to when they became major and got separate chaks and how during lifetime of petitioner. Form 45 filed by the petitioner, though indicates the name of the sons of the petitioner, namely Gurmeet Singh and Paramjeet Singh having their separate chaks but it does not indicate as to when these have been prepared, whereas these have been got issued on 18.10.2022. On a specific query being put to learned counsel for the petitioner, as to when the consolidation proceedings had taken place and the name of the sons of the petitioners were recorded separately, he had stated that the consolidation had taken place in the year 1998 and the name of sons of the petitioner were recorded separately. The prescribed authority had decided the case by means of the order dated 11.04.1997. Therefore it is apparent that at the time of start of proceedings as per Section 29 of the

Act of 1960 or even by the time of passing of the order by the prescribed authority, the name of the sons of the petitioner were not recorded separately. Therefore the plea that the sons of the petitioner were separate tenure holder in terms of Section 3(17) of the Act of 1960 and required separate notice was not taken, therefore now at this stage it cannot be taken, even otherwise it is mis- conceived and not tenable. A query was also put to the learned counsel for the petitioner as to how during life time of the petitioner, the name of the sons of the petitioner have been recorded separately, learned counsel for the petitioner failed to give any answer to it.

19. The next contention of learned counsel for the petitioner is that the land of the petitioner has not been declared irrigated in accordance with Section 4 A of the Act of 1960. The prescribed authority without any evidence has held the land in dispute to be irrigated whereas it was unirrigated. Section 4 A of the Act of 1960 is extracted here-in-below:-

[4A. Determination of irrigated land.

-The prescribed authority shall examine the relevant Khasras for the years 1378 Fasli, 1379 Fasli and 1380 Fasli, the latest village map and such other records as it may consider necessary, and may also make local inspection where it considers necessary and thereupon if the prescribed authority is of opinion :-

firstly, (a) that, irrigation facility was available for any land in respect of any crop in any one of the aforesaid years; by-3

(i) any canal included in Schedule No. 1 of irrigation rates notified in Notification No. 1579-W/XXIII-62-W-1946, dated March 31, 1953, as amended from time to time; or

(ii) any lift irrigation canal; or

(iii) any State tube-well or a private irrigation work; and

(b) that at least two crops were grown in such land in any one of the aforesaid years; or

secondly, that irrigation facility became available to any land by a State Irrigation Work coming into operation subsequent to the enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 1972 and at least two crops were grown in such land in any agricultural year between the date of such work coming into operation and the date of issue of notice under Section 10; or

thirdly, (a) that any land is situated within the effective command area of a lift irrigation canal or a State tube-well or a private irrigation work; and

(b) that the class and composition of its soil is such that it is capable of growing at least two crops in an agricultural year; then the Prescribed Authority shall determine such land to be irrigated land for the purposes of this Act.

Explanation I-For the purposes of this section the expression "effective command area" means of an area, the farthest field whereof in any direction was irrigated-

(a) in any of the years 1378 Fasli, 1379 Falsi and 1380 Fasli or,

(b) in any agricultural year referred to in the clause "secondly"

Explanation II-The ownership and location of a private irrigation work shall not be relevant for the purposes of this Section.

Explanation III- Where sugarcane crop was grown on any land in any of the year of 1378 Falsi, 1379 Fasli and 1380 Falsi, it shall be deemed that two crops were grown on it any of these years, and that the land is capable of growing two crops in an agricultural year."

20. The aforesaid Section 4A of the Act of 1960 contemplates the situations in which the land can be said to be irrigated. Firstly irrigation facility and growing of two crops in any of the three years. Secondly where irrigation facility became available to any land after coming into enforcement of the Amendment Act of 1972 and at least two crops were grown in such land in any agricultural year between the date of such work coming into operation and the date of issue of notice under Section 10. Lastly land should be situated within effective command area of lift irrigation canal, tubewell, a private irrigation work and class and composition of soil may be such that it may be capable of growing two crops. Rule 3 of the U.P. Imposition of Land Holdings Rules 1961, as amended by means of the notification dated 18.09.1975 w.e.f. 19.09.1975, provides; "In areas where due to consolidation operations or record operations or for any other reason no Khasras were prepared during the years mentioned in Section 4-A, the Prescribed Authority while examining other records may also examine available Khasras for the three latest years preceding the year in which the Khasra was not prepared'.

21. The prescribed authority decided the issues nos. 2,3 and 4 together. The prescribed authority after considering the evidence and material on record and considering the Khatauni of the 1399-1404 Fasli and Khasra 1402 Fasli and CH Form 45 and 41 and oral evidence, which proved the same, recorded a categorical finding that there are provisions of irrigation in all the plots and wheat and sugar cane etc. are being sown which is not possible without the facility of water. A specific finding has also been recorded that in Gata No.115 of the petitioner there is a tube well from

which all the gatas of the petitioners are being irrigated. It has been proved by the Khasra of 1402 Fasli i.e. the relevant year in which notice was issued and evidence of Lekhpal and Assitant Registrar Kanoongo. CH Form 41 also shows that the land is of the high quality, the soil is Domut Auval and there are tube well in many of other gatas also. Accordingly recorded a finding that leaving the abadi and grove land of petitioner all is irrigated land and capable of growing two crops. These findings have not been challenged by the petitioner either before the appellate authority or before this Court and filed any cogent evidence to controvert these findings.

22. This Court, in the case of ***State of U.P. versus Mukh Ram Singh and another(supra)***, has held that the prescribed authority has not specifically recorded the finding that the class and composition of the soil is such that it is capable of growing at least two crops in an agricultural year. Therefore simply because there are two tube wells near the disputed plot, it cannot be held in view Section 4-A, and clause thirdly of that Section, that it is an irrigated plot. Moreover a finding of fact recorded on the basis of appreciation of evidence including Khasra cannot be interfered.

23. This Court, in the case of ***Badi Bahu versus State of U.P. and others(supra)***, has held that so far as consideration of the agricultural character of the land, it is also significant to note that the notice was issued in 1982 then it was the duty of the competent authority to see as to whether the irrigation facilities were available in the relevant year as provided under Section 4-A.

24. This Court in the case of ***Vibhuti Kumar Bajpai versus State of U.P.(supra)***

has held that question as to what extent the land is covered under water and is submerged in water and no cultivation is taking place on the same, has not been taken into consideration by the prescribed authority.

25. This Court, in the case of **Bal Krishna versus State of U.P. and others(supra)**, has held that in Kallu Vs. State (1979 ALJ 1113), while interpreting sub-cl.(a) of section 4-A of the U.P. Imposition of Ceiling on Land Holdings Act it was observed that if irrigation facilities of the nature mentioned in sub-cl.(a) of cl. "firstly" of S.4-A are available only to a part of the total area of which a plot is comprised, it cannot be held that irrigation facilities were available for the entire plot, meaning thereby that other plot is not unirrigated.

26. This Court, in the case of **Ram Sagar versus Civil Judge, Bahraich and others(supra)**, has held that it is well settled that while computing the irrigated area, the prescribed authority has to consider Khasra and relevant revenue records in order to find out whether irrigation facilities were available to any land in respect of any crop. It has further been held that it is also equally well settled that the onus lies on the state to establish that the land which is mentioned in the notice is irrigated land.

27. This Court, in the case of **Bhagwan Singh versus State of U.P. and others(supra)**, has considered the scope of Section 4A of the Act of 1960. The relevant portion of paragraph 5 is extracted hereinbelow:

"Section 4 A provides for determining a land to be irrigated under 3 conditions

mentioned therein as firstly, secondly and thirdly. While enacting said provision the legislature was aware about the difference between soil capacity of growing at least two crops in one agricultural year and actual growing of two crops. In cases firstly and secondly of said section the language used is at least two crops were grown whereas under thirdly the test which has been provided is that the composition of soil is such that it is capable of growing at least two crops. The legislature having been conscious about the difference between the two and providing different test under different condition has been specific in providing for actual growing of two crops under Section 4 A secondly. For the aforesaid reasons it is to be held that under S. 4-A secondly unless two crops are actually grown after the date of enforcement of Amending Act and date of issuing of notice under Section 29(b), the land cannot be treated as irrigated....."

28. This Court, in the case of **Raj Bahadur versus State of U.P. and others(supra)**, has held that the land can be declared as surplus if the land was covered by the test laid down under Section 4-A. The test laid down under Section 4-A of the Act has to be followed in all cases where ceiling area is to be re-determined after coming into operation of U.P. Imposition of Ceiling on Land Holdings (Amendment) Act 1972.

29. This Court, in the case of **Raja Mahipal Singh versus State of U.P. and others(supra)**, has observed that the Prescribed Authority is required to consider the date of mutation in favour of the transferees and the question regarding nature of some plot being irrigated or not or being grove or not and if there is reduction

in valuation of land due to change of plots in consolidation proceedings.

30. This Court, in the case of ***Kaushlendra Bahadur Singh versus State of U.P.(supra)***, has observed that it is apparent from the reading of Section 4-A of Act of 1960 that it is the statutory mandate that the prescribed authority is first required to examine the relevant khasras and local inspection as such is meant merely to be corroborative and cannot form the basis for determination of irrigated land keeping in view the specific provisions of Section 4 A of the Act of 1960.

31. This Court, in the case of ***Adi Kumar Jain versus Additional Commissioner and others (supra), Rajendra Prasad Tiwari versus State of U.P. and others(supra) AND Smt. Binda Gupta versus State of U.P. and others (supra)*** have also taken the similar view.

32. This Court, in the case of ***Kunwar Bahadur Singh and others versus Prescribed Authority and another(supra)***, has held that for issuance of a fresh notice under Section 10(2) of the Act of 1960, the conditions stipulated under Section 29 are required to be fulfilled. The relevant paragraphs 14 and 15 are extracted hereinbelow:

"14. For the purposes of a fresh notice under Section 10(2) of Act of 1960 pertaining to subsequent declaration of further land as surplus land after the enforcement of Amendment Act of 1972, it is imperative that the land has come to be held by a tenure holder under a decree or order of any Court, or as a result of succession or transfer, or by prescription in consequence of an adverse possession, and such land together with the land already

held by him exceeds the ceiling area applicable to him or that any other unirrigated land becomes irrigated land as a result of irrigation under certain conditions.

15. Once the said conditions of Section 29 are fulfilled, the provisions of Section 30 of the Act become applicable. From a perusal of aforesaid proceedings, it is clear that for issuance of a fresh notice under Section 10(2) of Act of 1960, the conditions stipulated under section 29 of Act of 1960 are compulsorily required to be fulfilled."

33. A Full Bench of this Court, in the case of ***Shantanu Kumar versus State of U.P. and others(supra)***, has held that the existence of another remedy under the Act cannot validate the proceedings which are void for lack of jurisdiction and which have resulted in the delcaration as surplus land of an area which a person other than the tenure holder who has been heard claims.

34. A Coordinate Bench of this Court in the case of ***State of U.P. versus The Additional Commissioner Judicial and others(supra)***, has observed that in Explanation (III) of Section 4A, where sugar cane crop has been recorded on Khasra in any of the fasli years, it shall be deemed that two crops are grown on it and that land is capable of growing two crops in an agricultural year. It has further been observed that so far as the private tube well is concerned, the petitioner did not raise any objection with regard to the boring tube well before the prescribed authority. The entries in one fasli year is sufficient to substantiate regarding irrigation work and crops on the land in question. The oral statement of lekhpal of area can be treated as a good evidence if it is supported by documentary evidence. The respondent has

also failed to submit any proof either before the prescribed authority or the appellate authority to show the reason to disbelieve the statement of Area Lekhpal. In the present case also, the findings have been recorded on the basis of the Khasra of the relevant year i.e. 1402 Fasli and supported by the evidence of Area Lekhpal, Lekhpal who prepared the file and the Assistant Registrar, Kanoongo, which have not been controverted by the petitioner at any stage by any cogent evidence.

35. Coming back to the facts of the case in hand and considering the same in the light of the law and the case laws, referred above, it is apparent that the notice was rightly issued to the petitioner in accordance with law and as per Section 29 of the Act of 1960. The plea of limitation and res-judicata taken by the petitioner are not tenable as discussed above. The plea that notice was required to be given to the sons of the petitioner is also not tenable because it was never taken except in the supplementary affidavit filed in November 2022, therefore since it was not taken before the Prescribed Authority or Appellate Authority and even in this petition upto the stage of rejoinder affidavit it is not considerable, even otherwise the petitioner has failed to give the relevant details in this regard and as admitted by learned counsel for the petitioner, the separate chaks were allotted in 1998 i.e. after passing of the order by the Prescribed Authority. All the land of the petitioner, except abadi and grove land of petitioner has been found irrigated on the basis of Khasra of the relevant year, material and evidence on record, and the factual finding recorded by the prescribed authority is unchallenged and no material contrary to it has been produced, therefore the factual finding cannot be interfered by this Court.

Thus, this Court is of the view that the impugned orders have rightly been passed in accordance with law and after affording sufficient opportunity to the petitioner. The writ petition has been filed on mis conceived and baseless grounds, therefore it lacks merit and liable to be dismissed.

36. The writ petition is, accordingly, **dismissed**. No order as to costs.

(2023) 5 ILRA 1214
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Matters Under Article 227 No. 271 of 2023

Naveen Kumar Sharma & Anr.

...Petitioners

Versus

State Of U.P. & Anr.

...Respondents

Counsel for the Petitioners:

Sri Utkarsh Dixit, Sri Anupam Shyam Dwivedi, Sri Sudhir Dixit

Counsel for the Respondents:

G.A., Sri Ardhendu Shekhar Sharma, Sri Ram Babu Sharma

A. Criminal/Banking Law – Negotiable Instruments Act, 1881: Section 138 - Handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques. (Para 8, 18)

In the present case, whether the account of which said cheque was drawn, was having sufficient balance to pay the amount gathered by said cheque worth Rs. 90,000,00/- drawn in favour of respondent, whether petitioner was having some other account apart from the

account which was blocked as said above on which cheque would be drawn in favour of the respondents in discharge of certain debt and liability as claimed by her, whether the petitioner indeed intended to get the cheque encashed, all these questions are to be decided during trial and the grounds taken in present petition can be raised by the petitioner at the stage of leading defence. The petitioner has claimed that said cheque was issued in favour of the respondent No. 2 as security cheque, as huge amount was outstanding to the respondent No. 2 and for that reason after completing all formalities of disassociation from firm the cheque was to be encashed, is dispelled by the proposition of law laid down by Hon'ble Apex Court.

The impugned orders are in accordance with law and no illegality or irregularity is found therein. In that view of the matter, trial court is required to record evidence of the parties and arrive at an independent conclusion as to whether an offence is made out u/s 138 of N.I. Act or not. (Para 18)

Writ petition dismissed. Summoning order is affirmed. (E-4)

Precedent followed:

1. Womb Laboratories Pvt. Ltd. Vs Vijay Ahuja & ors., 2019 Legal Eagle (SC) 1447 (Para 8)
2. M/s Go Go International Pvt. Ltd. Vs M/s Lilliput Kidswear, Karnataka High Court in Criminal Petition No. 2726 of 2014 (Para 16)
3. D.P. Gulati Manager Accounts M/s Jetking Infotrain Ltd. Vs State of Uttar Pradesh and another, Supreme Court, judgment dated 31.03.2015, CrI. Appeal No. 1550 of 2014 (Para 17)

Precedent cited:

1. M/s Ceasefire Industries Ltd. Vs State & ors., decided on 01.05.2017 (Para 10)
2. Rajesh Meena Vs St. of Har. (Para 11)

Present petition prays for suitable direction setting aside the entire proceedings of Criminal Complaint Case

No. 496 of 2022, u/s 138 N.I. Act, pending before the Court of Ld. Additional Civil Judge, (J.D.)/Judicial Magistrate, Bulandshahar as well as the impugned summoning order dated 13.10.2022 passed by the Court of Ld. Additional Civil Judge (Junior Division)/Judicial Magistrate and impugned judgment and order dated 13.12.2022 passed by Court of Ld. Additional Sessions Judge/Fast Track Court, Bulandshahar in CrI. Revision No. 361 of 2022.

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Instant petition under Article 227 of the Constitution of India has been filed with following prayer:-

(i) *Issue an order or direction of suitable nature setting aside the entire proceedings of Criminal Complaint Case No. 496 of 2022 (Smt. Shashi Sharma Vs. M/s Naveen Autos & Another, under Section 138 N.I. Negotiable Instruments Act, P.S. Kotwali Nagar District Bulandshahar, pending before the Court of Ld. Additional Civil Judge, (J.D.)/Judicial Magistrate, Court No. 9, Bulandshahar as well as the impugned summoning order dated 13.10.2022 passed by the Court of Ld. Additional Civil Judge (Junior Division)/Judicial Magistrate, Court No. 9, Bulandshahar in CrI. Complaint Case No. 496 of 2022 (Smt. Shashi Sharma Vs. M/s Naveen Auto and Another) under Section 138 of N.I. Act, P.S. Kotwali Nagar, District Bulandshahar (Annexure No. 6 to this petition) and impugned judgment and order dated 13.12.2022 passed by Court of Ld. Additional Sessions Judge/Fast Track Court, Court No. 2, Bulandshahar in CrI. Revision No. 361 of 2022.*

(ii) *Issue any other order or direction in the like nature, which this*

Hon'ble Court may deem fit and proper in the circumstances of the case.

2. I have heard learned counsel for the petitioner, learned counsel for the respondent no. 2 and learned A.G.A. for the State and perused the record.

3. Factual matrix of the case in brief are that respondent no. 2 filed a complaint which is registered as Case No. 496 of 2022 (Smt. Shashi Sharma Vs. M/s Naveen Auto and Another), under Section 138 of N.I. Act, P.S. Kotwali Nagar, District Bulandshahar with averment that complainant and respondent no. 2 are working in a partnership firm in the name of M/s Naveen Auto at Raje Babu road, Bulandshahar. Complainant and respondent no. 2, both are partners in the firm. This firm deals in business of TVS bike spare parts and repairing etc. In the profits of firm, share of complainant is 30%, share of wife of respondent no. 2 is 30%, share of respondent no. 2 is 20% and share of Uma Sharma is 20 %.. The respondent no. 2 has been directed to transact the business on behalf of the firm, however, for last three years no profit was given to the complainant and she was avoided by respondent no. 2 in respect of affairs of the firm. When she negotiated with respondent no. 2, he asked her to terminate her relations with the firm and this was agreed between the complainant and partners of the firm that Rs. 3,00,000, 00/- will be given to the complainant in lieu of her 30% share and profits. This was also agreed between partners that until Rs. 3,00,000,00/- is paid to the complainant, she would keep on receiving the profits and on that count a cheque of Rs. 90,00,000/- was issued by the firm in favour of the complainant dated 15.6.2022 which was signed by respondent no. 2 as authorized

signatory of the firm. This cheque was drawn on Canara Bank account of the firm. The complainant presented the cheque on same day at his Bank PNB, Yamunaparm Branch Bulandshahar on her bank account, however, the same was dishonoured and returned on 20.7.2022 with endorsement "account blocked", thus consequently the cheque got bounced. When she asked about this to respondent no. 2, he could not give any satisfactory answer and misbehaved with her. She sent a demand notice on 25.7.2022 at his address which was received by him on 28.7.2022, however, its wrong reply was sent by them on 2.8.2022, therefore, complainant had no option but to file present complaint for prosecution of the firm and respondent no. 2 for charge under Section 138 of N.I. Act.

4. Learned Magistrate recorded statement of complainant under Section 200 Cr.P.C. and her witnesses under Section 202 Cr.P.C. and passed impugned summoning order whereby the present petitioners were summoned to face trial for charge under Section 138 of N.I. Act.

5. Feeling aggrieved by the impugned summoning order dated 13.10.2022 passed by learned Additional Civil Judge, (Junior Division), Court No. 9, Bulandshahar, the present petitioners/accused in the case filed a Criminal Revision No. 361 of 2022, Naveen Kumar Sharma and Another Vs. Shashi Sharma and another, before Court of Session Judge, Bulandshahar, however, the said revision was dismissed by learned Additional Session Judge/FTC, Court No. 2, Bulandshahar vide order dated 13.12.2022. The impugned order passed by learned magistrate was affirmed therein. The ground taken in said revision was that the share of partners was decided by firm which is shown in the complaint which is

admitted and accordingly Smt. Shashi Sharma, complainant was allotted 30% share in the firm, whereas accused Naveen and his wife was allotted 20%, 30% share respectively and Uma Sharma was allotted 20% share in the firm. The disputed Cheque No. 149610 for amount of Rs. 90,00,000/- was given to the complainant as it was agreed between the partners that she will complete all the formalities of disassociating from the firm herself and till completion of the formalities and accounting, she will keep the cheque safely with her. As per balance sheet of the firm Rs. 1,53, 34,470/- was outstanding against Shashi Sharma to the firm. After receiving the said cheque complainant Shashi Sharma with mala fide intention wrote a letter to bank officers on 10.11.2021 to block and seize the Account No. 2154261011432 of the firm and she also wrote to regional office of the bank that as there was conflict among partners of the firm, therefore, the said account of the firm be seized and blocked and on account of the said letter dated 30.11.2021 of the complainant, account of the firm was blocked since 1.12.2021.

6. Learned counsel for the petitioners submitted that specific grounds were taken by the revisionist/accused persons in criminal revision before the court of session that said cheque was given to the complainant/respondent no. 2 as security in pursuance of an understanding reached between the partners and she had to keep the cheque safely but she presented the same immediately to embarrass and coerce the petitioners. This fact also brought to the notice of the revisional court that the said cheque was not dishonoured on the ground of insufficiency of funds or amount not arranged for, which are enumerated as ground for prosecution under Section 138

of N.I. Act but on ground that account was blocked and this ground is not covered under Section 138 of N.I. Act, therefore, in view of dishonour of cheque on the ground that account was blocked, the petitioners cannot be prosecuted for charge under Section 138 of N.I. Act, inasmuch as the account was blocked at the instance of complainant herself by issuing letters to the concerned bank to block and seize the account of firm due to conflict between partners of the firm, therefore, both the orders of court below are not sustainable and are liable to be set aside and proceedings drawn against the petitioners before the trial court deserve to be quashed otherwise the petitioners will face irreparable loss without any legal basis.

7. Per contra, learned counsel for the respondent no. 2 submitted that there is no illegality, irregularity or any proprietary in the impugned order passed by court below. The complaint filed by the respondent no. 2 under Section 138 of N.I. Act is based on just a legal grounds and grounds taken by the petitioners in present petition under Article 227 of the Constitution of India were considered by learned revisional court and after passing a detailed order or considering the points involved in the matter. Learned Additional Sessions Judge dismissed criminal revision filed by the petitioners against summoning order dated 13.10.2022 passed by learned magistrate.

8. Learned counsel for the respondent cited a judgment of Hon'ble Apex Court in **Womb Laboratories Pvt. Ltd. Vs. Vijay Ahuja and Ors., 2019 Legal Eagle (SC) 1447**, wherein Hon'ble Apex Court in paragraph nos. 5 and 6 has held as follows:-

"5. In our opinion, the High Court has muddled the entire issue. The

avermert in the complaint does indicate that the signed cheques were handed over by the accused to the complainant. The cheques were given by way of security, is a matter of defence. Further, it was not for the discharge of any debt or any liability is also a matter of defence. The relevant facts to countenance the defence will have to be proved - that such security could not be treated as debt or other liability of the accused. That would be a triable issue. We say so because, handing over of the cheques by way of security per se would not extricate the accused from the discharge of liability arising from such cheques.

6. Suffice it to observe, the impugned judgment of the High Court cannot stand the test of judicial scrutiny. The same is, therefore, set aside."

9. Provisions of Section 138 of N.I. Act are reproduced as under:-

"138 Dishonour of cheque for insufficiency, etc., of funds in the account. -
-Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 1 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with

both: Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

10. Learned counsel for the petitioner placed reliance on a judgment of Delhi High Court in **M/s Ceasefire Industries Ltd. Vs. State & Ors. On 1 May, 2017**, wherein petitioner had instituted two complaint under Section 138 of N.I. Act against the respondent accused in question of dishonor of two cheques issued by the respondent with Okhla Industries area, New Delhi, however, the said cheques were returned by the bank with memo indicating reasons for returned to be "account blocked". The complainant after return of the said cheques unpaid by the bank issued legal demand notice calling upon the respondents to pay and upon default in payment on their part a complaint was instituted. Learned magistrate summoned the 2nd to fourth respondents after holding

enquiry under Section 200 and 202 Cr.P.C., however, learned magistrate after conducting trial acquitted the respondent of charge under Section 138 of N.I. Act. Delhi High Court while affirming the verdict of acquittal of respondent passed by learned magistrate observed that bank, which has returned cheques unpaid which had made it clear that account has been blocked. It is clear that complainant itself was aware that account has been frozen in terms of directions of some statutory authority. In these circumstances the reason for return of the cheques unpaid being not what is envisaged in Section 138 of the N.I. Act, these petitions are devoid of merit and are dismissed.

11. In another judgment cited by learned counsel for the petitioner in Rajesh Meena Vs. State of Haryana and Others, High Court held that in given facts, this Court has no hesitation in holding that on the date when cheques were presented by the complainant to the drawee bank, the account holder was not maintaining the said account. Resultantly, in the absence of this material condition, it cannot be said that offence punishable under Section 138 of the N.I. Act would be made out.

12. From perusal of record it appears that petitioner Naveen Kumar had also filed a complaint against respondent no. 2 before the court of Additional Civil judge (Junior Division)/Judicial Magistrate, Court No. 9, Bulandshahar, with allegation of misuse of a security cheque worth Rs. 90,00,000/- given to her by the victim as security and writing to the bank where account of firm was being maintained to block the same and on her instance, the said account was blocked. In that complaint, learned magistrate summoned the respondent no. 2 Smt. Shashi Sharma and her husband for

charge under Section 417, 406, 420, 504, 506 IPC vide order dated 17.11.2022, however, the said opposite parties in said complaint Naveen Kumar Sharma and Smt. Shashi Sharma filed a petition under Section 482 Cr.P.C. No. 40041 of 2022 before this Court for quashing the proceedings of said complaint case in which this Court vide order dated 5.12.2022 stayed proceedings of said complaint case for a period of six weeks.

13. From perusal of record it appears that two complaint under Section 138 of N.I. Act are filed, one by present respondent no. 2 and one by her husband for dishonor of cheque issued by the firm amount to Rs. 90,00,000/- and Rs. 12,50,000/- respectively.

14. The information has been given by Canara Bank by public Information Officer/Divisional Manager, Canara Bank, on application of present petitioner under Right to Information Act on 12.10.2022 wherein it is stated that Account No. 2154261011432 of M/s Naveen Auto Raje Babu, Bulandshahar, is lying with concerned branch of Canara Bank, however, its operation has been blocked on 1.12.2021 as per information received from Bulandshahar branch. Its operation was suo moto stopped due to expiry of O.D. time limit and in addition to this, on document for renewal of said O.D. limit, one partner Smt. Shashi Sharma has not signed the document and had also requested for blocking of all sort of withdrawal from the bank due to mutual dispute with other partner.

15. Learned counsel for the respondent submitted that the petitioner had deliberately drawn a cheque on account which was blocked. He did not intend to pay the amount gathered in the cheque

which was got dishonoured by the bank. The petitioner himself took the case that said cheque was given as security in his reply to demand notice given by the respondent after dishonour of said cheque. All the issues have been addressed by revisional court while dismissing the revision petition filed by the present petitioner and no interference is warranted in impugned orders passed by learned court below in present petition under Article 227 of the Constitution of India which is an extraordinary remedy.

16. **Karnataka High Court in Criminal Petition No. 2726 of 2014, M/S Go Go International Pvt.Ltd. vs M/S Lilliput Kidswear**, considering the judgment of Delhi High Court in M/S. Ceasefire Industries Ltd. vs State & Ors. (supra) vide order dated 24.1.2019 held that when cheque is dishonoured for the reason account blocked, the same constitutes an offence under Section 138 of the N.I. Act, therefore there is divergence of opinion on this issue amongst High Courts.

17. In **D.P. Gulati Manager Accounts M/s. Jetking Infotrain Ltd. vs. State of Uttar Pradesh & Anr.**, Hon'ble Apex Court in judgment dated 31.3.2015 in Crl. Appeal No. 1550 of 2014 set aside the order passed by High Court of Judicature at Allahabad in Crl. Misc. Application u/s 482 Cr.P.C. No. 6667 of 2014 filed under Sections 420, 467, 468 IPC by accused persons, whereby the said court disposed of the petition and declined to quash the proceedings of Criminal Complaint Case no. 1446 of 2013 and complaint under Section 138 of N.I. Act filed by appellants before Hon'ble Apex Court on the ground that it was a clear case of abuse of process of law on the part of respondent no. 2.

18. Whether the account of which the said cheque was drawn, was having sufficient balance to pay the amount gathered by said cheque worth Rs. 90,000,00/- drawn in favour of respondent, whether petitioner was having some other account apart from the account which was blocked as said above on which cheque would be drawn in favour of the respondents in discharge of certain debt and liability as claimed by her, whether the petitioner indeed intended to get the cheque encashed, all these questions are to be decided during trial and the grounds taken in present petition can be raised by the petitioner at the stage of leading defence. The petitioner has claimed that said cheque was issued in favour of the respondent no. 2 as security cheque, as huge amount was outstanding to the respondent no. 2 and for that reason after completing all formalities of disassociation from firm the cheque was to be encashed, is dispelled by the aforesaid proposition of law laid down by Hon'ble Apex Court in Om Laboratory Pvt. Ltd., wherein it was held that handing over of cheque by way of security per se, would not absolve the accused from discharge of liability arising from said cheque, therefore, in the light of foregoing discussion, this Court finds no good ground to interfere in impugned orders passed by court below which are under challenged in present petition. The impugned orders are in accordance with law and no illegality or irregularity is found therein. In that view of the matter, trial court is required to record evidence of the parties and arrive at an independent conclusion as to whether an offence is made out under Section 138 of N.I. Act or not.

18. In the result the petition stands **dismissed**. The summoning order passed by learned magistrate is affirmed. The trial

court shall proceed to record the evidence of parties after appearance of the accused petitioner and recording therein statements on charge and decide the questions with reference to Section 138 of N.I. Act in accordance with law.

19. The interim order stands **discharged.**

(2023) 5 ILRA 1221
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters Under Article 227 No. 11228 of 2022

Phool Kumar ...Petitioner
Versus
Shyam Singh & Ors. ...Respondents

Counsel for the Petitioner:
Sri Aditya Kumar Singh, Sri Nipun Singh

Counsel for the Respondents:
Sri Syed Ali Imam, Sri Syed Ali Imam

A. Civil Law – Injunction – Status quo - Where any property is held by several co-owners, each co-owner has interest in every part of the property, but such an interest is qualified by similar interest of other co-owners, and therefore, to that extent, no damage or waste to the property or illegitimate use of the property can be permitted by one of the co-owner to the disadvantage of other co-owners. (Para 28, 29)

Ownership imports three essential rights, namely, right to possession, right to enjoy and right to dispose. If an owner is wrongly deprived of possession of his property he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All co-owners have equal rights and

co-ordinate interest in the property, though their shares may be either fixed or indeterminate. Every co-owner has a right to enjoyment and possession equal to that of the other co-owner or co-owners. Each co-owner has, in theory interest in every infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with others. (Para 30)

Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part- owner or a fractional owner of the property. The position will change only when partition takes place. (Para 30)

B. If one co-sharer is being enjoined from using and enjoying the land which falls in his share also by virtue of being co-sharer, such an aggrieved co-sharer can maintain a suit for injunction. (Para 31)

In the plaint, the general pleading is w.r.t. undivided shares and the only exception is para-9 wherein allegations have been made that there was a threat by the co-sharers namely the respondents to change the nature of the land. (Para 32)

The injunction could not have been maintained and instead petitioner ought to have either amended the relief clause in the plaint demanding for partition or should have filed a fresh suit for partition. Since the defendants have taken the plea that they were not raising any new construction activity and only some repair work was going on in the old existing construction where the defendants are residing, such an act would not amount any destruction or damage to the joint property, nor would result in appropriation by the defendants of any part of land in name of raising construction. In these circumstances, the judgment passed by the District Judge does not suffer from any manifest error of law and facts. (Para 33, 34)

It is left open for the petitioner to either seek amendment in the suit to add a relief for partition or to file a fresh suit for partition and also maintain an application of injunction afresh

in the event any new construction activity is undertaken upon a joint land. (Para 35)

Writ petition disposed of. (E-4)

Precedent followed:

1. Awadh Narain Vs Additional District Judge-IVth, Jaunpur & ors., 2001 ALLJ 2551 (Para 4)

2. Radhay Shyam & ors. Vs Uma Shankar & ors., 1997 ALLCJ 9 (Para 4)

3. Ram Prasad Tiwari Vs Shankur Tiwari, Manu / U.P. / 0282/1964; (2003) 5 SCC page 150 (Para 4)

4. T. Lakshmi Pati & ors. Vs T. Reddy & ors. and Girdhar Lal Vs Ram Lal, SCC Online J&K 693; AIR 2019 J&K 1 (Para 4)

5. Virendra Kumar Vs A.D.J., Kannauj & ors.; 2014 (3) Current Civil Cases 43 (Para 7)

6. Chhedi Lal Vs Chhote Lal, AIR 1951 ALL 199 (Para 7)

7. K.P.M. Aboobucker Vs K. Kunhamoo & ors., 1958 AIR Madras 287 (Para 7)

8. Robert Watson and Co. Vs Ram Chand Dutt & ors., (1989-90) L.R. 17 I.A. 110 (Para 14)

9. Midnapur Zamindary Comp. Ltd. Vs Naresh Narayan Roy & ors., (1923-24) L.R. 51 I.A. 293 (Para 15)

10. Paras Ram Vs Sherjit, (1887) ILR 9 All 661 (Para 14)

11. Lala Bishwambhar Lal Vs Raja Ram, (1869) 3 Beng. L.R. Appendix 67 (Para 15)

12. Shadi Vs Anup Singh, (1890) ILR 12 All 430 (Para 15)

13. Ram Lal Vs Jagan Nath, 1950 AWR 336 (Para 16)

14. Lala Sheo Nath Vs Lala Shiam Behari, Second Appeal No. 445 of 1942, decided on 23.12.1948 (Para 16)

15. Abhai Singh Vs Gyan Singh, 1971 JKLR 326 (Para 26)

16. Chagan Lal Vs St. of Raj., 2022 Latest Caselaw 9493 Raj. (Para 26)

17. Sant Ram Nagina Ram Vs Daya Ram Nagina Ram & ors., AIR 1961 PH 528 (Para 26)

18. Kochkunju Nair Vs Koshy Alexander & ors., AIR 1999 SC 2272 (Para 28)

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

1. Heard Sri Nipun Singh, learned counsel for the petitioner and Shri Syed Ali Imam, learned counsel appearing for the respondents.

2. Petitioner before this Court is the plaintiff in the suit instituted for permanent prohibitory injunction being O.S. No. 106 of 2020. In the suit, he moved a temporary injunction application being paper no. 6C along with an affidavit. After the written statement was filed and so also the objection to the pending 6C application by the defendant-respondents, the said application was finally granted by the trial court in favour of the petitioner with a direction to the parties to maintain status quo in respect of the suit property vide order dated 16.3.2021.

3. However, upon a miscellaneous appeal being filed under Order XLIII Rule 1(r) by the defendant-respondents, the said appeal came to be allowed by the District Judge, Gautam Buddha Nagar vide order dated 24.11.2022 setting aside the order of the status quo passed by the trial court.

4. The petitioner pleads that even in case no partition of the suit property has taken place in metes and bounds amongst co-sharers, the Court in order to protect the suit property and from being damaged by

raising any construction in any manner or demolition exercise, direct the parties to maintain status quo. Reliance has been placed upon various judgements of this Court : **Awadh Narain v. Additional District Judge-IVth, Jaunpur and others; 2001 ALLJ 2551, Radhay Shyam and other v. Uma Shankar and others; 1997 ALLCJ 9, Ram Prasad Tiwari v. Shakur Tiwari, Manu / U.P. / 0282/1964 (2003) 5 SCC page 150, T, Lakshmi Pati and others v. T. Reddy and others and Girdhari Lal v. Ram Lal; SCC Online J & K 693 : AIR 2019 J & K Page 1.**

5. Learned counsel for the petitioner submits that it is because the defendant-respondents started raising construction upon a joint land that the necessity arose to institute the suit for permanent injunction. He submits that the plaintiff would have instituted the suit for partition, but he instituted the suit for permanent injunction, instead to ward off an eminent danger of a part of land being appropriated by a co-sharer.

6. *Per contra*, it is argued by the learned counsel appearing for the contesting respondents that the petitioner having admitted the property to be the joint property, the suit for injunction simpliciter was not maintainable and the proper cause for the plaintiff was to institute suit for partition in which he would have claimed injunction also. It is submitted that no injunction can be granted against another co-sharer because possession of one is possession of all the co-sharers in equal measure and any injunction order if passed would amount to direct interference in the enjoyment of the property by the other co-sharers.

7. Learned counsel for the respondent has relied upon the judgement of this Court

in the case of **Virendra Kumar v. Additional District Judge, Kannauj and others; 2014 (3) Current Civil Cases, page 43**, Full Bench of this Court in the case of **Chhedi Lal v. Chhote Lal, AIR 1951 ALL 199** and a judgement of Madras High Court in the case of **K.P.M. Aboobucker v. K. Kunhamoo and others; 1958 AIR Madras 287.**

8. Before I proceed to deal with the rival submissions made by the respective parties, it is necessary to refer to certain basic facts pleaded in the plaint and in the written statement filed by the respondents. The suit property is relating to khasra/plot no. 112, in which the heirs except one Kripal from the branch of Kanhaiya Lal (the second son of Udai Singh) are impleaded as defendant first set and heirs from the branch of Natthu Singh (the first son of Udai Singh) and one Kripal son of Kanhaiya Lal have been impleaded as defendant second set. In the plaint case while seeking a decree of permanent prohibitory injunction, a pedigree is given of all the parties to the suit and the common ancestor being Uday Singh. The plaintiff-petitioner is also the son of Kanhaiya Lal.

9. The suit property is stated to have devolved upon the heirs of the Nathu Singh and Kanhaiya Lal in equal measure i.e. 1/2 share. The dispute arose after the acquisition of an area measuring 1.138 hectares out of total area 1.846 hectares from plot no. 112 by the State for New Okhla Development Authority (NOIDA) and thus only 0.7080 hectares land was left with the parties. It is stated vide paragraph-8, that parties to the suit are jointly enjoying the property measuring 0.7080 hectares of plot no. 112 which is now a minjumla number i.e. 112m.

10. Now the grievance raised is that the defendants first set started deliberately construction activity and thereby taking possession of a specific piece of land in the remaining area of 0.7080 hectares of plot no. 112m. The petitioner, therefore, has pleaded that in the absence of any partition on such a unilateral act on the part of the respondents to change the nature of the land on spot and to take possession of a particular piece of that land by raising constructions was not permissible and hence the suit.

11. When the suit was instituted, the trial court considering the urgency granted injunction order of status quo. The defendants thereafter appeared in the suit and filed written statement. In the written statement, it has been pleaded that the defendants were entitled to 1/2 share in the land and of which mutual partition had taken place some 30 years ago by way of family arrangement and ever since then the parties had made permanent construction of their respective houses and were in possession thereof. It is stated vide-paragraph-6 of the written statement that every share holder had got separate share and had fortified his land falling in his share. But what is interesting to note is that the area in plot no. 112m is being disputed vide para-9 and the defendants seem to be claiming larger area than what exactly stated in the plaint case. The pleadings of both the parties if are tested on the revenue records, I find that in plot no. 112 minjumla the total area shown is 0.7080 hectares in which names of the parties have continued in the revenue record as on 1428 fasli and the New Okhla Development Authority is also shown to be in possession of plot no. 112 minjumla 1.1380 hectares. The pleadings in paragraph-7 of the plaint show total area to be 1.846 hectares as against the

area shown in plot no. 112m to be 1.1380 hectares. Nowhere it is pleaded either in the plaint or in the written statement as to what is the exact total area of plot no. 112m. If the parties had agreed to the mutual understanding for family arrangement preciously at some point of time then at least there should not have been dispute regarding the area that was left with the tenure holders after the part of the land stood acquired for the New Okhla Development Authority.

12. In view of the above, prima facie it appears that no partition in metes and bounds has taken place. However, it would be a matter of evidence when the suit is tried. The raising of construction upon a joint land in the absence of partition, would certainly be disturbing the nature of the suit land and, therefore, with this plea, the plaintiff sought injunction in the suit.

13. This Court as early as in the year 1950 had already held that ordinarily an injunction should not be granted to a co-owner against other co-owner.

14. The Full Bench decision in the case of Chhedi Lal (supra) delivered on 16.11.1950 has not been overruled till date. The Full Bench held that while it was not an absolute rule to deny injunction to one co-owner against another co-owner but it can be granted when an exclusively co-owner uses a unpartitioned property to the exclusion of right of others co-sharers. In other words, the Full Bench accepted right enjoyment of property by co-sharers inter se, i.e. an interest and right of a co-sharer in a property with those others is absolute, but this rightly stands qualified by the interest of other co-owners. The Full Bench referred to the judgement of the Judicial Committee in **Robert Watson and Co. v.**

Ram Chand Dutt and others; (1989-90) L.R. 17 I.A. 110, which runs as under :

"It appears to their Lordships that, in a case like the present, an injunction is not the proper remedy. In India a large proportion of the lands, including many very large estates, is held in un-divided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected-a work which, in ordinary course, in large estates would probably occupy & period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the courts of justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

15 . The Bench also quoted the observations made in the case of **Midnapur Zamindary Company Limited v. Nares Narayan Roy and others; (1923-24) L.R. 51 I.A. 293** :

"Where lands in India are so held in common by co-sharers, each co-sharer is

entitled to cultivate in his own interests in a proper and husband like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary rights as co-sharers in the lands. When co-sharers cannot agree how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can as against his co-sharers, obtain any jote right, a right of permanent occupancy, in the lands held in common nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them."

14. Referring to the judgment of **Mahmood, J in Paras Ram v. Sherjit (1887) ILR 9 All 661**, the Full Bench observed :

"The cases of the Allahabad High Court on the point are far more numerous. Paras Ram v. Sherjit (1887) ILR 9 All 661 is a decision by Mahmood, J. in a case where a co-owner sought demolition of a building constructed by a joint owner in spite of his protest. The learned Judge observed that as a pure question of law as distinguished from the rules of equity the plaintiffs may be entitled to the decree but courts in India exercise the combined jurisdiction of law and equity and cannot disregard equitable doctrines in enforcing remedies. He distinguished cases in which a building is erected by a rank trespasser upon a land of another and cases in which the building is erected by a joint proprietor

on joint land without the permission of his joint owners or in spite of their protest."

15. On the question of demolition of structure if raised upon a joint land by a co-sharer with the consent of the other co-sharers, the Full Bench first referred to the judgment in **Lala Bishwambhar Lal v. Raja Ram (1869) 3 Beng. L.R. Appendix 67** and then Full Bench judgment of 5 Judges in **Shadi v. Anup Singh (1890) ILR 12 All 430**, and observed thus :

"Sir Barnes Peacock in **Lala Bishwambhar Lal v. Raja Ram (1869) 3 Beng. L.R. Appendix 67** and concludes that when a joint owner of land, without obtaining the permission of his co-owners, builds upon such land, such buildings should not be demolished at the instance of such co-owners, unless they prove that the action of their joint owner in building upon joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land. This case was considered by a Full Bench of five Judges including Mahmood, J. in **Shadi v. Anup Singh (1890) ILR 12 All 430**. The suit was brought for an injunction within three or four days of the defendant commencing a construction upon joint land. The defendant asserted exclusive right to the land. The plaintiff obtained an interim injunction but the District Judge on appeal, in view of the ruling in **Paras Ram (supra)**, went into the question as to whether the plaintiff could be compensated by the defendant at partition. He found that the defendant was building upon land which was in excess of the share which would come to him on partition and the plaintiff could not therefore, be adequately compensated. Sir John Edge, C.J., held that the District Judge was wrong in going into

the question whether the excess land had been appropriated and that on the finding of fact given by him the injunction should have been granted. It is obvious from a reading of the judgment in **Paras Ram (supra)** that it did not justify an investigation into the question whether more land than belonged to the co-sharer was appropriated. The learned Chief Justice observed that the defendant, instead of going to the partition court, proceeded to appropriate to himself lands in which each of his co-sharers had an interest and thus he proposed to exclude them from all use and enjoyment of a portion of common land. He went on to say. "We need not in this case consider" what a civil court should do if the defendant has erected "at great expense buildings which a court of equity might hesitate to order him to pull down." This observation clearly saves the power of the court under section 55 of the Specific Relief Act as a court of equity to regulate its discretion in accordance with the provisions of that section in granting or withholding injunction."

16. The Full Bench then proceeded to further refer two decisions of Division Bench of this Court in the case of **Ram Lal v. Jagan Nath; 1950 AWR 336** and **Lala Sheo Nath v. Lala Shiam Behari in Second Appeal No. 445 of 1942, decided on 23rd December, 1948**.

"So far we have referred to the decisions of the Allahabad High Court before the amalgamation but two cases of the new Court after the amalgamation need to be noticed. One of these is reported in **Ram Lal v. Jagan Nath 1950 AWR 336** and is a decision by the present Chief Justice. The other is a Bench decision, unreported, in **Lala Sheo Nath v. Lala Shiam Behari in Second Appeal No. 445**

of 1942, decided on 23rd December, 1948 by the present Chief Justice sitting with our brother Chandiramani, J. In the former case the learned Chief Justice enunciated the principle that a co-sharer in exclusive possession of joint land is not entitled to so can change the character of possession as to effect a complete ouster of the other co-sharers. By adding more constructions to those already existing a co-sharer cannot be said to change the nature of his possession or putting the land to use for which it was not meant and the other co-sharers are not entitled to have the constructions removed. Such cases are to be decided on a balance of convenience and the courts have to see whether the acts complained of are such that they were detrimental to the interest of the co-sharers and some thing to which they had not already acquiesced before. The learned Chief Justice also refers to a large number, of Allahabad decisions and to the unreported case. This view is in full accord with the older Avadh decisions to which we have referred."

17. Then having discussed the law as above Full Bench finally held as under :

"As a result of the foregoing discussion, it appears to us that the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to co-sharer, whose right in respect of joint land has been invaded by the other co-sharers either by exclusively appropriating and cultivating land or by raising constructions thereon. The conflict in some of the decisions has apparently risen from the confusion of the distinct matters. entitled to object to While therefore a co-sharer is another co-sharer exclusively

appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for demolition and injunction will be granted or withheld by the court according as the circumstances established in the case justify. The court may feel persuaded to grant both the reliefs if the evidence establishes that the plain till cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the court to lay down an inflexible rule as to the circumstances in which the relief for demolition injunction should be granted or refused."

18. In view of, the above exposition of principle of law on grant of injunction to a co-sharer, entire discretion to grant injunction to other co-sharer is held to be dependant upon the facts of each case and the testing point is, as to whether one co-sharer is trying to appropriate unpartitioned land by raising construction to the disadvantage of the other co-sharer.

19. In the case of **Sant Ram Nagina Ram (supra)**, Punjab and Haryana High Court held that in the absence of any suit for partition in respect to joint holding while it is true that one co-sharer cannot be permitted to usurp the best piece of land without the consent of the other co-sharer. The Court summarized the legal proposition regarding joint possession of the property vide paragraph-14 thus :

"14. The Weight of the authorities and the principles which have been discussed propositions:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of the joint property one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title and de- nies that of the other

(5) Passage of time does not extinguish the right of co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition.

(8) The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

(9) Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered."

20. In the case of **Awadh Narain (supra)**, this Court had held that if one of the co-sharers intended to raise construction without there being any partition between the co-sharers in metes and bounds, i.e. demarcating exclusively their rights shares in the property, then injunction should not be denied to a co-sharer against the other merely on a premise that construction would be raised at the risk of the person concerned and it would be pulled down at the time the decree is passed. The Court, therefore, held that if any co-sharer is raising construction

on an undivided and unpartitioned land, he can be enjoined from doing so.

21. In the case of **Radhey Shyam (supra)**, the Court referred to the judgment of Justice Watch H AIR 1960 ALL 322, that injunction cannot be granted against a co-sharer for a wrongful use of a joint land so the issue decided by the Division Bench was that the joint owner had no right to deal with the joint property without consent of the other joint owner. In turn, the learned Judge relied upon a Division Bench of this Court, ILR 18 ALL 115 and then the Court referred to the judgement of the Punjab & Haryana High Court (*supra*).

22. In the case of **T. Lakshmipathi & others (supra)**, it was held that one co-owner cannot be permitted take exclusive possession of the property nor can be permitted to commit waste or do illegitimate use of a joint property. A right of the co-sharer to enjoy the property jointly and exclusively has been recognized and to that extent right to protect possession has also been recognized. The interest in the property of one stands fortified by another co-sharer and to that extent nobody can be permitted to take exclusive possession of a particular area by way of illegitimate use thereof or may be changing the nature of the land.

23. In this above case, the controversy had arisen from a decree passed by the Court for eviction under the ANDHRA PRADESH BUILDINGS (LEASE, RENT AND. EVICTION) CONTROL ACT, 1960. The rent controller in that case had directed for eviction of the tenant namely respondent nos. 2 and 3. In the SLP and hence the persons inducted to be in possession were held to be liable for eviction. The appeal was dismissed against

the said decree by the Principal Senior Civil Judge affirming the order of the rent controller. In the revision that was filed before the High Court, though it got wrongly recorded as unregistered sale deed in favour of applicant nos. 3 to 5 in the SLP and then applicant nos. 1 and 2 and so there was no effect of transferring title to that, but the counsel appearing for the respective parties agreed before the Supreme Court that those sale deeds were registered one. Thus, it was pleaded before the High Court that the appellant being transferee in possession by virtue of the sale deed also acquired status of the co-owner and so they could not be the tenant of respondent no. 1 who was just one of the other co-owners and so it was also pleaded that the landlord and tenant relationship was found fundamentally misconceived and the suit deserved to be dismissed. It is in that background that a plea was taken before the High Court and the Supreme Court that remedy of a co-owner was to file a suit for partition against another co-owner in possession.

24. The rival submissions before the Court in the above case where :

"A. If the appellants were held to be co-owners in possession of the property, so the suit for eviction would not lie; and on behalf of the decree holder:

B. Since appellants were inducted by the tenant in the suit property without his consent, they deserved eviction."

25. It is in this above background of legal plea that question in that case was considered about the injunction inter se parties. Vide paragraph-25 held thus :

"In the facts and circumstances of the case, no defence or shelter is available

to the appellants behind the plea that they have acquired interest of some of the co-owners. The law as to co-owners is well settled. Where any property is held by several co-owners, each co-owner has interest in every inch of the common property, but his interest is qualified and limited by similar interest of the other co-owners. One co-owner cannot take exclusive possession of the property nor commit an act of waste, ouster or illegitimate use, and if he does so he may be restrained by an injunction. A co-owner may, by an arrangement, expressed or implied, with his other co-owners, possess and enjoy any property exclusively. Such a co-owner can also protect his possession against the other co-owners and if he is dispossessed by the latter, he can recover exclusive possession. (See *Jahuri Sah & Ors. v. Dwarika Prasad Jhunjunwala & Ors.*, (1966) Supp SCR 280). It is beyond any controversy that on the death of late P. Narayana Reddy, his rights devolved upon the several heirs including respondent no.1. The respondent no.1 is the only male person in the body of the co-owners, all others being women. It may be for this reason, or otherwise, that the respondent no.1 was in possession of the property, through tenants, realizing the rent peacefully and with the consent, expressed or implied, of other co- heirs of late P. Nithyananda Reddy. So far as the respondents no.2 and 3 are concerned, by operation of Section 116 of the Evidence Act, they were estopped from challenging or denying the ownership of the respondent no.1 and his rights in the tenancy premises. As held in *Vasudeo v. Balkishan*, (2002) 2 SCC 50, the rule of estoppel between landlord and tenant continues to operate so long as the tenancy continues and unless the tenant has surrendered possession to the landlord. The estoppel would cease to

operate only on the tenant openly restoring possession by surrender to the landlord. Neither the respondents no. 2 and 3 nor their successors in interest or the persons claiming under them could have denied the title of the respondent no.1 during the continuance of the tenancy and even thereafter unless they had restored possession over the tenancy premises to the respondent No.1. Looking at the status of the appellants whether as co-owners or as persons inducted in possession by the tenants they have no legs to stand on. If other co-owners could not have dispossessed the respondent no.1 or demolished the property without the consent of respondent no. 1, it is difficult to conceive how their transferees could have demolished the tenancy premises and raised their own construction over the land on which the tenancy premises stood earlier."

26. In the case of **Girdhari Lal (supra)**, the Court was faced with the legal issue as to whether a co-sharer can seek injunction raising other co-sharer from using joint property or raising construction thereon without seeking relief of partition. The Court after referring to the facts and discussing various judgement has referred to the judgement in the case of **Abhai Singh v. Gyan Singh** 1971 JKLR page 326 in which the Court had observed that one co-sharer cannot be permitted to raise construction upon a joint land without the consent of other may be such a construction may not cause direct loss to other joint owners. The learned Judge also referred to the judgement of the Rajasthan High Court in **Chagan Lal v. State Of Rajasthan: 2022 Latest Caselaw 9493 Raj** and also Division Bench of the **Punjab and Haryana in Sant Ram Nagina Ram v. Daya Ram Nagina Ram and others; AIR**

1961 P H 528. The Court thus ultimately held that if the property was found to be a joint property and that encroachment was being made upon the defendants then the trial court ought to have decreed the suit for injunction.

27. Considering the judgement in the aforesaid cases, while I find there to be no dispute that where any property is held by several co-owners, each co-owner has interest in every part of the property, but such an interest is qualified by similar interest of other co-owners, and therefore, to that extent, no damage or waste to the property or illegitimate use of the property can be permitted by one of the co-owner to the disadvantage of other co-owners.

28. A co-ordinate Bench of this Court in the case of **Virendra Kumar (supra)** was confronted with this law point as to whether suit simpliciter for permanent injunction would be maintainable and entertainable if instituted by one co-sharer against the other co-sharer and the interim injunction in that case was granted by the trial court to maintain status quo. The order of the trial court was set aside by the Court in appeal and hence the co-sharer plaintiff came to the High Court. The controversy in that case was that though the property was joint but the one brother had sold out a part of the property for consideration of Rs. 40,000/- in favour of the respondent nos. 2 and 3 and so the grievance was that such transfer of the property by sale without there being partition thereof was not permissible. It also transpired that in the said case that no suit was filed questioning the sale deed and, therefore, the purchaser also claimed to be a co-sharer. The Court therefore held that without a suit for partition injunction could not have been granted, relying upon a judgement of the

Supreme Court in the case of **Kochkunju Nair v. Koshy Alexander and others; AIR 1999 SC 2272.** Supreme Court in the case of **Kochkunju Nair (supra)** was dealing with a right of Kudikidappukaran claimed by one of the co-owner. Kudikidappukaran is a right to build dwelling house. Interpreting the rights of the co-owners in respect of the joint property vide paragraph-9, 10 & 11, the Court had held thus :

"9. Ownership imports three essential rights, namely, right to possession, right to enjoy and right to dispose. If an owner is wrongly deprived of possession of his property he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All co-owners have equal rights and co-ordinate interest in the property, though their shares may be either fixed or indeterminate. Every co-owner has a right to enjoyment and possession equal to that of the other co-owner or co-owners. Each co-owner has, in theory interest in every infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with others (vide Mitra's Co-ownership and Partition, Seventh Edn.).

10. A three-Judge Bench of this Court has held in Sri Ram Pasricha v. Jagannath, AIR 1976 SC 2335 that a co-owner owns every part of the composite property along with others. Following statement of law has been made by their Lordships (Para 29):

"Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it

cannot be said that he is only a part-owner or a fractional owner of the property. exist". The position will change only when partition takes place."

11. To hold that a co-owner is not an owner and his possession is not the possession envisaged in Section 2(25) of the Act is in conflict with the correct legal position. If a co-owner wants to erect homestead on the land he is free to do so. When a division of the co-ownership property takes place the co-owner who put up the homestead can claim that the said portion may be allotted to his share. Courts would ordinarily grant such equitable relief when claimed. [vide Nutbehari Das v. Nanilal Das, AIR 1937 PC 611] If the other co-owner objects to the construction of a homestead he can get the co-ownership property divided by partition, and if the other party is not readily willing to that course it is open to him to get it partitioned through suit. These are various remedies available to the co-owner in respect of his land. Merely because he has to re-sort to such steps it cannot be said that a co-owner cannot erect a homestead on his land."

29. In the case of **Ram Prasad Tiwari (supra)**, a co-ordinate Bench of this Court has held that if one co-sharer is being enjoined from using and enjoying the land which falls in his share also by virtue of being co-sharer, such an aggrieved co-sharer can maintain a suit for injunction.

30. In the light of the authorities discussed, and applying the above principle to the facts of the case, I find that in the plaint, the general pleading is with regard to undivided shares and the only exception is paragraph-9 wherein allegations have been made that there was a threat by the co-sharers namely the

respondents to change the nature of the land.

31. In the background of these pleadings, I find that there is no pleading with regard to any construction activity initiated by the defendants-respondents in the suit and the Relief-A in the Final Relief Clause is to the effect that without partition the respondents be restrained not to change the nature of land. The Court without least application of mind directed for an ad-interim injunction on 10.6.2020. However, thereafter, the written statement was filed in which the basic plea was taken that there was already mutual partition of the property amongst the co-owners and that there was no construction work going on but only some repair work was being undertaken given the old constructions upon land land that fell into their shares. In these circumstances, the basic prayer ought to have been for partition if the plaintiff was claiming that the property had not been partitioned in metes and bounds. The trial court after the objections were filed though noticed the objections of the defendants taken in the suit as well as to the 6C application but proceeded to assume that the property was undivided as the tenure holders continued to be recorded in a joint khata.

32. In the background of the pleadings that have been discussed above an injunction order was totally uncalled for. The principles that have been finally discussed above for consideration of injunction suit, on those parameters, the injunction could not have been maintained and instead petitioner ought to have either amended the relief clause in the plaint demanding for partition or should have filed a fresh suit for partition. Since the

defendants have taken the plea that they were not raising any new construction activity and only some repair work was going on in the old existing construction where the defendants are residing, such an act would not amount any destruction or damage to the joint property, nor would result in appropriation by the defendants of any part of land in name of raising construction. In these circumstances, I do not find, the judgment passed by the District Judge suffering from any manifest error of law and facts.

33. However, it is left open for the petitioner to either seek amendment in the suit to add a relief for partition or to file a fresh suit for partition and also maintain an application of injunction afresh in the event any new construction activity is undertaken upon a joint land.

34. With liberty aforesaid, this petition stands **disposed of**.

35. Cost made easy.

(2023) 5 ILRA 1233
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 1695 of 2023

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

Counsel for the Applicants:

Sri Syed Imran Ibrahim, Sri Vinay Kumar Rai

Counsel for the Opposite Parties:

G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 156(3), 200,202 - Indian Penal Code, 1860 - Sections 323, 427, 504, 506 , The Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3 (1) Da Dha - Against the judgment and orders passed in S.C S.T Act remedy has been provided u/s 14-A of the Act of 1989 but it cannot be challenged under Articles 226 or 227 of the Constitution of India, Revision under Section 397 Cr.P.C or by an Application U/s 482 Cr.P.C. - even if an applicant has been failed in filing an appeal under Section 14-A of the SC ST Act, it can be preferred any time. (Para - 15,16)

Complainant (opposite party no. 2) moved an application under Section 156 (3) Cr.P.C - converted into complaint - deposition under Sections 200 and 202 Cr.P.C. - applicants were summoned for their appearance as accused - circumstances mentioned by the Apex Court not present - Maintainability of Petition - summoning order under challenged - which is appealable - u/s Section 14-A of the S.C. / S.T Act). **(Para - 6,11)**

HELD:-Application under Section 482 Cr.P.C not maintainable and liable to be rejected. Applicants can file an appeal under Section 14-A of the S.C/S.T Act. **(Para -22)**

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

List of Cases cited:

1. Gulam Rasool Khan & ors.Vs St. of U.P. & ors., Criminal Appeal No. 1000 of 2018
2. Prithvi Raj Chauhan Vs U.O.I. & ors., (2020) 4 SCC 727
3. Lalita Kumari, (2014) 2 SCC 1
4. U.O.I. Vs St. of Maha. & ors., (2020) 4 SCC 761

5. Ram Awtar Vs St. of M.P. , 2021 SCC OnLine SC 966

6. Ram Gopal & anr. Vs St. of M.P. , 2021 SCC OnLine SC 834

7. Gulam Rasool Khan Vs St. of U.P., Criminal Appeal No. 1000 of 2018

8. Dr. Sah Faisal Vs U.O.I. & anr., (2020) 4 SCC-1

9. N.I.C. Ltd Vs Pranay Sethi & ors., (2017) 16 S.C.C 680

10. Sandeep Kumar Vs St. of Maha., (2014) 16 SCC 623

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

1. Heard Sri Syed Imran Ibrahim, learned counsel for the applicants, Sri Pankaj Kumar Tripathi, learned A.G.A for the State and perused the record.

2. This application under Section 482 Cr.P.C has been moved to quash the summoning order dated 10.11.2022 arising out of Special Case No. 70 of 2019 - (*Amar Singh Vs. Rakesh Mishra and others*) under Sections 323, 427, 504, 506 I.P.C & Section 3 (1) X, of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Highway, district Mathura as well as all consequential proceedings of Case No. 70 of 2019, pending in the Court of Special Judge, SC/ST At, Mathura.

3. In brief, the facts of the case are that opposite party no. 2, Amar Singh, the complainant moved an application under Section 156 (3) Cr.P.C to lodge an F.I.R under the aforesaid Sections against the applicants in respect of commission of crime at 09:00 a.m on 28.07.2019 with the

allegations that the applicant and four five other persons armed with Lathi, sticks and other weapons reached at his land, broke the boundary wall through a J.C.B Machine and caused a loss of Rs.50,000/-. When they were prevented they abused, saying the applicant and his brother to be *Chamar Dherh* and assaulted the complainant and his brother.

4. The complainant ranged up 100 number and when police reached on the spot, they scrapped giving threatening to their life. The 100 number police carried the complainant and his brother Kundan Singh, Kedar Singh at the P.S. where the complainant presented a written complaint, but the Highway P.S. did not take any action in the matter. The accused persons are the Gunda and miscreants, who want to occupy the complainant's land by dint of his muscle power. The applicant also moved a complaint to S.S.P, Mathura on 31st July, 2019, and again sent an application on 13.08.2019 to S.S.P, Mathura and other superior authorities but no action was taken , hence application u/s 156 (3) Cr.P.C was moved.

5. The aforesaid application was converted into complaint. The statement of the complainant was recorded under Section 200 Cr.P.C. The statements of P.W. 1 Kundan Singh, P.W. 2 Kedar Singh and P.W 3 Vinod Kumar were recorded under Section 202 Cr.P.C. On 10.11.2022, the learned Special Judge (SC/ST Act) Mathura, summoned the applicants under Sections 323, 504, 506, 427 I.P.C and Section 3 (1) Da Dha of the S.C/S.T Act, for their appearance on 16.12.2022.

6. Being aggrieved, the accused applicants have preferred this Application under Section 482 Cr.P.C. At the time of

hearing, the learned A.G.A raised an objection that in view of the Full Bench Judgement of this Court passed in **Gulam Rasool Khan & Ors. Vs. State of U.P. & Ors. Criminal Appeal No. 1000 of 2018 on 28.07.2022**, (appeal can be preferred u/s Section 14-A of the S.C. / S.T Act), this petition is not maintainable. By this application basically the summoning order has been challenged, which is appealable.

7. Contrary to that the learned counsel for the applicant relying on several judgments, which are discussed herein argued that the application under Section 482 Cr.P.C is maintainable against the order passed by the learned Special Judge (SC/ST Act) even in cases wherein an order has been passed under the S.C. S.T Act.

8. It would be proper to mention Section **14-A of the SC ST Act**, which is here in below :-

"14A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in sub-section (3) of section 378 of the Code of Criminal Procedure, 1973, an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

(3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the

judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal."

9. The judicial precedent referred by the learned counsel for the applicant are categorically discussed herein below.

a) **Prithvi Raj Chauhan Vs. Union of India & Ors. (2020) 4 SCC 727**, this was the case, in which an anticipatory bail under Section 438 Cr.P.C had been preferred, Hon'ble the Apex Court held that the grant of anticipatory bail under Section 438 Cr.P.C is barred in respect of offences under the S.C S.T Act of 1989 however, where the prima-facie case are not made out, anticipatory bail can be granted in appropriate circumstances, with exercising the of power u/s 482 Cr.P.C.

b). It has also been held that preliminary inquiry before the registration of F.I.R in respect of occurrence under the Act of 1989 can only be in circumstances enumerated in **Lalita Kumari, (2014) 2 SCC 1**.

c). In para 12 of the judgment it has been held that in exceptional

circumstances and strictly in parameter laid down in the judgment, quashment to proceedings under the Act of 1989 can be prayed under Section 482 Cr.P.C for preventing the misuse of law.

d). Para 12 of the judgment is reproduced herein below:-

"12) Dr. Ashok Dhamija, learned counsel for the CBI, submitted that the use of the word "shall" under Section 154(1) of the Code clearly mandates that if the information given to a police officer relates to the commission of a cognizable offence, then it is mandatory for him to register the offence. According to learned counsel, in such circumstances, there is no option or discretion given to the police. He further contended that the word "shall" clearly implies a mandate and is unmistakably indicative of the statutory intent. What is necessary, according to him, is only that the information given to the police must disclose commission of a cognizable offence. He also contended that Section 154 of the Code uses the word "information" simpliciter and does not use the qualified words such as "credible information" or "reasonable complaint". Thus, the intention of the Parliament is unequivocally clear from the language employed that a mere information relating to commission of a cognizable offence is sufficient to register an FIR. He also relied on *Bhajan Lal (supra)*, *Ramesh Kumari (supra)*, *Aleque Padamsee (supra)*, *Lallan Chaudhary (supra)*, *Superintendent of Police, CBI vs. Tapan Kumar Singh (2003) 6 SCC 175*, *M/s Hiralal Rattanlal (supra)*, *B. Premanand (supra)*, *Khub Chand vs. State of Rajasthan AIR 1967 SC 1074*, *P. Sirajuddin (supra)*, *Rajinder Singh Katoch (supra)*, *Bhagwant Kishore Joshi (supra)*, *State of West Bengal vs. Committee for*

Protection of Democratic Rights, West Bengal (2010) 3 SCC

571. He also pointed out various safeguards provided in the Code against filing a false case. In the end, he concluded by reiterating that the registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. Further, he also clarified that the preliminary inquiry conducted by the CBI, under certain situations, as provided under the CBI Crime Manual, stands on a different footing due to the special provisions relating to the CBI contained in the *Delhi Special Police Establishment Act, 1946*, which is saved under Sections 4(2) and 5 of the Code.

e). From the above, it is very much clear that only in exceptional cases the High Court can exercise its power under Section 482 Cr.P.C in case of any order passed under the S.C. S.T Act. Here no such exceptional circumstances are into existence, hence this Court is of the view that in the present case the aforesaid precedent does not apply.

f). *Union of India Vs. State of Maharashtra & Ors. (2020) 4 SCC 761*, this case was also in respect of grant of anticipatory bail regarding the offence committed under the Act of 1989. In this case it has been held that if information discloses a cognizable offence, registration of F.I.R is mandatory and no recourse to Section 438 Cr.P.C is permissible, so far as, exercise of power under Section 482 Cr.P.C is concerned, paras 52 and 60 of this judgment are relevant which are reproduced herein below:

52. It is an unfortunate state of affairs that the caste system still prevails

in the country and people remain in slums, more particularly, under skyscrapers, and they serve the inhabitants of such buildings.

60. By the guidelines issued, the anomalous situation may crop up in several cases. In case the appointing authority forms a view that as there is no prima facie case the incumbent is not to be arrested, several complications may arise. For the arrest of an offender, maybe a public servant, it is not the provision of the general law of Cr.PC that permission of the appointing authority is necessary. No such statutory protection provided to a public servant in the matter of arrest under the IPC and the Cr.PC as such it would be discriminatory to impose such rider in the cases under the Act of 1989. Only in the case of discharge of official duties, some offence appears to have been committed, in that case, sanction to prosecute may be required and not otherwise. In case the act is outside the purview of the official discharge of duty, no such sanction is required. "

10. From the scrutiny of the aforesaid part of the judgment it is very much clear that there might be certain false cases in which interference by the High Court exercising its power under Section 482 Cr.P.C. might be necessary. As per para 60 of the judgment, if there is apprehension of arrest, harassment and false implication, the applicant may approach the High Court for quashment of the F.I.R under Section 482 Cr.P.C and in this case also the Hon'ble, the Apex Court has propounded similar preposition of law as held in the Case of ***Prithviraj Chauhan (supra)***.

11. Hear the complainant - opposite party no. 2 had moved an application under

Section 156 (3) Cr.P.C., which was converted into complaint and in which after deposition under Sections 200 and 202 Cr.P.C., the applicants were summoned for their appearance as accused. Here the circumstances mentioned by the Apex Court are not present. Hence, this Court is of the view that in the facts and circumstances of this case, this precedent also does not support the contention of the applicants.

12. Learned counsel for the applicant have also relied on the judicial precedent ***Ram Awtar Vs. State of MP 2021 SCC OnLine SC 966*** and ***Ram Gopal and another Vs. State of M.P. 2021 SCC OnLine SC 834***. In both the cases the parties had entered into compromise and thereafter a question arose that when a criminal case under the S.C / S.T Act is not compoundable in view of Section 320 Cr.P.C whether the High Court or the Supreme Court can entertain the petition for quashment of the entire criminal proceedings under Article 142, 226 and 227 of the Constitution of India and Section 482 of the Cr.P.C.

13. Hon'ble the Apex Court held that no useful purpose would be served keeping the matter pending if the parties have compromised the case. Since the parties had entered into compromise and also considering the old pendency of the case, it was held that in the facts and circumstances of the case in hand, the proceedings of the criminal case under the S.C. S.T Act may also be quashed u/s 482 Cr.P.C.

14. Here no such circumstances with regard to compromise are present. The applicants are challenging the summoning order and opposite party no. 2, the complainant is prosecuting the impugned

criminal case, Hence, this Court is of the view that these judicial precedents have no applicability in favour of the applicants due the change of facts and circumstances of the case.

15. Learned A.G.A has relied on the judgment passed in ***Gulam Rasool Khan Vs. State of U.P., Criminal Appeal No. 1000 of 2018*** decided on **July, 28, 2022** Full Bench decision of this Court, in which relying on the judgement in ***Re: provision of Section 14(a) of SC ST (Prevention of Atrocities) Amendment Act, 2015 (2018) 6 ALJ 631*** concluded that against the judgment and orders passed in S.C S.T Act remedy has been provided u/s 14-A of the Act of 1989 but it can not be challenged under Articles 226 or 227 of the Constitution of India, Revision under Section 397 Cr.P.C or by an Application U/s 482 Cr.P.C.

16. It has also been held that since in Re: provisions of Section 14-A of the SC ST Amendment Act 2015 (supra), the provisions of Section 14-A (3) has been held to be in violation of Article 14 and 21 of the Constitution of India and the same has been struck down. Therefore, even if an applicant has been failed in filing an appeal under Section 14-A of the SC ST Act, it can be preferred any time.

17. Learned counsel for the applicant argued that since the judgment of ***Prithviraj Chauhan, Ram Awtar, Ram Gopal and Union of India Vs. State of Maharashtra*** properly have not been discussed by the Full Bench of this Court, while passing the judgment in the case of ***Gulam Rasool Khan & Ors.*** (supra). The judgement of Full Bench of this Court would be barred by the principle of per incurium.

18. In this regard learned counsel for the applicant has relied on ***Dr. Sah Faisal vs. Union of India and another (2020) 4 SCC-1, N.I.C. Ltd Vs. Pranay Sethi and others (2017) 16 S.C.C 680 Sandeep Kumar Vs. State of Maharashtra (2014) 16 SCC 623***, in which it has been laid down that if a judgment of Division Bench, Full Bench, or High Court has not been discussed on the very impugned point involved in the case, later judgments would be barred by the principle of per incurium.

19. Certainly, while pronouncing the judgment in ***Gulam Rasool Khan & Ors.*** (supra), the aforesaid judgments have not been discussed by the Full Bench of this Court, but it has also been discussed by this Court that in ***Prithviraj Chauhan, Ram Awtar, Ram Gopal (supra), and Union of India Vs. State of Maharashtra (Supra)***, facts and circumstances of the concerned cases were totally different from the facts and circumstances of the case in hand. Since the relevant discussion has also been mentioned earlier, there is no need to reiterate it again, but it is very much clear that the Hon'ble Supreme Court has made an obitor dicta opinion that in extraordinary and exceptional cases, a petition under Section 482 Cr.P.C may be entertained.

20. This court is of the considered view that the circumstances pointed out in the judgment cited by the learned counsel for the applicants are not here. Hence, the judgement of ***Gulam Rasool Khan & Ors (Supra)*** the Supreme Court is not barred by principle of per incurium.

21. This judgement has been passed directly in respect of S.C / S.T Act and Section 14-A of the aforesaid Act with regard to the provision of appeal.

22. On the basis of facts and circumstances, it is concluded that this application under Section 482 Cr.P.C is not maintainable and is liable to be rejected. However, remedy is open to the applicants for filing an appeal under Section 14-A of the S.C / S.T Act.

23. This Application under Section 482, is accordingly **dismissed**.

(2023) 5 ILRA 1239

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 27.04.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No. 4003 of 2023

Ashok Kumar Singh **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:
Sri Ravi Kant Pandey

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power , Section 319 - Power to proceed against other persons appearing to be guilty of offence - much stronger evidence than mere possibility of complicity is required in the cases, where the trial court is invoking the jurisdiction under section 319 of Cr.P.C. while summoning the accused - power given to the court under section 319 of Cr.P.C. is a discretionary and extraordinary - should be exercised sparingly and further it is not to be exercised in supine and cavalier manner - strong and cogent evidence is warranted for test of degree of satisfaction.(Para - 27)

Application under section 319 Cr.P.C. - trial court summoned applicant - statements of P.W.- 1 to P.W.-3 mentioned in verbatim in the order - recorded prima-facie case against applicant - thus applicant summoned - Initially named in initial information report - investigation expunged - no material evidence found - final report submitted - without applicant involvement. **(Para - 25)**

HELD:-Trial court found prima-facie, a case against applicant. No such finding or the degree of satisfaction recorded that there are much stronger case available against the applicant. Trial court ignored the law enunciated by the Apex Court. Impugned order set aside. Matter remitted back to trial court to take a fresh decision. **(Para - 29,30,31)**

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

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. At the very outset, Sri Kailash Nath Mishra, learned counsel appearing for the opposite party no. 2 has raised a preliminary objection that this application under section 482 Cr.P.C. is not maintainable against the order dated 06-04-2023 passed by the learned Additional District & Sessions Judge, Gonda.

2 . He added that the impugned order has been passed while invoking the jurisdiction under section 319 of Cr.P.C. and it's not an interlocutory order and the same is revisable and therefore invoking the inherent powers under section 482 of Cr.P.C., is barred as the inherent power can be invoked, when there is no overt or express provision in the Criminal Procedure Code or otherwise any alternative remedy is available.

3. In support of his contentions, he has placed reliance on the Judgment of the Apex Court rendered in the case of Mohit

alias Sonu and Another Versus State of U.P. and Another(Criminal Appeal No. 814 of 2013) decided on 1st July, 2013 and has referred paragraph no. 23 of the aforesaid Judgment, which is quoted hereinunder :-

"23. So far as the inherent power of the High Court as contained in Section 482 of Cr.P.C. is concerned, the law in this regard is set at rest by this Court in a catena of decisions. However, we would like to reiterate that when an order, not interlocutory in nature, can be assailed in the High Court in revisional jurisdiction, then there should be a bar in invoking the inherent jurisdiction of the High Court. In other words, inherent power of the Court can be exercised when there is no remedy provided in the Code of Criminal Procedure for redressal of the grievance. It is well settled that inherent power of the court can ordinarily be exercised when there is no express provision in the Code under which order impugned can be challenged. "

4. Relying on the aforesaid, he submits that the Apex Court has reiterated that if an order is not interlocutory, the same can be assailed in the High Court, in revisional jurisdiction and therefore, the remedy of revision is available to the applicant and invoking inherent powers in such conditions is barred, thus the instant application may be dismissed on this ground alone.

5. Per contra, Sri Amrendra Nath Singh, learned Senior Counsel appearing for the applicant submits that the ratio of the Judgment in Mohit alias Sonu & Another(Supra) is not a good law and he has placed reliance on the Judgment rendered in Prabhu Chawla Vs. State of Rajasthan & and Anr., reported in ABC

2016(II)126 SC and has referred paragraph nos.6 & 7 of the said Judgment, which are quoted hereinunder :-

"6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section 482 Cr.P.C. is unwarranted. We would simply reiterate that Section 482 begins with a non-obstante clause to state: 'Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.' A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J. 'abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more.' We venture to add a further reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders! A situation wholly unwarranted and undesirable.

"7. As a sequel, we are constrained to hold that the Division Bench, particularly in paragraph 28, in the case of Mohit alias Sonu and another(supra) in respect of inherent power of the High Court in Section 482 of the Cr.P.C. does not state the law correctly. We record our respectful disagreement."

6. Relying on the aforesaid, he submits that the Apex Court while considering the law propounded in the case of Mohit alias Sonu Vs. State of

U.P(Supra), has overruled the ratio of the Judgment, which was rendered in paragraph no. 28 and held that the inherent power of the High Court under section 482 Cr.P.C., which was otherwise, interpreted by the earlier Bench, is not correct law. He added that in the subsequent Judgments, Hon?ble Apex Court has held that Section 482 of Cr.P.C. begins with non obstante clause and therefore, in case of abuse of process of law, inherent power can be invoked and there is no limitation except the self restraining, thus, the summoning order, which was passed under section 319 of Cr.P.C. can very well be challenged while invoking the jurisdiction under section 482 Cr.P.C.

7. Mr. Anirudh Kumar Singh, learned A.G.A.-I appearing for the State has submitted that for understanding the ambit and scope of Section 482 of Cr.P.C., it would be appropriate to go into the history of the enactment of the said provision. He added that on 01-01-1862, the first Code of Criminal Procedure came into force in India and that did not contain any provision recognizing the inherent powers of the High Court. Thereafter, in 1898, the provisions recognizing the inherent powers of the High Court also did not contain and in 1908, when the Code of Civil Procedure was enacted and inherent powers under section 151 of the C.P.C. was envisaged, then the judicial opinion across the country became divergent that on whether the High Courts on criminal side also should have inherent powers. Prior to 1923, there were several verdicts of the High Courts that provision like Section 151 of the C.P.C. is nowhere in the Cr.P.C. and observed that conscious omission of the law makers omit the inherent powers of the criminal courts. This divergence of opinion was done away with by the amendment of the Cr.P.C. in

1923, known as Criminal Procedure Code, 1898(Amendment Act, 1923). By virtue of the aforesaid amendment, Section 561-A was inserted, which is quoted hereinunder :-

"Saving of inherent power of High Court" Division"-

561-A. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court "Division" to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

8. He added that thereafter, in Criminal Procedure Code, 1973, it was contained as Section 482, under Chapter XXXVII of the Code, which is titled as Miscellaneous Chapter.

9. Referring the aforesaid, he submits that the exercise of inherent powers under section 561-A of Cr.P.C. is to give effect to an order under the Code, or to prevent abuse of process of the Court and to otherwise secure the ends of justice. He added that no limitation can be put on the powers of the High Courts given in Section 482 Cr.P.C. known as inherent powers and had there been any intention of the legislature for any kind of limitation, that would have been given in the provisions itself.

10. Further submission is that the ratio of the Judgment in the case of Mohit alias Sonu and another(Supra) is now, not a good law, as much water has flown as considering the aforesaid ratio of the Judgment, the several Judgments have been passed by the Apex Court including the

Judgment in the case of Prabhu Chawla Versus State of Rajasthan and Another(Supra), wherein the ratio of Judgment in the case of Mohit alias Sonu and Another(Supra) has been overruled. Thus, the submission is that there is no merit in the contentions of the learned counsel for the opposite party no. 2 and the same may be rejected.

11. Considering the submissions of learned counsel for the parties and the historical background of inherent powers envisaged under section 482 of Cr.P.C., it transpires that prior to the enactment of the Criminal Procedure Code, 1973, in the old Cr.P.C. i.e. Cr.P.C. 1898(Amendment) Act, 1923, for the first time, the inherent powers of the High Courts were promulgated as under section 561-A. The aforesaid provision came into existence after thorough discussion, in the Forty First Report of the Law Commission Of India. The observations of the Law Commission in its report are as follows :-

"This statutory recognition, however, extends only to the inherent powers of the High Court. One may compare it with the recognition of the inherent powers of all civil courts by section 151, Civil Procedure Code.

In a number of decisions before and after the enactment of section 561-A, various High Courts have also recognised the existence of such power in subordinate Courts. We would, therefore, recommend a statutory recognition of such inherent power which has been recognised as vesting in all subordinate criminal courts.

However, the general principle of law is that the inherent power of a court can be exercised only to give effect to

orders made by it or to prevent abuse of its own processes."

We agree with the recommendation. We do not, however, consider it necessary or desirable to go further and recognise an "inherent power" in Courts of Session and other Courts of Appeal to pass appropriate orders to prevent the abuse of the process of any subordinate Court."

12. The parliament accepting the recommendations of Forty First Report of Law Commission of India, envisaged the provisions of inherent powers u/s 561-A of Cr.P.C.(old).

13. After enactment of the aforesaid provisions; time and again, the Apex Court has interpreted the meaning of the inherent powers given under section 482 of Cr.P.C. and it has been settled that the High Court can exercise the inherent powers to prevent the abuse of process of the Court for giving effect to the orders under the Code and to secure the ends of justice and the same should be exercised sparingly, but, at the same time, it is also noticeable that no bar provided in any Judgment with respect of invoking inherent powers, exercising jurisdiction under 482 of Cr.P.C. by the High Courts and infact, this is also the intent of the legislature while enacting the aforesaid provisions as no bar has been put on the inherent powers of the High Courts and this provision has been put in the Miscellaneous Chapter in the Cr.P.C. 1973. The very starting words of the provision says 'Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court; which clearly shows that no provision of

Cr.P.C. can be read overriding the provisions of Section 482 of Cr.P.C.

14. It reveals that in case of Mohit alias Sonu and another Vs. State of U.P.(Supra), it was held by the Apex Court that High Court while exercising its revisional jurisdiction, considering the legality and propriety of the order under section 319 of Cr.P.C., is required to give notice and opportunity of hearing to a person and further held that the inherent power of the High Court can be exercised when there is no remedy provided under the Code of Criminal Procedure for redressal of the grievance, though this question has again been raised and came for consideration before the Apex Court in the case of Prabhu Chawa(Supra) wherein, the Apex Court has very categorically held in para nos. 6 & 7 that inherent powers of the High Court under section 482 of Cr.P.C. cannot be barred by the alternative remedy provided under the Cr.P.C.

15. When this court further examines this issue, it is apparent from the bare reading of the provisions of section 482 of Cr.P.C. that the same starts with obstante clause i.e. "Nothing in this code shall be deemed to limit or affect the inherent powers of the High Court". This shows the intents of the legislature in so many words that any provision of Cr.P.C. can not said to be an alternative remedy in reference with the provisions of Section 482 of Cr.P.C and even no provision of Cr.P.C. can limit the inherent powers of High Court.

16. In view of the aforesaid submissions and discussions, the preliminary objection raised by the learned counsel for the opposite party no. 2 is hereby rejected.

17. Heard Sri Amrendra Nath Singh, learned Senior Counsel assisted by Sri Ravi

Kant Pandey, learned counsel for the applicant, Sri K.N.Mishra, learned counsel for the opposite party no. 2, Sri Anirudh Kumar Singh, learned A.G.A.-I for the State.

18. By means of the instant application under section 482 Cr.P.C. prayer has been made to quash the summoning order dated 06-04-2023 passed by the learned Additional District and Sessions Judge, Court No. 3, Gonda under section 319 Cr.P.C. in Sessions Trial No. 1028 of 2020, (State Vs. Awadh Kishor Tiwari and Others), arising out of Case Crime No. 184 of 2020, under sections 302,201 I.P.C., Police Station-Umari Begumganj, District-Gonda.

19. Learned Senior Counsel appearing for the applicant submits that by means of the instant application, the applicant has assailed the impugned order dated 06-04-2023 passed under section 319 of Cr.P.C. He submits that the factual matrix of the case is that a first information report was lodged with the allegation that one Rajveer @ Ranu was murdered by his brother, wherein the accused persons namely, Awadh Kishor Tiwari, Ram Kishor, Ashok Kumar Singh(present applicant) and Lalit Singh were named and after thorough investigation of the matter was done by the Investigating Officer and the Chargesheet was filed against the accused persons namely, Awadh Kishor and Kamla and the final report was submitted. The name of the present applicant was expunged at the time of investigation itself. He further added that the trial proceeded and chargesheet was filed and summons were issued against the other co-accused persons and when the statements of P.W.-1, P.W.-2 and P.W.-3 were recorded before the trial court, an application under section 319 of Cr.P.C.

was filed and objection was also submitted by the present applicant. He added that learned Magistrate while passing the impugned order dated 06-04-2023 has put the statements of the prosecution witnesses in vibratum, in the order and no finding has been recorded to the degree of satisfaction that there was much stronger case available. In support of his contentions, he has placed reliance on the Judgment of Apex Court in the case of Hardeep Singh Vs. State of Punjab and Others, reported in (2014) 3 Supreme Court Cases, 92 and has referred the paragraph no. 117.5 of the said Judgment, wherein the question no.(iv) has been answered. Para no. 117.5 of the said judgment is quoted hereinunder :-

"Q.IV What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?"

117.5. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial ? therefore the degree of

satisfaction for summoning the accused (original and subsequent) has to be different."

20. Referring the abovesaid, he submits that it has been held by the Apex Court that the degree of the satisfaction while deciding an application under section 319 Cr.P.C. is required to be recorded. He further added that in the course of deciding the application under section 319 Cr.P.C., the material must be disclosed against the newly summoned accused.

21. He has next referred the Judgment and order in the case of Brijendra Singh and Others Vs. State of Rajasthan, reported in (2017) 7 Supreme Court Cases, 706 and has referred paragraph no. 15 of the aforesaid Judgment, which is extracted hereinunder :-

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

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

22. Placing reliance on the aforesaid Judgment, he added that it has been held by the Apex Court that while deciding the application under section 319 of Cr.P.C., trial court has to look into, as to whether there are much stronger evidence than mere possibility of the complicity is available on record ? and the satisfaction in this regard, is also to be recorded. He submits that so far as the present case is concerned, the trial court while passing the impugned summoning order did not apply it's judicial mind and the law propounded by the Apex court and thus, the order dated 06-04-2023 is not sustainable in the eyes of law and therefore, the same may be set aside.

23. Contradicting the abovesaid contentions, learned counsel for the opposite party no. 2, has vehemently opposed the plea and arguments of the counsel for the applicant and submits that the learned trial court has recorded a detailed finding and has also mentioned the statements of the prosecution witnesses no. 1 to 3, which are apparent from the order itself. He submits that in the finding clause, it is also recorded

that there is prima-facie case against the present applicant as per the statements and evidences adduced by the prosecution and also got examined by the prosecution before the trial court. He also added that there are detailed discussion and reasoning made by the trial court in the impugned order and as such, there is no erroneousness or perversity and thus, the instant application has no merit and is liable to be dismissed.

24. Learned A.G.A. appearing for the State has also opposed the contentions of learned counsel for the applicant and submits that the learned trial court has rightly passed the impugned order considering the statements of the prosecution witnesses, which establishes more than the prima-facie case against the applicant, and thus, no interference is warranted.

25. Having heard learned counsel for the parties and after perusal of the material placed on record, it transpires that the impugned summoning order dated 06-04-2023 passed by the trial court is on an application under section 319 Cr.P.C. From perusal of the impugned order, it emerges that the statements of the P.W.-1 to P.W.-3 have been mentioned in verbatim in the order and it is recorded that there is prima-facie case against the applicant and thus, the applicant has been summoned.

26. This court has also noticed the fact that initially the present applicant was also named in the first information report and an investigation was done, wherein his name was expunged as the Investigating Officer while collecting the evidences against the accused persons, did not find material evidences with respect to involvement of the present applicant and thereafter final report was submitted.

27. It also transpires from the impugned order that the trial court found that there is prima-facie case against the present applicant, whereas, as per the law laid down by the Apex Court, more than prima-facie, case or much stronger cases, is required while summoning such accused thereby invoking the jurisdiction under section 319 of Cr.P.C. The power given to the court under section 319 of Cr.P.C. is a discretionary and extraordinary and therefore, the same should be exercised sparingly and further it is not to be exercised in supine and cavalier manner. The strong and cogent evidence is warranted for test of degree of satisfaction.

28. This court is also not unmindful to the Judgment and ratio rendered in the case of Brijendra Singh and Others Vs. State of Rajasthan (Supra), which clearly holds that much stronger evidence than mere possibility of complicity is required in the cases, where the trial court is invoking the jurisdiction under section 319 of Cr.P.C. while summoning the accused.

29. When this court examines the impugned order passed by the learned Additional District and Sessions Judge, Gonda in the light of the ratio of the Judgments aforesaid, it emerges from the order itself that the learned Additional District & Sessions Judge, has found prima-facie, a case against the applicant and there is no such finding or the degree of satisfaction recorded that there are much stronger case available against the applicant and as such, this court finds that the learned trial court has ignored the law enunciated by the Apex Court.

30. Resultantly, the impugned order dated 06-04-2023 is hereby set aside.

31. The matter is remitted back to the trial court concerned, to take a fresh decision, after considering the application under section 319 of Cr.P.C., within a period of sixty days, from the date of this order.

32. With the aforesaid observations, the instant application is hereby **allowed**.

(2023) 5 ILRA 1246
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2023

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Application U/S 482. No. 12560 of 2023

Yograj Singh **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Sri Vivek Kumar Maheshwari, Sri Anoop Trivedi (Sr. Adv.)

Counsel for the Opposite Parties:

G.A., Sri Nipun Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power , Section 216 - Court may alter charge , Section 319 - Power to proceed against other persons appearing to be guilty of offence , Section 212 - Particulars as to time, place and person , Indian Penal Code, 1860 - Sections 302 - murder - if the alteration or addition to a charge is such that no prejudice is caused to either the parties, court may, in its discretion, proceed with the trial by amending the said technical defects.(Para - 17)

(B) Criminal Law - Prejudice is shown based on the facts of the case - In judging a question of prejudice, as of guilt - courts must act with a broad vision and look to

the substance and not to the technicalities - their main concern should be to see whether the accused had a fair trial - whether he knew what he was being tried for - whether the main facts sought to be established against him were explained to him fairly and clearly - and whether he was given a full and fair chance to defend himself.(Para -15)

Applicant's application for amending charge to '*place of occurrence*' - rejected under Section 216 Cr.P.C. - prosecution witnesses examined - regarding place of incident - adding place of incident in the said charge - same does not cause any prejudice to either of the parties.(Para - 2,17)

HELD:- Direction to court below to amend the charge by incorporating the 'place of incident' in the original charge as per provision of Section 216(3) Cr.P.C. without recourse to further evidence . Proceed with trial expeditiously; following Apex Court's time frame.(Para - 18)

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

List of Cases cited:

1. Darbar Singh Vs St. of Punj., (2012) 10 SCC 476
2. Main Pal Vs St. of Har., AIR 2010 SC 3292

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

1. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Mr Vivek Kumar Maheshwari, learned counsel for the applicant, Mr Nipun Singh, learned counsel for the opposite party no. 2, Mr R. P. Mishra, learned AGA for the State and perused the material on record.

2. By means of this application, applicant/informant has prayed for setting aside the order dated 20.3.2023 passed by learned District and Sessions Judge,

Muzaffar Nagar in S.T. No. 561 of 2004 (State Vs Naresh Tikait), pending in the Court of Addl. Sessions Judge, Court No. 5, Muzaffar Nagar, relating to Case Crime no. 97 of 2003, under Section 302 IPC, P.S. Bhaurakalan, District Muzaffarnagar whereby the application of the applicant under Section 216 Cr.P.C. (paper No. 337 Kha) for amending the charge to the extent of '**place of occurrence**' has been rejected

3. Brief facts of the case are that the applicant lodged an FIR in relation to murder of his father, namely, Jagveer Singh, on 7.09.2003 vide Case Crime No. 97 of 2003, under Section 302 IPC, at P.S. Bhaurakalan, District Muzaffarnagar alleging therein that on 6.9.2003, when the informant along with his father and one Ramveer Singh, while going towards their village, are said to have reached in front of the house of one Parveen son of Ramphal at about 6 p.m. in Ambassdor Car, which was being driven by father of the informant, at that time, one Naresh Tikait son of Mahendra Tikait, Parveen son of Ramphal and Bittu @ Patwari son of Ramphal were standing in the way in a white coloured Maruti car in front of his house, and, as soon as father of the informant, decreases the speed of his vehicle, all the three accused persons, having country made pistols in their hands, came out of their car and accosted the vehicle of the informant from all sides, and, thereafter accused Praveen and Naresh are said to have shot dead his father by country made pistols. It is further alleged that at the time of incident, there were sufficient sun light and on raising alarm all the three accused persons fled away from the spot after leaving their Maruti Car. It is further alleged that informant immediately took his father to the Government Hospital but he died on the way to Hospital.

4. The matter was investigated by the police and thereafter the case was transferred to the CBCID, UP Police and after investigation charge sheet was filed before the concerned Court exonerating the accused Naresh Tikait, who lateron summoned by the trial court in exercise of power under Section 319 Cr.P.C. Charge is said to have been framed against the accused Naresh Tikait under Section 302 IPC on 11.6.2007 by Addl. Sessions Judge, Court No. 6, Muzaffarnagar, to the following effect as quoted below:-

"That on 6.9.2003 at 6 p.m. at village Alawalpur Majra, Police station Baura kalan, District Muzaffarnagar with common intention you and your companions Paveen Kumar and Rajeev Kmar caused grievous injuries by country made pistols to informant's father Jagveer Singh and due to said injuries, he succumbed, as such you committed murder which is punishable under Section 302 read with Section 34 of the IPC and is cognizable by this Court."

5. The grievance of the applicant is that in the FIR, itself, the informant/applicant has specifically mentioned the place of occurrence that the accused persons murdered his father in front of the house of accused Praveen Kumar at Village Alawalpur Majra and during the course of investigation, the Investigating Officer has also prepared the site plan in which he has also mentioned that the occurrence took place in front of the house of Praveen but the trial court committed illegality in framing of the charge against the accused by not mentioning the specific place of occurrence. Further, the applicant, who has been examined as P.W.-1 in his deposition, he had specifically stated that on 6.9.2003

at 6 p.m., the accused persons fired at his father in front of the house of accused Praveen at Village Alawalpur Majra. Another eye witness i.e. P.W.-2, namely, Yashpal has also stated in his deposition to the same effect. It is also alleged that during course of final argument, counsel for the applicant noticed that the charge framed against the accused Naresh Tikait is defective and needs alteration in the charge framed against the accused. Therefore, applicant/informant moved an application before the trial Court on 17.3.2023 with a prayer that in the charge framed against the applicant the place of occurrence has been typed as Village Alawalpur and no specific place has been mentioned, whereas in the FIR and in the site plan the place of occurrence is in front of the house of accused Praveen at Village Alawalpur Majra is mentioned, as such to fix the place of occurrence in front of the house of the accused Praveen Kumar, and also to avoid any technical error in future to get benefit of the same by either side, it becomes necessary to amend the charge to the extent that the place of occurrence be mentioned. The said application has been rejected by the court below vide impugned order, which is subject matter of challenge before this Court.

6. Record further discloses that the applicant also approached the Apex Court by filing Transfer Application on account of the threats extended by the accused with a prayer for transferring the Sessions Trial pending before the court of 5th Addl. District and Sessions Judge, Muzaffarnagar, UP to the court of District and Sessions Judge, Tishazari Courts, New Delhi, which was dismissed by the Hon'ble Supreme Court vide order dated 10.2.2023 considering the fact that the trial is pending since the last 19 years and the fact that the

evidence is already over and the trial is at the stage of final arguments. However, it was directed that the trial is conducted in a peaceful and fair manner as it is apprehended on behalf of the applicant that the accused are given a special treatment. Trial court was also directed to conclude the trial at the earliest and preferably, within a period of six months from today.

7. Record further discloses that thereafter applicant also filed transfer application before the District and Sessions Judge, Muzaffar Nagar with a prayer to transfer the said sessions trial to other appropriate court of District, Muzaffarnagar, which too was dismissed by order dated 23.02.2023 passed by District and Sessions Judge, Muaffarnagar. Aggrieved by the said order, applicant preferred Transfer Application (Criminal) No. 156 of 2023 before this Court, which is stated to be pending.

8. Submission of learned counsel for the applicant is that the charge framed against the accused is not sustainable in law in view of the provision of Section 212 of Cr. P.C. as the specific place the incident is not mentioned in the charge framed against the accused.

9. Learned counsel for the accused/respondent no. 2 stated that there is no irregularity in the charge framed against the applicant as the prosecution witnesses have stated in their deposition regarding the place of incident and during cross examination questions regarding place of incident have been asked, therefore, no prejudice would be caused to either side. It is further argued that the defect in framing of the charges must be so serious that it cannot be covered under Section 464/465 Cr.P.C., which provide that, an order of

sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s). In support of his argument, he placed reliance on the case of **(2012) 10 SCC 476 Darbar Singh Vs State of Punjab**.

10. To the contrary, learned AGA appearing for the State contended that the charge against the accused was framed on 11.06.2007, under Section 302/34 I.P.C. It is evident from the Charge that **except place of occurrence**, date and time of occurrence has been mentioned therein. It is further submitted that the charge is an accusation made against a person in respect of an offence alleged to have been committed by him/her and the basic requirement is that it must be so framed as to give the accused person a fairly reasonable idea of the case which he/she has to face. The mere irregularity in framing the charge against the accused, does not vitiate the trial, unless some prejudice is caused to the accused. It is further submitted that the scope of powers

of the court to alter or add any charge under Section 216 Cr.P.C. is very wide in nature and it confers exclusive jurisdiction on the court in regard to such matters which may be exercised at any time before the judgement is pronounced. The rights of the parties in regard to the same would be extremely limited and no addition or alteration or objection with regard thereto, can be raised as a matter of right.

11. To buttress his argument, learned AGA further pointed out that Section 215 Cr.P.C. clearly states that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Section 464 Cr.P.C. also provides that no finding sentence or order by a competent Court shall be deemed to be invalid merely on the ground that no charge has been framed or that there are some errors, omission or irregularity in the charge unless some failure of justice has occurred on that ground. In order to take the benefit of the same either of the parties must establish that failure of justice has been occasioned by an error or defect in stating the particulars in the charge. No such plea of any prejudice supported with evidence was adduced suggestive of the failure of justice due to any defect in framing of charge. There is also nothing on record to show that any prejudice has been caused to the applicant due to such omission. Under such circumstances omission to mention the place of occurrence in the charge does not vitiate the trial, when the trial is at the fog end. Learned AGA has also pointed out that there is sufficient material available against

the accused, which can at best be appreciated in evidence during trial. Thus, the impugned order does not suffer from any illegality, infirmity or any error of law justifying interference by this Court in exercise of its power under Section 482 Cr.P.C.

12. Considered the submission of learned counsel for the parties and perused the record.

13. Perusal of the impugned order discloses that while dismissing the application, learned Trial Court has returned a finding to the effect that during the cross examination of the prosecution witnesses, the question regarding place of incident have been asked by the accused. It is clear from the evidence that the accused had full knowledge about the place of occurrence of the crime committed by them and the accused during trial have enough opportunity to explain the situation of the crime committed by them. It has been clearly stated in the court by the learned counsel for the accused Naresh Kumar that the accused had no suspicion regarding the incident alleged against him and the prosecution witnesses have been clearly cross-examined about the place of incident. Thus there arises no question of prejudice to be caused to either of the parties.

14. Not doubt, it is trite law that in case of any omission in framing of the charge if it comes to the knowledge of the court trying the offence, the power to alter the charge under Section 216 Cr.P.C. is always vested in the Court to be exercised at any time before the judgment is pronounced. The section is in the nature of an enabling provision for the Court to exercise its power under certain contingencies when the relevant facts with

regard thereto are brought to its notice. In case where a situation so demands if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, the Court may do so on its own or upon an application of the parties.

15. How prejudice is to be shown ? Much depends on facts of the case. Hon'ble the Apex Court in the case of **Main Pal Vs State of Haryana, AIR 2010 SC 3292** enunciated the following principle as under:

(i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(iii) **In judging a question of prejudice, as of guilt, the courts must act**

with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself."

16. However, this court is also mindful of the provisions of Section 216 (3) Cr.P.C., which reads as under:-

"(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge."

17. Going through the aforesaid provision, it is very much clear that if the alteration or addition to a charge is such that no prejudice is caused to either the parties, court may, in its discretion, proceed with the trial by amending the said technical defects. It is admitted by the parties that the prosecution witnesses have been examined regarding the place of incident and by adding the place of incident in the said charge the same does not cause any prejudice to either of the parties.

18. In view of above, the court below is directed to amend the charge by incorporating the 'place of incident' in the original charge as per provision of Section 216(3) Cr.P.C. without recourse to further evidence and thereafter may proceed with

the trial and conclude the same as expeditiously as possible keeping in view the time frame as directed by the Apex Court.

19. With aforesaid observation, the application is disposed of.

(2023) 5 ILRA 1252
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Application U/S 482. No. 33349 of 2022

Kalika Pratap Singh **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Sri Shri Krishna Mishra, Sri Ajay Mishra, Sri Sheshadri Trivedi, Sri Satish Trivedi (Sr. Adv.)

Counsel for the Opposite Parties:

G.A., Sri Ashish Pandey, Pragya Pandey, Sri Radhey Shyam Shukla

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 173(8) - further investigation into the matter , Indian Penal Code, 1860 - Sections 420, 376,306, 406,120-B, Dowry prohibition Act,1961 - Section 3/4 , Information Technology Act , 2000 - Section 67 - Publishing of information which is obscene in electronic form - Court cannot adjudicate disputed question of fact under Section 482 Cr.P.C; only prima facie case considered - Accused's disputed defense not considered at this stage - Applicant has discharge rights under Section 239 or 227/228 Cr.P.C. .(Para - 11)

Accused developed a friendship with deceased - had a long relationship - suddenly withdrew -

potentially causing depression or embarrassment for victim - case not under Section 306 on refusal to marry - rather a case where accused had developed a relationship with the victim and later refused to continue - victim may have considered poison as a possible solution.(**Para -12**)

HELD:- Court cannot examine relationship between deceased and applicant at this stage, as it is not relevant to charge sheet stage. Court must examine the documents collected during investigation by police and any alleged evidence during trial. Court cannot examine any defences that have not yet been placed before the court below, as the stage of placing the defence version does not arise at this stage. Request for quashing case proceedings and charge sheet refused; application lacks force.(**Para - 12,13**)

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

List of Cases cited:

1. Vinay Tyagi Vs Irshad Ali @ Deepak & ors., 2012 (2) Supreme (SC) 903
2. M/s Pepsi Food Ltd & anr. Vs Special Judicial Magistrate & ors., 1998 UPCR.R. paged 118
3. Mandar Deepak Pawar Vs The St. of Maha. & anr., (Criminal Appeal No.442 of 2022)
4. Gangula Mohan Reddy Vs St. of A.P., (2010)1 SCC 750
5. Daxaben Vs The St. of Guj. & ors., SLP Criminal No. 1132-1155 of 2022
6. M/s Neeharika Infrastructure PVT Ltd. Vs St. of Maha., AIR 2021 SC 1918
7. R.P. Kapur Vs St. of Punj., A.I.R. 1960 S.C. 866
8. St. of Haryana Vs Bhajan Lal, 1992 SCC (Cr.) 426
9. St. of Bihar Vs P.P.Sharma, 1992 SCC (Cr.) 192
10. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cr.) 283,

11. St. of M.P. Vs Awadh Kishore Gupta & ors., (2004) 1 SCC 691

12. Dr. Monica Kumar & anr. Vs St. of U.P. & Ors., (2008) 8 SCC 781

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

1. Heard Mr Satish Trivedi, learned senior counsel assisted by Mr Sheshadri Trivedi, learned counsel for the applicant, Mr Radhey Shyam Shukla, learned counsel for the private respondent no. 2, learned AGA for the State and perused the record.

2. By means of this application, applicant has prayed for quashing of the entire proceedings of Criminal Case No. 13802 of 2022 (State Vs Kalika Pratap Singh) arising out of Case Crime No. 401 of 2019, Under Sections 420, 376, 306, 406, 120-B IPC and Section 67 of IT Act and Section 3/4 of D.P. Act, P.S. Jhansi, District Prayagraj including the charge sheet dated 12.05.2022 and the summoning order dated 18.06.2022.

3. Brief facts of the case are that on the basis of the application filed by opposite party no. 2 an FIR was registered on 2.5.2019 bearing case Crime No. 401 of 2019, under Section 420 IPC and Section 3/4 of D. P. Act at P.S. Jhansi, District Prayagraj alleging therein that applicant and daughter of opposite party no. 2 came in contact through facebook and they had visited Bhopal twice and were in talking terms with each other and, thereafter, father-in-law of informant and two of his uncles including the informant went to the house of the applicant at Allahabad and talk took place on 05/07/2017 and thereafter informant and his uncles went to the house of the applicant's brother at Mathura on 20/08/2017 and after that applicant's

brother came to my house at Bhopal to see the girl and returned thereafter. It is further alleged that exactly after one year i.e. on 18/08/2018, informant is said to have gone to Mathura where applicant's uncle, namely, Jai Prakash Singh, brother, namely, Arvind Singh and another brother, namely, Vishwanath Pratap Singh were present and there the informant is said to have paid Rs. 24,80,000/- and again informant is said to have gone to the house of applicant at Allahabad on 16/11/2018, where the date of marriage was finalized and Tilak's date has been fixed on 07/05/2019 and Marriage's date have been fixed for 15/05/2019. It is further alleged that the D'zire Car, which was promised to be given on Tilak ceremony has been purchased by the informant on 30/04/2019 and when the date of marriage and Tilak came closer and the invitation cards have been distributed and the dates reached nearer, then the applicant, without any reason, is said to have denied for marriage because family members of the applicant are said to have refused for marriage. Thereafter, informant and other family members including the victim are said to have reached the applicant's house at Allahabad and there they were threatened to ran away from his house. On this, daughter of the informant is said to have consumed some poisonous substance as a result of which her condition worsened and at that time applicant is said to have taken the victim to Swarooprani Hospital and got admitted her there and when her condition could not be approved, she was later on transferred and admitted to Shakuntala Hospital.

4. During investigation a suicide note of victim was recovered by the Investigating Officer, thereafter, the Investigating Officer added the new section

as Sections 376, 306, 406, 120-B IPC and Section 67 of I. T. Act and after investigation, Investigating Officer found no case against the applicant and therefore submitted final report against the applicant on 18.09.2021. Which was objected by the mother of the deceased by moving application before the police authority for further investigation into the matter upon which an enquiry was ordered and the enquiry officer recommended for further investigation into the matter under Section 173(8) Cr.P.C. thereafter vide order dated 18.2.2022 SSP, Prayagraj ordered further investigation into the matter and pursuant to the order dated 18.02.2022 the Investigating Officer conducted investigation and thereafter submitted charge sheet against the applicant on 7.5.2022 in Case Crime No. 401 of 2019, under Sections 420, 376,306,406,120-B IPC and Section 67 of IT Act and Section 3/4 of D.P.Act upon which the court below took cognizance vide order dated 12.05.2022 and summoned the applicant to face the trial. Further, NBW has also been issued against the applicant vide order dated 26.08.2022.

5. It is submitted that the victim and applicant used to chat on facebook and with the passage of time, they developed love and intimacy and with the consent of the family members their marriage was settled but on coming to know that daughter of the informant is involved in several criminal cases including on registered as Case Crime No. 0005 of 2018, under Sections 384, 388, 120-B IPC at P.S. Crime Branch, Bhopal Madhya Pradesh, lodged by one Member of Legislative Assembly, Madhya Pradesh for allegedly blackmailing him, and after coming of the said fact into knowledge of the family members of the

applicant, the applicant denied to perform said marriage.

6. It is contended by learned counsel for the applicant that the police has not taken permission of Magistrate for conducting further investigation into the matter and supplementary charge sheet has been submitted in gross violation of the judgement of Apex Court in the case of **Vinay Tyagi Vs Irshad Ali @ Deepak and others, 2012 (2) Supreme (SC) 903.**

7. It is further contended by learned counsel for the applicant that the order dated 12.05.2022 has been passed without applying his judicial mind as the same has been passed without considering the nature of allegations and the evidence both oral and documentary. In support of this argument, he relied upon the case of **M/s Pepsi Food Ltd and another Vs Special Judicial Magistrate and others, 1998 UPCR.R. paged 118.** It is further contended by learned counsel for the applicant that it is not rape if consensual physical relationship was based on a genuine promise of marriage, which could not be fulfilled. In support of this argument, he relied upon the case of **Mandar Deepak Pawar Vs The State of Maharashtra and another, (Criminal Appeal No.442 of 2022).** It is further contended that making refusal to marry by the applicant to the deceased cannot be said to be an instigation on the part of the applicant. It is further submitted that abetment involves a mental process of instigating a person or intentionally aiding a person in doing a thing. Without a positivist act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. It is further contended that in order to convict a person under Section 306

IPC there has to be a clear mens-rea to commit offence. It also requires an active act or direct act which leads deceased to commit suicide. In support of his argument, he relied upon the case of **Gangula Mohan Reddy Vs State of Andhra Pradesh (2010)1 SCC 750**.

8. The contention of the learned counsel for the applicant is that no offence against the applicant is disclosed and the present prosecution has been instituted with malafide intentions for the purposes of harassment.

9. Mr R. P. Mishra, learned AGA opposed the application and submitted that a suicide note in the handwriting of deceased is found and the same been sent before the handwriting expert and there is a report to the effect that same was written by the victim herself. The Investigating Officer, investigated the matter and submitted charge sheet against the applicant. It is not a case of grave injustice or abuse of process of law. It is further contended that further investigation under section 173(8) Cr.P.C. is statutory right of Police which does not requires permission from any Magistrate. In this connection, he has drawn attention of this Court to the provisions enshrined under section 173(8) Cr.P.C. which does not contemplate any prior permission of the Magistrate. Learned AGA as well as learned counsel for respondent no. 2 has further claimed that judgment of Apex Court in Vinay Tyagi's case (Supra) is not applicable in the instant case as the same is against the express provisions of Section 173(8) Cr.P.C. He has further argued that even if it is assumed that prior permission of Magistrate is necessary, then absence of prior permission is an irregularity which has been cured subsequently by the Magistrate by taking

cognizance on the supplementary charge sheet.

10. Further learned AGA relied upon the decision of the Hon'ble Apex Court in the case of **Daxaben Vs. The State of Gujrat & Ors, SLP Criminal No. 1132-1155 of 2022 decided on 29.07.2022** to contend that in this case a opinion was exhibited that even indirect act of incitement to the commission of suicide would constitute the offence of abetment of suicide. In the said case, it has also been said that in exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegation in the complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence.

11. From the perusal of material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicant. All the submissions made at the bar relates to the disputed question of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of **M/s Neeharika Infrastructure PVT Ltd. Vs State of Maharashtra, AIR 2021 SC 1918, R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192, lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283, State of M.P. Vs Awadh Kishore Gupta and others [(2004) 1 SCC 691, and Dr. Monica Kumar and Another Vs State of UP and Others, (2008) 8 SCC 781. The**

disputed defence of the accused cannot be considered at this stage. Moreover, the applicant has got a right of discharge under Section 239 or 227/228 Cr.P.C. or 245 Cr.P.C. as the case may be, before the court below and he is free to take all the submissions in the said discharge application before the trial court.

12. Whether accused instigated deceased to take poison or not cannot be considered at this stage. The other facts which are relevant that accused developed friendship with deceased and he had relation with her for quite some time and all of a sudden, he withdrew from relationship, which might cause serious depression to victim or breaking of relationship with her might have caused such embarrassment to her so that she may not have thought of any other recourse but to consume poison. It is not a case where accused has been charged of offence only under Section 306 on mere refusal to marry but here the applicant had developed relationship with victim from before. He continued with relationship for quite some time and later on he refused to continue with relationship and to marry the victim. Whether it is a case of entering into relationship with deceased with or without consent or whether he played any active direct or indirect role which leads deceased to commit suicide cannot be looked into at this stage. At the stage of charge sheet, Court concerned has to examine only upon the documents collected during investigation by Police, who submitted charge sheet and all other evidence as alleged by the applicant will be examined during trial when defence is adduced by both the parties. While considering prayer for quashing of charge sheet, this Court cannot examine any defence of accused which has yet to be placed before Court

below. Stage of placing the defence version does not arise at the stage of charge sheet and, therefore, this Court will not examine alleged defence at this stage.

13. In the circumstances, the prayer for quashing the proceedings of case as well as charge sheet is refused. The application has no force and is accordingly **dismissed.**

(2023) 5 ILRA 1256
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2023

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Application U/S 482. No. 34816 of 2022

Avtar Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
 Ms. Gunjan Jadwani

Counsel for the Opposite Parties:
 G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 229, The Prevention of Damage to Public Property Act, 1984 - Sections 2 and 3, The UP Imposition of Ceiling on Land Holdings Act, 1960 - Section 11(2), 13(2) - Criminal proceedings can be quashed in exercise of powers under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) when it is found that the attempt was to give a "cloak of criminal offence" to a dispute which is essentially of civil nature. (Para - 12)

Applicants accused of ploughing surplus agricultural land - filed FIR - Charge sheet filed,

summoned - dispute between parties - which is of civil nature - sought to be given a criminal colour - only with a view to grab the land of the applicants. **(Para - 2,6)**

HELD:- This civil dispute is considered an abuse of legal process and requires quashing to ensure justice. Petition allowed, criminal case quashed against applicants under Prevention of Damage to Public Property Act, 1984. **(Para – 14,15)**

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

List of Cases cited:

1. Mohd. Ibrahim & ors. Vs St. of Bihar & anr., 2009 (67) ACC 679;
2. I.O.C. Ltd. Vs NEPC India Ltd., 2006 Law Suit (SC) 488,
3. Indra Mohan Goswami & anr. Vs St. of Uttaranchal, 2007(12) SCC 1
4. St. of Haryana & Ors. Vs Ch. Bhajan Lal & ors. , 1992 Suppl (1) SCC 335
5. Indra Mohan Goswami & Anr. Vs St. of Uttaranchal & ors.. , 2007(12) SCC 1
6. Usha Chakraborty & Anr. Vs St. of W.B. & anr. in SLP (Crl.) 5866 of 2022

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

1. Heard Ms Gunjan Jadwani, learned counsel for the applicants, learned AGA for the State and perused the record.

2. This application under Section 482 Cr.P.C. is filed by the applicants for quashing of the entire proceedings of Case No. 1053 of 2020, arising out of Case Crime No. 1053 of 2020, under Sections 2 and 3 of the Prevention of Damage to Public Property Act, 1984, P.S. Bilaspur, District Rampur including the charge sheet and the summoning order.

3. In short, allegation against the applicants are that they were ploughing the agricultural land, which was declared surplus in ceiling proceedings. Applicants are said to have cultivated the crops standing on Khasra No. 123. For which an FIR vide Case Crime No. 0497 of 2019, under Section 2 and 3 of the Prevention of Damage to Public Property Act, 1984 has been filed, in which after investigation charge sheet has been filed, whereupon the applicants have been summoned.

4. Record discloses that the the land in dispute was recorded in the name of the predecessors of the applicants since 1338 (F) and since then they are in the cultivator possession of the land. Thereafter when it is revealed that the said land has been recorded as ceiling land and on the pretext of the said land, respondents started interfering with the possession of the applicants, as such they preferred writ petition before this Court being Writ C No. 35056 of 2010 (Kulvinder Singh and others Vs State of UP and others), wherein the order declaring the land of the applicants as ceiling land has been challenged and this court vide order dated 9.9.2010 directed the parties to maintain status quo till the disposal of the interim relief application filed along with suit, if filed, under Section 229 of the UPZA & LR Act or till the disposal of the application under Section 11(2) of the UP Imposition of Ceiling on Land Holdings Act. Against the said order, respondents approached the Apex Court by filing SLP CC No. 10765 of 2012, which has also been dismissed vide judgement and order dated 23.09.2013 and while dismissing the SLP, the Apex Court directed that the possession of the applicants and other co-teunre holders could not be interfered with till the dispute with regard to their ownership is not

decided by the competent authority. Thereafter, on 5.11.2019, the Prescribed Authority, without considering the objection of the applicants and others and without taking note of the orders passed by this court treated the land of the applicants as surplus land in ceiling and even without giving any opportunity to remove the crop, proceeded to auction the crops. Against the said order appeal under Section 13(2) of the UP Imposition of Ceiling on Land Holdings Act, 1960 is filed and the order of the prescribed authority has been stayed and the appellate court also directed that no interference in sowing and harvesting the crop by the appellants will be made by the respondents vide its order dated 23.12.2019. Hence, the cultivator possession of the applicants also stands protected vide order dated 23.12.2019 passed by the appellate court.

5. It is contended by learned counsel for the applicants that with regard to the land being surplus, proceedings before this Court and before the revenue court are already pending. It is further submitted that the present FIR has been lodged only to dispossess the applicants, who are in possession over the land in dispute.

6. The main thrust of the applicants is that the criminal proceedings in question is liable to be quashed on the ground that essentially there is a dispute between the parties which is of civil nature and which is sought to be given a criminal colour, only with a view to grab the land of the applicants. In support of his arguments, he relied upon the case of Mohd. Ibrahim and others Vs State of Bihar and another, 2009 (67) ACC 679; Indian Oil Corporation Limited Vs NEPC India Limited, 2006 Law Suit (SC) 488,

Indra Mohan Goswami and another Vs State of Uttaranchal, 2007(12) SCC 1.

7. On the contrary, learned AGA does not dispute the fact that a civil proceedings are pending between the parties before the competent courts.

8. Before analyzing the facts emanating from the record of the case, it would be apt to notice the legal position as regards the scope of powers of the High Court under Section 482 Cr.P.C. to interfere with the proceedings of the aforesaid criminal case.

9. The power under Section 482 of CrPC can be exercised by the High Court to prevent the abuse of process of the Court and otherwise to secure the ends of justice. The authority of the Court exists for advancement of justice and if any attempt is made to abuse the said authority, the Court has the power to prevent that abuse. These inherent powers of the High Court are wide in their scope. Wider the power, higher the degree of responsibility upon the authority vested with such power to exercise it with circumspection. These powers are generally exercised to secure the ends of justice.

10. The Supreme Court in the case of **State of Haryana & Ors. vs. Ch. Bhajan Lal & Ors reported as 1992 Suppl (1) SCC 335**, has dealt with the scope of power of High Court under Section 482 CrPC in an elaborate manner. Paragraphs 102 and 103, which enumerates seven categories of cases, where power can be exercised under Section 482 CrPC, are extracted as follows:-

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

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not

confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

11. The Hon'ble Supreme Court has taken note of the fact that sometimes there is a tendency to convert civil dispute in a criminal proceeding by giving it a criminal colour. In the case of **Indra Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors. reported in 2007(12) SCC 1** the Hon'ble Supreme Court has recorded in paragraph 23 and 24 as under :-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under Section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code; (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice.

24. Inherent powers under Section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

12. In a recent judgement, decided on 30.01.2023 in the case namely **Usha Chakraborty & Anr. Versus State of West**

Bengal & Anr. in SLP (Crl.) 5866 of 2022, Hon'ble Supreme Court observed that criminal proceedings can be quashed in exercise of powers under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) when it is found that the attempt was to give a ?cloak of criminal offence? to a dispute which is essentially of civil nature.

13. Thus, it is clear that this Court can examine whether a matter which is essentially of a civil nature has been given a cloak of a criminal offence. In the instant case, perusal of record manifestly discloses that an attempt has been made to cloak a civil dispute with a criminal nature despite. Record discloses that the parties are already contesting the civil litigation with regard to property in dispute regarding their ownership. The dispute involves in the present case certainly determination of issues which are of civil nature, one can by no means stretch the dispute to an extent, so as to impart it a criminal colour.

14. Considering the facts and circumstances of the case, it is a dispute essentially of civil in nature. Therefore, it can be said to be a case of abuse of legal process and is required to be quashed to secure the ends of justice.

15. For the aforesaid reasons, the instant petition is allowed and the proceeding of Criminal Case No. 1053 of 2020, arising out of Case Crime No. 1053 of 2020, under Sections 2 and 3 of the Prevention of Damage to Public Property Act, 1984, P.S. Bilaspur, District Rampur against the applicants is hereby quashed.

16. Application is thus, disposed of, accordingly.

23.09.2022 passed by the Special Judge (MP/MLA) Court/Additional Sessions Judge, Ghazipur by which charges have been framed against the accused-petitioner in Special Sessions Trial No.980 of 2012 under Section 3(1) of the Gangsters Act in the said case.

Further prayer has been made for quashing of the entire proceedings of the Special Sessions Trial No.980 of 2012.

2. Heard Mr. Dilip Kumar, learned Senior Advocate, assisted by Mr. Upendra Upadhyay and Mr. Ajay Srivastava, Advocates, representing the accused-petitioner, as well as Mr. Mahesh Chandra Chaturvedi, Additional Advocate General assisted by Mr. Sanjay Kumar Singh, representing respondent-State, and gone through the entire file.

3. It is said that the applicant is a social worker and politician. He remained Member of Legislative Assembly (hereinafter referred to as the "MLA") from Mohammadabad Constituency, District Ghazipur since 1985 and got elected five times. At present the accused-petitioner is second time Member of Parliament from Ghazipur Constituency.

4. The accused-petitioner was an accused in offence of brutal and gruesome murder of the then sitting MLA, Late Krishna Nand Rai and six others for which an FIR was lodged at Case Crime No.0589 of 2005, under Sections 147, 148, 149, 307, 302, 404 and 120-B IPC at Police Station Bhanvar Kol, District Ghazipur. The accused-petitioner, along with co-accused, were charge sheeted in the said offence. The trial of the said case got transferred by the Supreme Court to the CBI Court situated at Rouse Avenue Court Complex,

New Delhi. The CBI Court, presided over by Mr. Arun Bhardwaj, Special Judge (PC Act): CBI-09 (MPs/MLAs Cases) RACC, New Delhi had acquitted all the accused vide judgment and order dated 03.07.2019 as all the eye-witnesses and other material witnesses turned hostile. Paragraphs 936 to 943 of the said judgment and order dated 03.07.2019 would be relevant to extract here-under:-

*"936. **Hostile Witnesses:-** This is a gruesome case involving murder of seven persons. The investigation of the case was transferred from U.P. Police to CBI. The trial of the case was also transferred from U.P. to Delhi. Unfortunately, the case of the prosecution has suffered as all the eye witnesses and other material witnesses turned hostile.*

*937. The Hon'ble Supreme Court in the case of **Mahender Chawla & Ors vs. Union of India & Ors, 2018 (12) JT 21** has noted the importance of the witness particularly in a criminal trial as under:-*

"In search of truth, he plays that sacred role of the sun, which eliminates the darkness of ignorance and illuminates the face of justice, encircled by devils of humanity and compassion.

xxx xxx xxx

The value of witnesses can't be denied, keeping in view the dependency of the criminal proceedings on the testimonies and cooperation of witnesses in all the stages of the proceedings, especially in those cases where the prosecution has to establish the guilt with absolute certainty via oral cross-examination of witnesses in hearings open to the world at large. In such cases, the testimony of a witness, even if

not as an eye witness, may prove to be crucial in determining the circumstances in which the crime might have been committed..."

938. It is further held by the Hon'ble Supreme Court that:-

"Notwithstanding the same, the conditions of witnesses in Indian Legal System can be termed as 'pathetic'. There are many threats faced by the witnesses at various stages of an investigation and then during the trial of a case. Apart from facing life threatening intimidation to himself and to his relatives, he may have to face the trauma of attending the court regularly. Because of the lack of Witness Protection Programme in India and the treatment that is meted out to them, there is a tendency of reluctance in coming forward and making statement during the investigation and/or testify in courts. These witnesses neither have any legal remedy nor do they get suitably treated. The present legal system takes witnesses completely for granted. They are summoned to court regardless of their financial and personal conditions. Many times they are made to appear long after the incident of the alleged crime, which significantly hampers their ability to recall necessary details at the time of actual crime. They are not even suitably remunerated for the loss of time and the expenditure towards conveyance etc."

939. Further, the Hon'ble Supreme Court has observed:-

"5) It hardly needs to be emphasised that one of the main reasons for witnesses to turn hostile is that they are not accorded appropriate protection by the State. It is a harsh reality, particularly, in those cases where the accused

persons/criminals are tried for heinous offences, or where the accused persons are influential persons or in a dominating position that they make attempts to terrorize or intimidate the witnesses because of which these witnesses either avoid coming to courts or refrain from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not undertaken any protective measure to ensure the safety of these witnesses, commonly known as 'witness protection'.

6) Over the last many years criminal justice system in this country has been witness to traumatic experience where witnesses turn hostile. This has been happening very frequently. There may be many causes for this sordid phenomena."

940. On the analysis of various cases, the Hon'ble Supreme Court has noted following reasons for witnesses retracting their statements before the court and turning hostile:-

"(i) Threat/Intimidation.

(ii) Inducement by various means.

(iii) Use of muscle and money power by the accused.

(iv) Use of stock witnesses.

(v) Protracted trials.

(vi) Hassles faced by the witnesses during investigation and trial

(vii) Non-existence of any clear-cut legislation to check hostility of witness."

941. In Para-10, the Hon'ble Supreme Court has held as under:-

"8) All this has created problems of low convictions in India. This has serious repercussions on the criminal justice system itself. Criminal justice is closely associated with human rights. Whereas, on the one hand, it is to be ensured that no innocent person is convicted and thereby deprived of his liberty, it is of equal importance to ensure, on the other hand, that victims of crime get justice by punishing the offender. In this whole process, protection of witnesses assumes significance to enable them to depose fearlessly and truthfully. That would also ensure fair trial as well, which is another concomitant of the rule of law."

942. The Hon'ble Supreme Court has noted that the Central Government has now finalized Witness Protection Scheme, 2018. The essential features of the scheme include identifying categories of threat perceptions, preparation of a "Threat Analysis Report" by the Head of the Police, types of protection measures like ensuring that the witness and the accused do not come face to face during investigation etc., protection of identity, change of identity, relocation of witness, witnesses to be apprised of the scheme, confidentiality and preservation of records, recovery of expenses etc. The Hon'ble Supreme Court has given its imprimatur to the scheme and approved the same. The scheme is to be enforced in letter and spirit by the Union of India and States and Union Territories. The scheme is the law under Article 141/142 of the Constitution, till the enactment of suitable Parliament and/or State Legislation on the subject.

943. The case in hand is another example of prosecution failing due to

hostile witnesses. If the witnesses in this case had the benefit of Witness Protection Scheme, 2018 during trial, the result may have been different."

5. Against the said judgment and order of acquittal passed by the learned CBI Court, Rouse Avenue Court Complex, New Delhi, appeal has been preferred before the Delhi High Court and the same has been admitted. Direction has been issued for preparation of paper-book and listing of the appeal for hearing.

6. After the FIR vide Case Crime No.0589 of 2005, under Sections 147, 148, 149, 307, 302, 404 and 120-B IPC lodged at Police Station Bhanvar Kol, District Ghazipur against the present applicant and co-accused, a case under Section 3(1) of the Gangsters Act came to be registered against three accused persons, namely, Afjal Ansari (present applicant), his brother Mukhtar Ansari and Azaz alias Azaz-ul-Haq, was lodged vide Case Crime No.1052 of 2007 at Police Station Mohammadabad, District Ghazipur. In respect of two co-accused persons, separate FIRs vide Case Crime Nos. 1051 and 1053 of 2007 were registered under Section 3(1) of the Gangsters Act and separate charge-sheets were filed against them.

7. It is alleged that the accused-petitioner is the member of a dreaded gang of criminals and this gang is actively involved in committing heinous offences such as murder, abduction, extortion, loot, ransom and from committing these offences and striking fear and terror in the minds and hearts of the public in general in the State, they had acquired enormous illegal wealth and still accumulating illegal wealth by committing heinous offences. It is further alleged that the gang leader,

Mukhtar Ansari had been directing the activities of the gang from jail itself. It is further alleged that the gang leader is the most dreaded criminal having a very long criminal history of heinous offences and because of his fear and terror and political power/influence, no one would dare to give evidence against the present accused-petitioner or any other member of the gang nor anyone would come forward to lodge a compliant/FIR. It is further alleged that this gang was involved in commission of murder of Late Krishna Nand Rai, sitting MLA from Mohammadabad Constituency from where the present accused-petitioner used to get elected and six other persons in a most gruesome, cruel and heinous manner for which FIR at Case Crime No.0589 of 2005, under Sections 147, 148, 149, 307, 302, 404 and 120-B IPC at Police Station Bhanvar Kol, District Ghazipur came to be registered against Mukhtar Ansari, Afjal Ansari (present accused-petitioner) and others.

8. In the FIR lodged at Case Crime No.0589 of 2005, charge-sheet was submitted on 21.02.2006 and further additional charge-sheet was filed on 15.03.2006. It is further said that on 22.01.1997 at 17:45 hours one businessman, Nand Kishore Sangara alias Nanu Babu was abducted in a white Maruti Car in which charge-sheet was filed by the CBI against dreaded criminals, Mukhtar Ansari, Shahabuddin, Maragurrahman, Barbinder, Gurmeet Singh, Jasveer Singh, Laxmi Yadav, and Jitendra Tiwari and after investigating the offence, charge-sheet was filed in the CBI Court.

9. The gang-chart was approved by the District Magistrate, Ghazipur on 19.11.2007 against these three persons, Mukhtar Ansari, Afjal Ansari (present

accused-applicant) and Azaz alias Azaz-ul-Haq.

10. In paragraph-42 of the present application, criminal cases registered against the accused-petitioner have been mentioned, which are as follows:-

1. *Case Crime No.028 of 1998, U/S 171-F IPC read with Section 135(2) of Representation of People Act lodged at PS Nonhara Distt Ghazipur;*

2. *Case Crime No. 0260 of 2001, U/S 147, 148 and 353 IPC read with Section 3 of the Damages to Public Property Act and Section 7 Criminal Law Amendment Act, PS Mohammadabad, District Ghazipur;*

3. *Case Crime No. 0584 of 2005, U/S 147, 148, 149, 302, 404 and 120-B IPC read with Section 7 Criminal Law Amendment Act, PS Bhanvar Kol, District Ghazipur;*

4. *Case Crime No.0493 of 2005, U/S 302, 506 and 120-B IPC, PS Mohammadabad, District Ghazipur;*

5. *Case Crime No.01051 of 2007, U/S 302, 120-B, 436 and 427 IPC read with Section 345 Explosive Act and Section 7 Criminal Law Amendment Act, PS Kotwali, District Ghazipur;*

6. *Case Crime No.01052 of 2007, U/S 3(1) Gangsters Act, PS Mohammadabad, District Ghazipur; and*

7. *Case Crime No. 018 of 2014, U/S 171-Ja and 88 IPC and 12(2) Representation of People Act, PS Chakar Ghatta, District Chandauli."*

11. Against brother of the accused-petitioner, Mukhtar Ansari, the gang leader, a gangster, the biggest Bahubali in the country and a dreaded criminal, following cases are registered:-

"1. NCR No.219 of 1978, under section 506 IPC;

2. Case Crime No.169 of 1986, under Section 302 IPC,

3. Case Crime No.106 of 1988, under Section 302 IPC,

4. Case Crime No.410 of 1988, under Sections 147, 148, 149, 302 and 307 IPC,

5. NCR No.233 of 1988, under Sections 504 and 506 IPC,

6. Case Crime No.124 of 1990, under Sections 364, 395 and 397 IPC,

7. Case Crime No.399 of 1990, under Sections 147, 148, 149 and 307 IPC,

8. Case Crime No.682 of 1990, under Sections 147 and 506 IPC,

9. Case Crime No.266 of 1990, under Sections 467, 468, 420, 120-B IPC,

10. Case Crime No.44 of 1991, under Section 302 IPC,

11. Case Crime No.172 of 1991, under Sections 147, 148 and 302 IPC,

12. Case Crime No.294 of 1991, under Sections 307 and 302 IPC,

13. Case Crime No.229 of 1991, under Sections 147, 148, 149 and 302 IPC,

14. Case Crime No.456 of 1993, under Sections 365 and 387 IPC,

15. Case Crime No.503 of 1993, under Section 5 TADA,

16. Case Crime No.834 of 1995, under Sections 353, 504 and 506 IPC,

17. Case Crime No.165 of 1996, under Sections 323, 352 and 307 IPC,

18. Case Crime No.192 of 1996, under Section 3(1) U.P. Gangster Act,

19. Case Crime No.264 of 1996, NSA,

20. Case Crime No.237 of 1996, under Sections 120, 135, 136 Lo.Pra.Adhi.;

21. Case Crime No.19 of 1997, under Sections 364A, 365, 302, 120-B and 34 IPC;

22. NCR No.19 of 1997, under Section 506 IPC,

23. Case Crime No.121 of 1997, under Section 364A IPC;

24. Case Crime No.377 of 1997, under Section 506 IPC;

25. Case Crime No.58 of 1998, NSA;

26. Case Crime No.33 of 1999, NSA;

27. Case Crime No.17 of 1999, under Section 506 IPC;

28. Case Crime No.60 of 1999, under Sections 419, 420, 109 and 120-B IPC;

29. Case Crime No.106 of 1999, under Sections 307, 302 and 120-B IPC;

30. Case Crime No.126 of 1999, under Section 506 IPC;

31. Case Crime No.428 of 1999, under Section 2/3 U.P. Gangster Act;

32. Case Crime No.66 of 2000, under Sections 147, 336, 353 and 506 IPC;

33. Case Crime No.209 of 2002, under Section 3/7/25 Arms Act;

34. Case Crime No.131 of 2003, under Sections 353, 504 and 506 IPC;

35. Case Crime No.9A of 2004, under Sections 147, 148, 149, 307 IPC;

36. Case Crime No.808 of 2004, under Sections 147, 148, 149, 393, 307, 507, 506, 504 and 342 IPC;

37. Case Crime No.493 of 2005, under Sections 302, 506 and 120-B IPC;

38. Case Crime No.589 of 2005, under Sections 147, 148, 149, 302, 307, 404, 120-B IPC and Section 7 Criminal Law amendment Act;

39. *Case Crime No.1580 of 2005, under Sections 147, 148, 149, 302, 435, 436, 153A IPC;*

40. *Case Crime No.1051 of 2007, under Section Gangster Act;*

41. *Case Crime No.361 of 2009, under Sections 302, 120-B IPC and Section 7 Criminal Law Amendment Act;*

42. *Case Crime No.1182 of 2009, under Sections 307, 506 and 120-B IPC;*

43. *Case Crime No.66 of 2009, under Section 3 Makoka Act;*

44. *Case Crime No.1866 of 2009, under Sections 147, 148, 149, 307, 302, 325, 404, 120-B IPC and Section 7 Criminal Law Amendment Act;*

45. *Case Crime No.399 of 2010, under Sections 302, 307, 120-B, 34 IPC, Section 7 Criminal Law Amendment act and Section 25 Arms Act;*

46. *Case Crime No.482 of 2010, under Section 3(1) U.P. Gangster Act;*

47. *Case Crime No.891 of 2010, under U.P. Gangster Act;*

48. *Case Crime No.20 of 2014, under Section 147, 148, 149, 302, 307, 506, 120-B IPC and Section 7 Criminal Law Amendment Act;*

49. *Case Crime No.05 of 2019, under Sections 386 and 506 IPC;*

50. *Case Crime No.04 of 2020, under Sections 419, 420, 467, 468, 471, 120B IPC Section 30 Arms Act;*

51. *Case Crime No.160 of 2020, under Section 3(1) U.P. Gangster Act;*

52. *Case Crime No.236 of 2020, under Sections 468, 471, 120-B IPC and Section 3 Sa.Sa.Nu, Adhi;*

53. *Case Crime No.55 of 2021, under Section 3(1) U.P. Gangster Act;*

54. *Case Crime No.369 of 2021, under Sections 419, 420, 467, 468, 471, 120-B, 506, 177 IPC and Section 7 Criminal Law Amendment Act;*

55. *Case Crime No.121 of 2021, under Section 25/26 Arms Act; and*

56. *Case Crime No.185 of 2021, under Sections 419, 420, 467, 468, 471 and 120-B IPC"*

12. On behalf of the accused-petitioner, Mr. Dilip Kumar, learned Senior Advocate, has advanced two submissions in support of the petition; (a) since the accused-petitioner has been acquitted in offence regarding murder of sitting MLA, Late Krishna Nand Rai and six others i.e. in the substantive offence, continuation of the proceedings under the Gangsters Act is an abuse of process of the Court; (b) trial for offence by Special Judge should have got precedence over the trial of any other case against the accused-petitioner, and in the present case trial of the persons should have been conducted first before conducting the trial in substantive offence. As the procedure, as mandated under Section 12 of the Gangsters Act, has not been followed, the impugned proceedings are liable to be quashed.

13. In support of his contentions, the learned Senior Advocate, representing the accused-petitioner, has placed reliance upon the judgment reported in **2013 0 Supreme (SC) 699 (Dharmendra Kirthal Vs. State of U.P. and another).**

14. On the other hand, on behalf of the respondent-State, Mr. Mahesh Chandra Chaturvedi, Additional Advocate General, has submitted that this has been a modus operandi of the accused-petitioner, his brother and his gang members to get acquittal in most of heinous offences as the witnesses would turn hostile because of their fear, terror and political power/influence. It has been further submitted that against the acquittal, the

appeal has been admitted by the Delhi High Court and the appeal, being continuation of the trial, it cannot be said that the substantive offence does not exist against the accused-petitioner. It has been further submitted that even in the said case, the acquittal was because of witnesses did turn hostile. It has been further submitted that acquittal or conviction is not a criteria for invoking the provisions of Gangsters Act against a person, who is a member of a gang or any member of the gang commits serious and heinous offences as in the present case. It has been further submitted that as the mandate of Section 12 of the Gangsters Act was not complied because trial of substantive offence was transferred by the Supreme Court and trial of present case not transferred. Further, the accused-petitioner never raised such an objection before the learned Special Judge, CBI/MP/MLA, New-Delhi, Merely for this reason, it cannot be said that the proceedings under the Gangsters Act would get vitiated. The learned Additional Advocate General has placed reliance upon judgment of this Court dated 23.09.2022 passed in Government Appeal No.779 of 2021 in support of his submissions.

15. I have considered the submissions advanced by Mr. Dilip Kumar, learned Senior Advocate on behalf of the accused-petitioner as well as Mr. Mahesh Chandra Chaturvedi, Additional Advocate General on behalf of the respondent-State.

16. The purpose, aim and object of the Gangsters Act is to prevent and cope with the gangsters and anti-social activities committed by the gangs in the State of U.P. The Gangsters Act has been enacted to prevent organized crimes in the State by enacting the special provisions. It is a deterrent statute. It would be apt to take

note of the definition of gang as provided under Section 2(b) of the Gangsters Act, which would read as under:-

"2 (b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

[(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in

the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities.

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966:

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xv) indulging in crimes that impact security of State, public order and even tempo of life."

17. This Court in its judgment and order dated 23.09.2022 passed in Government Appeal No.779 of 2021 has considered the definition of the 'gang' and held that if it is proved that an accused belongs to a gang and commits offence(s) individually or with other gang members with object of disturbing public order or for gaining any undue temporal and pecuniary material or other advantage for himself or any other member of the gang, he can be prosecuted and punished under the provisions of the Gangsters Act. Paragraphs-12 to 17 of the judgment and order dated 23.09.2022 passed passed by

this Court in Government Appeal No.779 of 2021 would be relevant to take note of which read as under:-

"12. Thus, if a person belongs to a group of persons, who, either acting singly or collectively, indulges in violence or threat or show of violence and coercion etc., with object to disturb public order or to gain any undue temporal and pecuniary material or other advantage to himself or any other person, indulges in anti-social activities and, commits offence, as defined under the said section, as the group of persons, would be a gang.

13. Gangster has been defined under Section 2(c) Gangsters Act, which reads as under:-

"2(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities."

14. Gang-leader and member of the gang is called gangsters. Even a person, who abets or assists in the activities of gang, as defined under Section 2(b), whether before or after the commission of such activities, or harbours any person, who has indulged in such activities, would be also a gangster. Section 3(1) Gangsters Act provides for punishment of gangster, which would be two years and may extend to ten years with fine and fine should not be less than Rs.5,000/-. If a gangster commits an offence against public servant or any member of public servant, then the minimum punishment would be of three years and fine.

15. The offence under the Gangsters Act is an independent offence

than the substantive offence. If it is proved that a person belongs to a group of persons and commits offence individually or with group of persons, which are defined under Section 2(b) of the Gangsters Act, such a person is a gangster and he would be punished for a term, which may be two or three years and extendable to ten years with minimum fine of rupees five thousand.

16. On behalf of the appellant-State, Mr. Umesh Verma, learned Additional Government Advocate, along with Mr. Rao Narendra Singh, learned Additional Government Advocate, has submitted that the basic ingredients to prosecute an individual under the Gangsters Act for commission of an offence as gangster is him being the member of the gang. Even if no FIR is registered against a person, still he can be prosecuted for the offence under the Gangsters Act. The purpose of the Gangsters Act is to curb organized crime and criminal activities of the gang and gangsters.

17. If it is proved that an accused belongs to a gang and commits offences individually or with other gang members with object of disturbing public order or of gaining any undue temporal and pecuniary material or other advantage for himself or any other member of the gang, he can be prosecuted and punished."

18. This Court in the judgment and order dated 23.09.2022 passed in Government Appeal No.779 of 2021 has dealt with the question that if accused has been acquitted for offence(s) which was/were in the gang-chart (substantive offence), can he be prosecuted and punished for offence under Section 2(3) of the Gangsters Act. This Court dealt with

the said question in paragraphs-22 to 27 of the said judgment, which read as under:-

22. *The moot question, which arises for consideration in this case, is that if the accused-respondent has been acquitted for offences, which were mentioned in the gang-chart, (substantive offences), can he still be convicted for offence under Section 2/3 Gangsters Act. As stated earlier, the offence under Section 2/3 Gangsters Act is a distinct and separate offence than the substantive offence. If the prosecution proves that the person belongs to a gang and indulges himself in committing offence with object of disturbing public order or of gaining any undue temporal and pecuniary material or other advantage for himself or any other person, he may be punished under the Gangsters Act.*

23. *A Coordinate Bench of this Court in 2007 (8) ADJ 716 (Vishnu Dayal and others Vs. State of U.P. and another) held that the object of the Act is to arrest the activities of organized criminals and members in their gangs. The Court also observed that gangsterism in the recent times has taken menacing dimensions and lives and liberty of citizens have been pushed against the walls of organized crimes. Paragraphs-11 and 12 of Vishnu Dayal and others Vs. State of U.P. and another case (supra), which are relevant for the purpose of this case, would read as under:-*

"11. From the definition clause it is per se clear that a gang is a group of one or more persons who commit the crimes mentioned under the definition clause for the motive of earning undue advantage whether pecuniary, material or otherwise. Even a single crime committed by a gang is

sufficient to implant Gangsters Act on such members of gang and repetition of crime is not desired for invoking offences under the said Act. The definition clause, as mentioned above does not engulf plurality of offence before the Gangsters Act is invoked. It is an Act to achieve an avowed object of arresting the activities of organised criminate and members of their gang. Gangsterism in the recent times has taken menacing dimensions and lives and liberty of citizens has been pushed against the walls of organised crimes. This type of offences have to be dealt with sternly and with tenacity. Further the offence under the Gangsters Act can be implanted on a group of persons who act individually or collectively.

12. *In the present case the incident was motivated and executed because of grabbing of property of the deceased as the accused persons are very close relatives of deceased and are in fact, his real nephews and wife of his real own brother. These accused persons had an evil eye on the property of the deceased because of which they have committed the murder of their own blood relation. The offence was well chalked out and pre-planned. This certainly is gangsterism. This fact clearly brings out the activity of the applicants within the perview of the Gangsters Act. The contention of Sri Sengar, learned counsel for the applicants, is that this was an individual act and from the F.I.R. it cannot be said that the murder had taken place because of the lust of the property and, therefore, the Gangsters Act is not applicable, does not appeal at all as the said contention is against the facts of the case. I have gone through the judgment of this Court in the case of Ashok Kumar Dixit, (1987 All LJ 806) (supra). The said judgment does not countenance the*

submissions raised by Sri Sengar, learned counsel for the applicants. From the facts of the case it is perceptibly clear that embedded motive in the minds of the culprits was to grab the property and to gain pecuniary advantage for them. This certainly brings in their case within the purview of the Gangsters Act."

24. In 2008 (2) JIC 227 (All) (Udham Singh & Anr. Vs. State of U.P. & Ors), this Court, while dealing with the question whether on the basis of single incident the provisions of Gangsters Act can be invoked against such a person, this Court held that under Section 2/3 Gangsters Act, if the gang-chart affirms part of the FIR and in the gang-chart it is clearly mentioned that there is a gang, which indulges into commission of offence and on the basis of perusal of the gang-chart the authorities are satisfied for sanctioning registration of the FIR, such person can be prosecuted and punished for the offence. It was again reiterated that the purpose of the Gangsters Act is to control activities of organized gangs and gangsters. When specific offence has been created, it is open to punish a person even for a single act if it is covered by the requirement of law.

25. The Supreme Court also in Geeta Devi Vs. State of U.P. & Ors. (Criminal Appeal No.78 of 2022), while delineating the provisions of Gangsters Act, held that even a person, against whom for single offence, charge-sheet has been filed for any activity, mentioned under Section 2/3 Gangsters Act, he can be prosecuted under the Gangsters Act.

26. Paragraphs 8 and 10 of Udham Singh & Anr. Vs. State of U.P. & Ors case (supra), which are relevant for

the purpose of decision of the present case, are extracted herein below:-

"8. Coming to the first contention of the learned counsel for the petitioners that on the basis of a single incident, the petitioners cannot be booked under the Act, we need to observe only this much that vide para 14 of the aforesaid judgment of Subhash (supra), the said contention has already been negated by the Division Bench of this Court on which decision, reliance has been placed by the petitioners themselves. It has been held in the aforesaid decision of Subhash (supra) as follows:--

"The words used in Section 2 are no doubt in plural indicating "indulges in anti social activities" but the sentence does not stop with the words "anti social activities". It goes on with the words "viz" followed by 15 clauses of anti social activities enumerated therein. The plural in "anti social activities" referred to the large number of activities to be brought under the umbrella of this single offence and it would never mean that there must be plurality of actions before a person could be prosecuted or convicted for an offence under the Act. When a specific offence has been created, it is open to be punished even for a single act, if it is covered by the requirements of law. We thus, answered point No. 1 framed by us."

10. There is another aspect of the matter which we would like to discuss. Under the definition clause of the Act u/S. 2(b) and (c), it is not required that the FIR must be registered against the gangster before he is booked under the Act. Sine qua non to prosecute an individual under the Act is commission of an offence as a "gangster". Gang means a group of

persons, who acting either signally or collectively, by violence, or threat or show violence or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti social activities. It is not the requirement of law that nobody can be prosecuted under the Act if no FIR is registered against him. It is the activity of an individual which is the determinative factor for bringing him under the mischief of the Act and nothing else. If he acts as a member or leader of a gang he can be booked under the Act irrespective of any previous FIR being registered against him or not. The plain reading of different definition clauses clearly indicates that if the person indulges into the commission of offence enumerated under Section 2(b)(I) to (XV) as a member or leader of a gang for gaining any undue temporal, pecuniary, material or other advantage then he is purviewed within the ambit of the Act and it is not the requirement of law that the FIR for the input offence must be registered before he is booked under the Act. Since the purpose of the Act is to curb the activities of gangster, which are more often than not commit not in any public gaze therefore the provisions of Act have to interpret in a manner which fosters its purpose and the intention of legislature best."

27. It is not in dispute that several FIRs and charge-sheets for offences, which are provided under definition clause of Section 2(b) of the Gangsters Act, were registered against the accused-respondent and the charge-sheets were filed against him, including in the case of murder of Jail Superintendent of District Jail, Lucknow. Acquittal or conviction is immaterial for invoking the provisions of Gangsters Act

against a person, who is otherwise a member of the gang and, allegedly commits offences, which are defined under Section 2(b) of the Gangsters Act. If the FIR is registered or the charge-sheet is filed and the person is member of gang, which is defined under Section 2(b) Gangsters Act, it fulfills the ingredients of Section 2 of the Gangsters Act and he can be punished under Section 3 of the Gangsters Act. The trial Court has acquitted the accused-respondent on the ground that the accused-respondent was acquitted in all the offences, which were mentioned in the gang-chart. The gang-chart was approved and the FIR came to be registered against accused-respondent along with others. This Court is of the view, on considering the law laid down by the Supreme Court and this Court, as discussed above, and carefully reading all the provisions of the Gangsters Act, that the accused-respondent was a member of the gang and for his criminal activities several FIRs and charge-sheets came to be registered and submitted against him for offences, which are defined under Section 2/3 Gangsters Act. The acquittal of the accused-respondent for turning the witness hostile or otherwise is not a material aspect."

19. In view of the aforesaid law laid down by this Court, I do not find any substance in the submissions advanced by the learned Senior Advocate on behalf of the accused-petitioner that since the accused-petitioner has been acquitted in substantive offence, the proceedings under the Gangsters Act should be dropped. Section 12 of the Gangsters Act, which has been relied upon on behalf of the accused-petitioner, by the learned Senior Advocate reads as under:-

"12. Trial by Special Courts to have precedence. - The trial under this Act

of any offence by Special Court shall have precedence over the trial of any other case against the accused in any other Court (not being a Special Court) and shall be concluded in preference to the trial of such other case and accordingly the trial of such other case shall remain in abeyance."

20. The trial in the offence under the Gangsters Act has not been conducted prior to trial for substantive offence as trials of substantive offence and Gangsters Act could not be conducted in the same Court for the reason that the trial of substantive offence was transferred by the Supreme Court to New Delhi, but trial of the offence under the Gangsters Act was not transferred and, therefore, Section 12 of the Gangsters Act would have no applicability in the present case. Further, accused-petitioner never took this plea during the trial of substantive offence by Special Court at New Delhi. I, therefore find no force in the submission of the learned Senior Advocate for the accused-petitioner that the proceedings under the Gangsters Act would get vitiated on this ground. If an accused is found to be the member of the gang and he or any of the members of the gang is or has been committing offence under Chapter XVI or Chapter XVII or Chapter XXII of the IPC, he is likely to be punished under the Gangsters Act.

21. In view of the above discussions, I do not find any merit in the present petition and, therefore, the same is hereby dismissed.

(2023) 5 ILRA 1274

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 28.04.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Bail Application No. 3504 of 2023

Kapil Wadhwan **...Applicant (In Jail)**
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicant:
Sri Pranjal Krishna

Counsel for the Opposite Party:
Sri Anurag Kumar Singh

A. Criminal Law - Criminal Procedure Code, 1973 - Section 439 - Indian Penal Code, 1860 - Sections 120-B, 409, 420, 467, 468, 471 - Section 7-A, 8 & 13 (2) r/w Section 13 (1) (d) of Prevention of Corruption Act, 1988- the applicant entered in a criminal conspiracy with other co-accused persons and in furtherance of the said criminal conspiracy, the surplus funds of UPPCL trust were got invested in fixed deposits of DHFL in contravention of investment guidelines dated 02.03.2015 issued by the Ministry of Finance, Government of India- the accused persons had dishonestly and fraudulently obtained higher ratings from rating agencies on the basis of false and bogus audited balance sheets and bogus financial statements- the applicant and co-accused in criminal conspiracy with other co-accused persons diverted funds from the bank accounts of DHFL to bank accounts of other companies by way of sanctioning bogus project loans and further diverted the said funds to their own companies and used the said funds- prima facie appears that the deposit of amounts in fixed deposits with DHFL would create a relationship of creditor and debtor between the Trust and DHFL and it would not amount to entrustment, so as to attract the offence of breach of trust- So far and the offences under 420, 467, 468 and 471 I.P.C. are concerned, it is not alleged that the aforesaid acts were committed by the applicant himself and it is alleged that he conspired and got it done through certain officials of DHFL, and those officials have already been granted bail- Charge-sheet and as many

as 5 supplementary charge-sheets have already been filed in the matter and the trial Court has already taken cognizance of the case-The charge-sheet mentions the names of as many as 57 witnesses of the case and the trial is yet to commence and it would certainly take a very long time to conclude and keeping the applicant incarcerated without his guilt having been established would not be proper, unless his case falls within any exception disentitling him to be enlarged on bail-the applicant is entitled to be released on bail pending conclusion of the trial.(Para 1 to 62)

B. The law is well settled that when moneys are deposited in a bank, the relationship that is constituted between the banker and the customer is one of debtor and creditor and not trustee and beneficiary. The banker is entitled to use the monies without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer. (Para 49)

The application is allowed. (E-6)

List of Cases cited:

1. Shanti Prasad Jain Vs Dir. of Enforcement, FERA(1963) 2 SCR 297
2. Anumati Vs PNB, (2004) 8 SCC 498
3. Baliya Vs St. of M.P. (2012) 9 SCC 696
4. Sanjay Chandra Vs CBI (2012) 1 SCC 40
5. Satender Kumar Antil Vs CBI (2022) 10 SCC 51
6. Mahesh Kumar & ors. Vs CBI SCC OnLine Del 3903
7. Praveen Kumar Agarwal Vs CBI (2022) SCC OnLine Del 1768
8. Y.S. Jagan Mohan Reddy Vs CBI (2013) 7 SCC 439

9. St. of Bih. Vs Amit Kumar (2017) 13 SCC 751
10. Rohit Tandon Vs Dir. of Enforcement(2018) 11 SCC 46
11. Mahipal Vs Rajesh Kumar (2020) 2 SCC 118
12. Shivnarayan Laxminarayan Joshi Vs St. of Mah.(1980) 2 SCC 465.
13. Sanjay Chandra Vs CBI (2012) 1 SCC 40
14. Y.S. Jagan Mohan Reddy Vs CBI (2013) 7 SCC 439
15. Dataram Singh Vs St. of U.P. (2018) 3 SCC 22
16. P. Chidambaram Vs Dir. of Enforcement (2020) 13 SCC 791
17. Satender Kumar Antil Vs CBI (2022) SCC OnLine SC 825
18. Peeyush Kumar Jain Vs U.O.I. (2022) 121 ACC 448 = (2023) 1 All LJ 10
19. Shivnarayan Laxminarayan Joshi Vs St. of Mah. (1980) 2 SCC 465

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

1. Heard Sri Gopal Swaroop Chaturvedi, Sri. Satish Chandra Misra and Sri Nandit Kumar Srivastava Senior Advocates assisted by Ms. Soumya Chaturvedi, Sri Pranjali Krishna, Sri Samarth Agarwal, Smt. Pooja Kothari and Ms. Urvi Purve, Advocates, the learned Counsel for the applicant and Sri Anurag Kumar Singh Advocate, the learned counsel representing the Central Bureau of Investigation (C.B.I.).

2. The instant application has been filed seeking release of the applicant on bail in Criminal Case No. 370 of 2020, arising out of Case Crime No. RC0062020A0005, registered with Police

Station CBI/ACB, Lucknow, under Section 120-B read with Sections 409, 420, 467, 468, 471 I.P.C. and Section 7-A, 8 and Section 13 (2) read with Section 13 (1) (d) of Prevention of Corruption Act, 1988, pending in the Court of Additional District Judge/Special Judge, Anti Corruption, C.B.I. (West), Lucknow.

3. On 02.11.2019, a First Information Report bearing Case Crime No. 540 of 2019 for commission of offences under Sections 409, 420, 467, 468 and 471 IPC was lodged in Police Station Hazaratganj, Lucknow by Sri. I. M. Kaushal, Secretary of Uttar Pradesh Power Corporation Contributory Provident Fund Trust against (1) Praveen Kumar Gupta, the then Secretary of the Trust and (ii) Sudhanshu Dwivedi, the then Director Finance, stating that on 09.05.2013, the Board of Trustees of the Trust had decided that the amount of General Provident Fund will be invested in Fixed Deposit Schemes of Nationalized Banks for 1 to 3 years. On 21.04.2014, a decision was taken by the Board of Trustees to consider other options, which are secured like investments made in the bank and which give higher assured interest and the Director Finance was authorized to take the services of a Financial Consultant, if necessary. Till October 2016, the amount of Provident fund was invested in fixed deposit schemes of Nationalized Banks. In December 2016, on a proposal made by Praveen Kumar Gupta, Secretary of the trust, which was approved by Sudhanshu Dwivedi, the then Director Finance and A. P. Mishra, the then Managing Director, amounts of General Provident Fund and Contributory Provident Fund were started being invested in Fixed Deposit Schemes of PNB Housing. In March 2017, the aforesaid named accused persons Praveen Kumar Gupta and Sudhanshu Dwivedi

started investing the amounts of GPF and CPF in DHFL in violation of the procedure laid down by the Notification dated 02.03.2015 issued by the Ministry of Finance, Government of India, as per which a maximum of 50% of non-government Provident fund can be invested in Scheduled Commercial Banks.

4. The F.I.R. further states that in a meeting of the Board of Trustees held on 24.03.2017, it was agreed to consider the investment proposals as per Government Notification dated 02.03.2015 in securities other than deposits of Nationalized Banks, in AAA rated companies giving higher security and high interest rates. In contravention of the clear guidelines of the government of India contained in the notification dated 02.03.2015 prohibiting investment of amounts of the employees Provident Fund in institutions other than Scheduled Commercial Banks, Secretary of the Trust Praveen Kumar Gupta invested ₹2,631.90 Crores in DHFL, after obtaining approval from Director Finance Sudhanshu Dwivedi, knowing fully well that DHFL is not a scheduled commercial Bank and it is an unsecured private institution. Out of the aforesaid amount, ₹ 1185.50 Crores had been received back by the trust and ₹ 1445.70 Crores were yet to be received. Similarly, an amount of ₹ 1491.50 Crores was invested in DHFL from the Contributory Provident Fund amount, out of which ₹ 669.30 Crores had been repaid and ₹ 822.20 Crores were pending. Thus a total of ₹ 2267.90 Crores principal amount was to be received from DHFL. The FIR alleged that the named accused persons Praveen Kumar Gupta and Sudhanshu Dwivedi had committed the offence of criminal breach of trust.

5. After registration of the case, the investigation was transferred to the

Economic Offences Wing (EOW) of Uttar Pradesh Police on the same day, i.e., 02.11.2019. The EOW filed a charge-sheet on 01.02.2020 against Praveen Kumar Gupta, Sudhanshu Dwivedi and Ayodhya Prasad Misra, the then Managing Director of UPPCL. Thereafter the EOW filed the First supplementary charge-sheet on 11.02.2020 against Abhinav Gupta, son of Naveen Kumar Gupta and his friend Ashish Chaudhary. The second supplementary charge-sheet was filed by EOW on 02.03.2020 against seven other persons. The third supplementary charge-sheet was filed by EOW on 05.03.2020 against four more persons.

6. The matter was subsequently transferred to CBI and on 05.03.2020 the CBI registered a fresh First Information Report No. RC 00620208A0005 for commission of offences under Sections 409, 420, 467, 468 and 471 IPC. Thereafter CBI conducted investigation in furtherance of the aforesaid FIR and it filed the fourth supplementary charge-sheet on 29.12.2020 against another accused person.

7. The applicant was not named in the FIR lodged by the informant and in the charge-sheet or the three supplementary charge-sheets filed by the EOW. He was also not named in the FIR lodged by the CBI and in the fourth supplementary charge-sheet submitted by the CBI.

8. The Trial Court took cognizance of the offences against all the charge-sheeted accused persons.

9. On 22.08.2022, the CBI submitted another charge-sheet against (i) Kapil Wadhawan (the applicant), (ii) Dheeraj Wadhawan and (iii) M/s Dewan Housing Finance Ltd. (DHFL) alleging commission

of offences under Sections 120 B read with 420, 409, 467, 468, 471 IPC and Section 7-A, 8 & 13 (2) read with 13 (1) (d) of Prevention Of Corruption Act, 1988 and substantive offences thereof. The charge-sheet states the huge amounts of General Provident Fund and Contributory Provident Fund were transferred in the bank accounts of DHFL for the creation of fixed deposits illegally and the applicant Kapil Wadhawan was the Chairman and Managing Director of DHFL and the co-accused Dheeraj Wadhawan was a Director of the Company during the relevant period and both of them entered in a criminal conspiracy with co-accused persons Praveen Kumar Gupta, Amit Prakash, Mahesh Gupta, and Alok Garg in and around March 2017 and in furtherance of the said criminal conspiracy, the applicant and Dheeraj Wadhawan dishonestly and fraudulently obtained the investments of surplus funds of UPPCL trust in fixed deposits of DHFL in contravention of investment guidelines dated 02.03.2015 issued by the Ministry of Finance, Government of India 02.03.2015.

10. The charge-sheet further states that the accused persons dishonestly and fraudulently obtained higher ratings from rating agencies on the basis of false and bogus audited balance sheets and bogus financial statements and thereby dishonestly and fraudulently obtained investments to the tune of ₹ 4,122 Crores of UPPCL funds in fixed deposits of DHFL during March 2017 to December 2018, out of which surplus funds to the tune of ₹ 2267.9 Crores were misappropriated by the applicant and co-accused Dheeraj Wadhawan in criminal conspiracy with other co-accused persons and they diverted the said funds from the bank accounts of DHFL to bank accounts of other companies by way of sanctioning bogus project loans

and further diverted the said funds to their own companies and used the said funds.

11. The applicant was arrested in another case by CBI as well as ED and he was remanded to judicial custody and was lodged in Taloja jail since May 2020. The Enforcement Directorate registered ECIR/MBZO-I/02/2020 dated 03.02.2020 (arising out of the present case) and filed a complaint. Bearing Special Case No. 1389 of 2021 in the Special Court PMLA, Mumbai, naming the applicant also as an accused, whereas till that time, the applicant was not made an accused in the present case. The applicant as released on furnishing a bond under Section 188 Cr.P.C. by order dated 14.02.2022 While the applicant was already in judicial custody in another case, on 24.05.2020, the applicant was taken from Taloja Jail and he was produced before the Special Judge, CBI, Lucknow on 26.05.2020, from where he was initially remanded to the custody of CBI for 14 days and thereafter he was sent to judicial custody and since then the applicant is languishing in jail in the present case.

12. Sri Gopal Swaroop Chaturvedi Senior Advocate has submitted that even as per the prosecution case, ₹ 4,122 Crores were invested in fixed deposit schemes of DHFL during the period March 2017 to December 2018 and the company repaid ₹ 1,854.8 Crores. Repayments were being made regularly in quarterly installments without any break and without any complaint. On 30.09.2019, the High Court of Bombay passed an interim order in Commercial Suit (L) number 134 of 2019 titled Reliance Nippon Life Asset Management Ltd versus Dewan Housing Finance Corporation Ltd and two others restraining DHFL from making further

payments to any unsecured creditor and secured creditor, except in cases where payments were made on pro rata basis to all secured creditors including the plaintiff including out of its current and future receivables, in preference to the payments owed to the plaintiff, without the sanction of the court. It was after passing of the aforesaid order by the Bombay High Court, that DHFL became incapacitated from making due payments to the trust. The aforesaid interim order was made absolute by means of an order dated 10.10.2019. DHFL had informed about the aforesaid order by sending a letter dated 08.11.2019 to the trust.

13. On 18.11.2019, the Trust filed an intervention application in the aforesaid suit before the Bombay High Court stating that pursuant to the orders dated 30.09.2019 and 10.10.2019 passed by the High Court, DHFL has refused to release the amounts due to the trust and the order passed by the High Court had caused grave injustice to the employees of UPPCL and it would continue to do so if not varied. It was stated in the application that since March 2017, ₹2631,20,00,000/- in the form of 319 fixed deposits, out of which 158 fixed deposit worth ₹1185,50,00,000/- had been measured and paid and 41 fixed deposits worth ₹352,00,00,000/- had matured and were outstanding. Until 30.09.2019, as and when of fixed deposit matured all the interest payable under became due, the maturity amount/interest was paid by DHFL. After passing of the interim order, DHFL did not pay any amount to the trust and the trust and it is stated that the only thing to impeding the release of the amounts to the trust was the order passed by the High Court. The trust requested the High Court to pass an order directing DHFL to release the amounts due to it.

14. Based on the aforesaid factual situation, the first submission of Sri Gopal Swaroop Chaturvedi is that there is no dispute that DHFL continued to make payments to the trust till passing of the interim order by the Bombay High Court restraining it from making the payments and the repayment could not be made thereafter only because of the order passed by the Bombay High Court. The dispute started only when DHFL could not make payments to the trust in compliance of the order passed by the Bombay High Court. He has submitted that since the payments were stopped in compliance of the order passed by the Bombay High Court, the non-payment of amount would not be an offence, as provided by section 78 I.P.C., which reads as follows: -

"78. Act done pursuant to the judgment or order of Court.--Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction."

15. Sri. Chaturvedi has next submitted that the offence of criminal breach of trust is not made out by the allegations leveled by the prosecution itself, as it is an admitted case that the amounts had been invested by the trust in fixed deposits with DHFL and such a deposit does not amount to 'entrustment' of the amount. In support of the aforesaid submission Sri. Chaturvedi has relied upon decisions of the Hon'ble Supreme Court in the case of **Shanti Prasad Jain v. Director of Enforcement, FERA**, (1963) 2 SCR 297 and **Anumati v.**

Punjab National Bank, (2004) 8 SCC 498.

16. Sri. Chaturvedi has submitted that as the relationship between DHFL and the Trust is one of debtor and creditor and not trustee and beneficiary, there is no occasion for commission of the offence as defined in Section 405 IPC and punishable in Section 409 I.P.C.

17. Sri. Chaturvedi has further submitted that the offence of cheating is also not made out, as the Trust itself had made investments in fixed deposits with DHFL. He has further submitted that it was not for the first time that the Trust had made such investments. Prior to making investments with DHFL, the Trust had made similar deposits with LIC Housing Finance Ltd. and PNB Housing in the year 2016. The Trust had willingly made the investments in fixed deposits in DHFL for obtaining better returns and the investments were not obtained by deceiving any person by fraudulently or dishonestly inducing him to make the investments. He has submitted that there is no allegation that the applicant has made any false document or has forged the same and, therefore, no case is made out for punishment of the applicant under Sections 467 or 468.

18. Sri. Chaturvedi has submitted that Sections 405 and 415 IPC operate in two different fields and both cannot be applied together. For attracting an offence of Criminal Breach of trust, entrustment of the property is necessary, which means that the person complaining had himself entrusted the property willingly, whereas for attracting an offence of cheating, it is necessary that the offender had fraudulently or dishonestly induced the victim to deliver the property to him.

19. Sri. Chaturvedi has further submitted that there is no evidence to prima facie establish the allegation of Criminal Conspiracy. He has placed reliance on a decision of the Hon'ble Supreme Court in **Baliya v. State of M.P.**, (2012) 9 SCC 696, in which the Hon'ble Supreme Court held that: -

"17. The offence of criminal conspiracy has its foundation in an agreement to commit an offence or to achieve a lawful object through unlawful means. Such a conspiracy would rarely be hatched in the open and, therefore, direct evidence to establish the same may not be always forthcoming. Proof or otherwise of such conspiracy is a matter of inference and the court in drawing such an inference must consider whether the basic facts i.e. circumstances from which the inference is to be drawn have been proved beyond all reasonable doubt, and thereafter, whether from such proved and established circumstances no other conclusion except that the accused had agreed to commit an offence can be drawn. Naturally, in evaluating the proved circumstances for the purposes of drawing any inference adverse to the accused, the benefit of any doubt that may creep in must go to the accused."

20. Sri. Chaturvedi has submitted that there was no meeting of mind of the applicant with that of any other accused person as there is no material to even prima facie establish that the applicant played any role in the decision making process of UPPCL whereby it was decided to make investments in PNB HFL, LIC HFL and DHFL and in payment of brokerage to the brokers.

21. Sri. S. C. Misra, Senior Advocate has also advanced submissions on behalf of

the applicant and he has submitted that the charge-sheet states that one of the co-accused persons Lalit Goel Chartered Accountant had entered into a criminal conspiracy with Alok Garg, Associate Vice President, Distribution, (Accounts and Operations), SMC Global Securities Ltd and also with Mahesh Kumar Gupta, Senior Vice President, Distribution, SMC Global Securities Ltd and in pursuance to the said criminal conspiracy, investments were made for the first time in PNB Housing Finance Ltd in December 2016 through broker SMC Global Securities Ltd. Lalit Goel had referred UPPCL to M/s SMC Global Securities Ltd. for investments in PNB HFL, DHFL and LIC HFL. The investments in PNB HFL were made in the year 2016, wherein the applicant had no role to play. In the initial FIR lodged by the Secretary of the trust, the only allegation was that the two named co-accused persons, who were officers of UPPCL, had made investments in violation of the Government guidelines and there was no allegation against the applicant. The allegation against the applicant was made for the first time in the 5th additional charge-sheet alleging that he had wrongfully obtained investments. The investments made in DHFL were not the first of its kind and similar investments were made in PNB HFL in the year 2016 and also in LIC HFL.

22. Sri. Misra has submitted that the applicant was not an accused till filing of the 4th additional charge-sheet in the case and nobody had any grievance against DHFL or against the applicant. During the year 2017-18, the total Treasury flow into DHFL was over ₹ 34,000 Crores and in the year 2018-19, it was over ₹ 38,000 Crores. The investments made by UPPCL constituted a very small fraction of the total

investment received by DHFL. The applicant was the Chairman and Managing Director of DHFL, which had more than 15,000 employees and the Fixed Deposit Department was managed by one Pradeep Bhadouria, who used to report to the Joint Managing Director Sri. Harshil Mehta. UPPCL has made investments in DHFL through SMC Brokers and even on earlier occasions, similar investments were made by UPPCL in PNB Housing Finance and LIC Housing Finance, which are also non-banking financial institutions.

23. Sri. Misra has further submitted that when DHFL became incapacitated to make repayments because of the interim order passed by the Bombay High Court, the RBI superseded its Board of Directors on 20.11.2019 and appointed an Administrator of the company, after which the applicant did not have any say in the affairs of the company. RBI filed Company Petition No. 4 to 58 of 2019 before the National Company Law Tribunal, Mumbai to initiate corporate insolvency resolution process for DHFL under the Insolvency And Bankruptcy Code 2016 and in furtherance of the aforesaid process, Piramal Housing Finance Capital Ltd. has taken over the management and control of DHFL under an order dated 07.06.2021 passed by the National Company Law Tribunal Mumbai. Piramal Housing Finance Capital Ltd was a business rival of DHFL and it was only after that it took control of DHFL, that two employees of the Company, namely Pradeep Bhadauria and Govindan Srinivasan have made a reference to an alleged conversation between the applicant and co-accused Praveen Kumar Gupta, the then Secretary of the Trust. However, none of the officials of the Trust have stated anything

regarding involvement of the applicant in commission of the offences.

24. Sri. Misra has further submitted that except for the applicant and his brother - Co-accused Dheeraj Wadhawan, all the other co-accused persons have been granted bail in the present case and, therefore, the applicant is also entitled to be released on bail on the ground of parity.

25. Sri. Misra has placed reliance of the judgments of the Hon'ble High Court in **Sanjay Chandra v. CBI**, (2012) 1 SCC 40, **Satender Kumar Antil v. CBI**, (2022) 10 SCC 51, **Mahesh Kumar & Ors Versus Central Bureau of Investigation**, SCC OnLine Del 3903 and **Praveen Kumar Agarwal versus CBI**, 2022 SCC OnLine Del 1768.

26. Sri. Nandit Kumar Srivastava Senior Advocate has also advanced submissions in support of the applications and he has submitted that the applicant was sent to Delhi, which shows that the custody of the applicant is not required in connection with the present case and, for this reason also, the applicant is entitled to be enlarged on bail in the present case.

27. *Per contra*, Sri Anurag Kumar Singh Advocate has submitted on behalf of the respondent - CBI that the conspiracy in the present case was hatched in two parts the first being at the office of UPPCL, where a decision was taken to invest the amount of Provident fund in companies other than Nationalised Banks and the second part being performed by the applicant and co-accused Dheeraj Wadhawan by obtaining AAA rating by CARE (Credit Analysis and Research Ratings) and BWR (Brick Works Ratings)

on the strength of bogus documents showing loans to the tune of ₹ 15,000 crore given to 2.5 lakh fictitious persons, which amount actually was the non-performing asset of DHFL and the fictitious loans were shown in the books of account to hide the NPA for obtaining AAA rating.

28. Sri. Singh has further submitted that DHFL had made a proposal to UPPCL for paying 8.05% interest on the deposits. Forged minutes of meeting dated 24.03.2017 of the Trustees of UPPCL Contributory Provident Fund Trust were prepared wherein it was recorded that the Board of Trustees had agreed to consider the investment proposals as per government notification dated 02.03.2015 in the securities with higher security and higher interest rate other than term deposits of Nationalised Banks and AAA rated companies and it was further resolved that further investments in securities will be decided by Secretary (Trust) on case to case basis with the consent/approval of Director (Finance), UPPCL and the trustee. In furtherance of the aforesaid forged resolution the Secretary / Director engaged brokers. Abhinav Gupta, the then Secretary of the Trust, was in regular touch with Amit Prakash, Regional Manager of DHFL through emails. Brokerage was paid to several non-existent broker firms and the amount paid as brokerage was withdrawn from the banks in cash. The call detail records of Abhinav Gupta and Amit Prakash establish their connection.

29. Sri. Singh has further submitted that it has come to light in investigation that huge amounts were transferred from the accounts of DHFL as unsecured loans to various other companies, which are sister concerns of DHFL and are controlled by the applicant and co-accused Dheeraj

Wadhawan. The loans were granted without carrying out any paper work.

30. Sri. Singh has taken the Court through the statements of some employees of DHFL recorded during investigation, who have stated that it was common practice of the group to make their employees as the authorized signatories in the bank accounts and Directors in other companies. He has also submitted that false entries used to be made in the accounts of the company for showing its false financial condition of the company and it obtained AAA credit rating on the basis of false documents and false accounts.

31. Sri. Singh has further submitted that the applicant is involved in and is in custody in connection with two other cases (i) FIR No. RC2102020E0004 dated 07.03.2020 lodged by CBI under Sections 120 B, 409, 420 and 477 A IPC and Section 13 (2) read with 13 (1) (d) of the Prevention of Corruption Act and substantive offences thereof and (ii) FIR No RC2242022A0001 dated 20.06.2022 lodged by CBI under Sections 120 B read with Section 420 IPC and Sections 7, 12 and 13 (2) read with 13 (1) (d) of the Prevention of Corruption Act. The applicant is involved in several other cases, which have not been disclosed in the affidavit filed in support of the bail application.

32. Sri. Anurag Kumar Singh has relied upon **Y.S. Jagan Mohan Reddy v. CBI**, (2013) 7 SCC 439, **State of Bihar v. Amit Kumar**, (2017) 13 SCC 751, **Rohit Tandon v. Directorate of Enforcement**, (2018) 11 SCC 46, **Mahipal v. Rajesh Kumar**, (2020) 2 SCC 118 and **Shivnarayan Laxminarayan Joshi v. State of Maharashtra**, (1980) 2 SCC 465.

33. The applicant's criminal history has been explained by filing the second supplementary affidavit, as per which he is involved in a total of nine cases apart from the present case and he has been granted bail in the following eight cases: -

(i) In ECIR / MBZO-I/08/2019 registered by the Enforcement Directorate under Sections 3 and 4 of PMLA, the applicant has been granted bail by means of an order dated 21.02.2020 passed by the Additional Sessions Judge, City Sessions Court/Special Court, C.R.No. 16, Mumbai, and by means of the aforesaid order, the applicant has been directed to surrender his passport before the Investigating Officer.

(ii) In ECIR / MBZO-I/03/2020 registered by the Enforcement Directorate in connection with FIR No. RC2192020E0004 under Sections 3 and 4 of PMLA, the applicant has been granted default bail by means of an order dated 20.08.2020 passed by the Bombay High Court, and this order has been affirmed by the Hon'ble Supreme Court by means of the judgment and order dated 27.03.2023 passed in Criminal Appeal Nos. 701-702 of 2020.

(iii) FIR No. RC2242022A0001 dated 22.06.2022 registered by CBI Delhi under Sections 120 B, 409, 420, 477A IPC and Sections 13 (2) and 13 (1) (d) of Prevention of Corruption Act, in which the applicant has been granted default bail by means of an order dated 03.12.2022 passed by the Sessions Court.

(iv) FIR No. 66 of 2017 registered by the EOW Delhi, under Sections 420, 406, 409 and 120 B IPC, in which the applicant has been granted bail

by means of an order dated 13.05.2022 passed by the Sessions Court.

(v) FIR No. 9 of 2020 registered by EOW Chennai, under Sections 120 B, 420, 409 IPC and Section 5 of the Tamil Nadu Protection of Interest Depositors Act, in which the applicant has been granted bail by means of an order dated 12.10.2020 passed by the Sessions Court.

(vi) In ECIR / MBZO-I/02/2020 registered by the Enforcement Directorate under Sections 3 and 4 of PMLA, in connection with FIR No. RC 0062020A0005/2020 (erstwhile CR No. 540 of 2019 registered by EOW Lucknow), in which the applicant was summoned and was released on bond under Section 88 Cr.P.C. by means of an order dated 14.02.2022 passed by the Special Court.

(vii) In ECIR / MBZO-I/05/2019 registered by the Enforcement Directorate in connection with FIR No. RC2192020E0004 under Sections 3 and 4 of PMLA, in connection with FIR No. RCBSM 2019E0002 dated 04.01.2019 registered by CBI Mumbai, in which the applicant was summoned and was released on bond under Section 88 Cr.P.C. by means of an order dated 15.02.2022 passed by the Special Court.

(viii) CR No. 84 of 2021 dated 25.03.2021 registered by EOW, Mumbai under Sections 465, 467, 468, 471, 406, 409, 420 and 120 B IPC, in which the applicant was summoned and was released on bond under Section 88 Cr.P.C. by means of an order dated 2.04.2022 passed by the Special Court.

34. Apart from the present case, the applicant is yet to be released on bail in FIR No. RC 209 2020 E 0004 dated 07.03.2020 registered by CBI Delhi under Sections 120 B, 409 ad 420 IPC.

35. I have considered the facts and circumstances of the case and the elaborate submissions advanced on behalf of the learned Counsel for the respective parties.

36. Since the allegation is of commission of economic offences, it would be appropriate to have a look at the law regarding grant of bail in such offences before proceeding to deal with the submissions. I will first mention the case-laws cited by the learned Counsel for the respondent in this regard.

37. In **Sanjay Chandra v. CBI**, (2012) 1 SCC 40, the Hon'ble Supreme Court held that: -

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted

persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

* * *

39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds: the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt,

true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

* * *

42. When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is: whether the same is possible in the present case.

* * *

46. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the

economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to allay the apprehension expressed by CBI."

38. In Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439 relied upon by the learned Counsel for the respondent - CBI, the Hon'ble Supreme Court held that: -

"34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public. State and other similar considerations.

39. In State of Bihar v. Amit Kumar, (2017) 13 SCC 751, the Hon'ble Supreme Court was pleased to hold that: -

"It is well settled that socio-economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. Usually socio-economic offence has deep-rooted conspiracies affecting the moral fibre of the society and causing irreparable harm, needs to be considered seriously."

40. **Rohit Tandon v. Directorate of Enforcement**, (2018) 11 SCC 46, which was a case arising out of Prevention of Money Laundering Act, Section 45 whereof lays down certain additional conditions regarding grant of bail, including the Court's satisfaction that there are reasonable grounds for believing that he is not guilty of the offence and that he is not likely to commit any offence while on bail, However, the present case does not involve allegation of any offence under the Prevention of Money Laundering Act and, therefore, the aforesaid judgment is not relevant for the case in hand.

41. In **Mahipal v. Rajesh Kumar**, (2020) 2 SCC 118, cited by Sri. Anurag Kumar Singh, the Hon'ble Supreme Court was examining the validity of an order passed by the High Court of Rajasthan granting Bail to an accused person by merely recording that "Considering the contentions put forth by the counsel for the petitioner and taking into account the facts and circumstances of the case and without expressing opinion on the merits of the case, this Court deems it just and proper to enlarge the petitioner on bail." The Hon'ble Supreme Court held that: -

"25. Merely recording "having perused the record" and "on the facts and circumstances of the case" does not subserve the purpose of a reasoned judicial order. It is a fundamental premise of open

justice, to which our judicial system is committed, that factors which have weighed in the mind of the Judge in the rejection or the grant of bail are recorded in the order passed. Open justice is premised on the notion that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The duty of Judges to give reasoned decisions lies at the heart of this commitment. Questions of the grant of bail concern both liberty of individuals undergoing criminal prosecution as well as the interests of the criminal justice system in ensuring that those who commit crimes are not afforded the opportunity to obstruct justice. Judges are duty-bound to explain the basis on which they have arrived at a conclusion."

42. In the above mentioned backdrop, the Hon'ble Supreme Court held that:

"12. The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter for trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted

by a lower court, an appellate court must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail."

43. In the case of **Dataram Singh v. State of Uttar Pradesh**, (2018) 3 SCC 22, the Hon'ble Supreme Court was pleased to reiterate the law of bail in the following words:--

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

* * *

5. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in **Nikesh Tarachand Shah v. Union of India** [(2018) 11 SCC 1] going back to the days of the Magna Carta. In that decision, reference was made to **Gurbaksh Singh Sibbia v. State of Punjab** [(1980) 2 SCC 565] in which it is

observed that it was held way back in **Nagendra v. King-Emperor** [AIR 1924 Cal 476] that bail is not to be withheld as a punishment. Reference was also made to **Emperor v. Hutchinson** [AIR 1931 All 356] wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days."

44. After considering the earlier judgments dealing with the question of grant of bail to a person accused of commission of an economic offence, in **P. Chidambaram v. Directorate of Enforcement** (2020) 13 SCC 791, the Hon'ble Supreme Court held that: -

"23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that **the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial.** However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even **economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation**

made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial."

(Emphasis supplied)

45. In its recent decision in **Satender Kumar Antil v. Central Bureau of Investigation**, 2022 SCC OnLine SC 825, the Hon'ble Supreme Court has summarized and reiterated the law regarding grant of bail in economic offences, as laid down in its earlier decisions, in the following words:--

"66. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in the case of *P .Chidambaram v. Directorate of*

Enforcement (2020)13SCC791, after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. **After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis."**

(Emphasis supplied)

46. Thus the legal position which emerges from the aforesaid cases, has been summarized by this Court in **Peeyush Kumar Jain versus Union of India**, (2022) 121 ACC 448 = (2023) 1 All LJ 10, in the following words: -

"31. The position of law regarding grant of bail which emerges from the judgments of the Supreme Court referred to above, is that the basic jurisprudence relating to bail in economic offences remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. It is not advisable to categorize all the economic offences into one group and deny bail on that basis. One of the circumstances to consider the gravity of the offence is the term of sentence that is prescribed for the offence the accused is alleged to have committed. Even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. While considering the prayer for grant of

bail in any offence, including an economic offence, the Court has to consider:--

(i) the nature of accusation and the severity of the punishment to which the party may be liable in the case of conviction and the nature of the materials relied upon by the prosecution;

(ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;

(iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;

(iv) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused;

(v) larger interest of the public or the State and similar other considerations.

32. A prayer for bail is not to be denied merely because of the sentiments of the community are against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required."

47. When we examine the facts of the case as the same appear from the material placed before the Court at this stage, the

accusation against the applicant is that (i) he entered in a criminal conspiracy with other co-accused persons and in furtherance of the said criminal conspiracy, the surplus funds of UPPCL trust were got invested in fixed deposits of DHFL in contravention of investment guidelines dated 02.03.2015 issued by the Ministry of Finance, Government of India, (ii) the accused persons had dishonestly and fraudulently obtained higher ratings from rating agencies on the basis of false and bogus audited balance sheets and bogus financial statements, (iii) the applicant and co-accused Dheeraj Wadhawan in criminal conspiracy with other co-accused persons diverted funds from the bank accounts of DHFL to bank accounts of other companies by way of sanctioning bogus project loans and further diverted the said funds to their own companies and used the said funds.

48. The Trust had made investments in fixed deposits of DHFL, which have not been repaid after DHFL was restrained by an order passed by the Bombay High Court.

49. The learned Counsel for the applicant have made elaborate submissions on various points, including the point that the offences are not made out against the applicant. However, at this stage, the Court is concerned with the question of grant or refusal of bail to the applicant and the Court cannot hold a mini-trial at this stage. These pleas are left open for being decided by the Trial Court at the appropriate stage. In **Shanti Prasad Jain v. Director of Enforcement, FERA**, (1963) 2 SCR 297, the Hon'ble Supreme Court has held that: -

"37. Now the law is well settled that when moneys are deposited in a bank, the relationship that is constituted between

the banker and the customer is one of debtor and creditor and not trustee and beneficiary. The banker is entitled to use the monies without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer."

50. In **Anumati v. Punjab National Bank**, (2004) 8 SCC 498, the Hon'ble Supreme Court reiterated that "The bank is thus a debtor to the account-holders in respect of the amount deposited -- a debt which is repayable by the bank to the account-holders with interest on the expiry of an agreed period."

51. Per Contra, Sri. Anurag Kumar Singh, the learned Counsel for the CBI has placed reliance on **Shivnarayan Laxminarayan Joshi v. State of Maharashtra**, (1980) 2 SCC 465. The facts of the case were that the Appellant 1 had resigned from the office of the managing director of Laxmi Bank and it was contended that he could not be held liable for misappropriation committed after he had relinquished his office. The High Court found that even though he acted as Chairman of the bank and had relinquished the office as managing director, he was for all practical purposes functioning as managing director of the Bank throughout the material period. The Hon'ble Supreme Court held that "*This finding is based on a thorough analysis and consideration of the evidence adduced before the court. In view of this finding it is manifest that even though the first appellant may have relinquished his office as managing director still he had full control over the affairs of the bank and virtually acted as de facto managing director.*"

52. In the aforesaid factual Background, the Hon'ble Supreme Court

held that "a director was clearly in the position of a trustee and being a trustee of the assets which has come into his hand he had dominion and control over the same." Thus it was held that the Director of the Bank was a trustee of the assets of the Bank, which had come into his hands and he had dominion and control over the same. However, the relationship of an investor and a bank was not in question in the aforesaid case.

53. Thus it prima facie appears that the deposit of amounts in fixed deposits with DHFL would create a relationship of creditor and debtor between the Trust and DHFL and it would not amount to entrustment, so as to attract the offence of breach of trust. So far and the offences under 420, 467, 468 and 471 I.P.C. are concerned, it is not alleged that the aforesaid acts were committed by the applicant himself and it is alleged that he conspired and got it done through certain officials of DHFL, and those officials have already been granted bail. However, as the Court is concerned with the applicant's prayer for grant of bail only, it is not permissible to hold a mini trial and record any conclusive finding, and the same will be done by the trial Court at the appropriate stage.

54. Charge-sheet and as many as 5 supplementary charge-sheets have already been filed in the matter and the trial Court has already taken cognizance of the case.

55. The charge-sheet mentions the names of as many as 57 witnesses of the case and the trial is yet to commence and it would certainly take a very long time to conclude and keeping the applicant incarcerated without his guilt having been established would not be proper, unless his

case falls within any exception disentitling him to be enlarged on bail.

56. When the applicant was already in judicial custody in another case, on 24.05.2020, the applicant was taken from Jail and was produced before the Special Judge, CBI, Lucknow on 26.05.2020, from where he was initially remanded to the custody of CBI for 14 days and his custodial interrogation has already been done. Thereafter he was sent to judicial custody and since then the applicant is languishing in jail in the present case.

57. Nothing has been placed on record to give rise to a reasonable ground of apprehension that in case the applicant is released on bail, he would influence the witnesses or tamper with the evidence.

58. The applicant has already been ordered to surrender his passport before the Investigating Officer by means of the order dated 21.02.2020 passed by the Additional Sessions Judge, City Sessions Court/Special Court, C.R.No. 16, Mumbai, in Remand Application No. 107 of 2020 and, therefore, he does not appear to be at flight risk.

59. As all other accused persons, against whom there is allegation of commission of the offences, have been granted bail in the present case, the applicant, against whom there is an allegation of entering into conspiracy with the other co-accused persons, is also entitled to be granted bail on the ground of parity.

60. There is no other material which outweighs the considerations for grant of bail keeping in view the law laid down by

the Hon'ble Supreme Court in the above referred cases.

61. In view the aforesaid discussion and without making any observations which may affect the merits of the case, I am of the view that the applicant is entitled to be released on bail pending conclusion of the trial. The bail application is accordingly allowed.

62. Let the applicant - **Kapil Wadhwan**, be released on bail in Criminal Case No. 370 of 2020, arising out of Case Crime No. RC0062020A0005, registered with Police Station CBI/ACB, Lucknow, under Section 120-B read with Sections 409, 420, 467, 468, 471 I.P.C. and Section 7-A, 8 and Section 13 (2) read with Section 13 (1) (d) of Prevention of Corruption Act, 1988, pending in the Court of Additional District Judge/Special Judge, Anti Corruption, C.B.I. (West), Lucknow, on his furnishing a personal bond and two reliable sureties for Rupees Ten Lakhs (₹10,00,000/-) each to the satisfaction of the trial Court, subject to following conditions:--

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the dates fixed, unless his personal presence is exempted.

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

to any police officer or tamper with the evidence.

63. In case of breach of any of the above conditions, the prosecution shall be at liberty to move an application before this Court seeking cancellation of bail.

(2023) 5 ILRA 1292
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.04.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Bail Application No. 14402 of 2023

Preetam Singh ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:

Sri Raj Kumar Singh, Sri Sunil Kumar Singh

Counsel for the Opposite Party:

G.A.

A. Criminal Law - Criminal Procedure Code, 1973 - Section 439 - Indian Penal Code, 1860-Section 302-application- the applicant, who happens to be the nephew of the deceased person, is stated to have assaulted his uncle by a knife thereby causing his death at the spot over a family dispute-PW-1 the material witness turned hostile- evidence of a hostile witness cannot be discarded in toto, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence- The bail application is found devoid of merits-Hence, rejected.(Para 1 to 12)

B. The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be

treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.(Para 8)

The application is rejected. (E-6)

List of Cases cited:

1. Bhagwan Singh Vs St. of Har. (1976) 1 SCC 389 : (AIR 1976 SC 202)
2. Rabindra Kumar Dey Vs St. of Ori.(1976) 4 SCC 233 : (AIR 1977 SC 170)
3. Syad Akbar Vs St. of Karn.(1980) 1 SCC 30 : (AIR 1979 SC 1848)
4. Khujji Vs St. of M.P.(1991) 3 SCC 627 : (AIR 1991 SC 1853) , SCC p. 635, para 6.)
5. St. of U.P. Vs Ramesh Prasad Misra [(1996) 10 SCC 360 : (AIR 1996 SC 2766): 1996 SCC (Cri) 1278]
6. Sohrab Vs St. of M.P., [(1972) 3 SCC 751 : (1972) SCC (Cri) 819 : AIR 1972 SC 2020]
7. St. of U.P. Vs M.K. Anthony, [(1985) 1 SCC 505 : 1985 SCC (Cri) 105] : (AIR 1985 SC 48)
8. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. [(1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753]
9. St. of Raj. Vs Om Prakash, [(2007) 12 SCC 381 : (2008) 1 SCC (Cri) 411] : (AIR 2007 SC 2257)
10. Prithu Vs St. of H.P., [(2009) 11 SCC 585 : (2009) 3 SCC (Cri) 1502] : (AIR 2009 SC 2070)
11. St. of U.P. Vs Santosh Kumar, [(2009) 9 SCC 626 : (2010) 1 SCC (Cri) 88] : (2009 AIR SCW 6177)
12. St. Vs Saravanan, [(2008) 17 SCC 587 : (AIR 2009 SC 152) : (2010) 4 SCC (Cri) 580]
13. Vinod Kumar Vs St. of Punj. (2015) 3 SCC 220 : (AIR 2015 SC 1206)

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.
2. Supplementary affidavit filed today is taken on record.
3. Heard Sri Sunil Kumar Singh, learned counsel for applicant and Sri Vibhav Anand Singh, learned A.G.A. for the State.
4. The present bail application has been filed by the applicant in Case Crime No.101 of 2022, under Section 302 IPC, Police Station Dubhar, District Ballia with the prayer to enlarge him on bail.

PROSECUTION STORY:

5. As per prosecution story, the applicant, who happens to be the nephew of the deceased person, is stated to have assaulted his uncle by a knife thereby causing his death at the spot on 03.07.2022 at about 4:00 PM over a family dispute.

RIVAL CONTENTIONS:

6. Learned counsel for the applicant has stated that the applicant is absolutely innocent and has been falsely implicated in the present case. Learned counsel has further stated that all the witnesses of fact have been examined and they have not supported the prosecution story. There is no likelihood of conviction of the applicant in the present case. The other witnesses are simply formal witnesses only. Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length. There is

no criminal history of the applicant. The applicant is languishing in jail since 04.07.2022. In case, the applicant is released on bail, he will not misuse the liberty of bail.

7. Per contra, learned A.G.A. has vehemently opposed the bail application on the ground that the examination-in-chief of the informant, as PW-1, was taken up on 14.11.2021 and he has categorically deposed against the applicant and nominated him to be the assailant of having caused the death of his brother and some cross-examination was even taken up the same day. Subsequent to it, further cross-examination of PW-1 was taken up on 14.12.2021 i.e. about a month after the said examination-in-chief and the first informant has resiled from his earlier statement and has been declared hostile by the public prosecutor.

CONCLUSION:-

8. The evidence of a hostile witness cannot be discarded in toto, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. The Apex Court in *Rajesh Yadav and another Etc. v. State of U. P.*,¹ has dealt with the evidentiary value of the Hostile witnesses. The relevant paragraphs are being reproduced as follows:

22. On the law laid down in dealing with the testimony of a witness over an issue, we would like to place reliance on the decision of this Court in C. Muniappan v. State of T.N., (2010) 9 SCC 567: (AIR 2010 SC 3718):

"81. It is settled legal proposition that:

"6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof." (Vide *Bhagwan Singh v. State of Haryana*, (1976) 1 SCC 389 : (AIR 1976 SC 202) , *Rabindra Kumar Dey v. State of Orissa*, (1976) 4 SCC 233 : (AIR 1977 SC 170) , *Syad Akbar v. State of Karnataka*, (1980) 1 SCC 30 : (AIR 1979 SC 1848) and *Khujji v. State of M.P.*, (1991) 3 SCC 627 : (AIR 1991 SC 1853) , SCC p. 635, para 6.)

82. In *State of U.P. v. Ramesh Prasad Misra* [(1996) 10 SCC 360 : (AIR 1996 SC 2766): 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra* [(2002) 7 SCC 543: 2003 SCC (Cri) 112] : (AIR 2002 SC 3137) , *Gagan Kanojia v. State of Punjab* [(2006) 13 SCC 516: (2008) 1 SCC (Cri) 109] : (AIR Online 2006 SC 574) , *Radha Mohan Singh v. State of U.P.* [(2006) 2 SCC 450: (2006) 1 SCC (Cri) 661 : (AIR 2006 SC 951)], *Sarvesh Narain Shukla v. Daroga Singh* [(2007) 13 SCC 360: (2009) 1 SCC (Cri) 188] : (AIR 2008 SC 320) and *Subbu Singh v. State* [(2009) 6 SCC 462: (2009) 2 SCC (Cri) 1106] : (2009 AIR SCW 3937).

83. Thus, the law can be summarised to the effect that the evidence

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

84. In the instant case, some of the material witnesses i.e. B. Kamal (PW 86) and R. Maruthu (PW 51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.

85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. "Vide *Sohrab v. State of M.P.*, [(1972) 3 SCC 751 : (1972) SCC (Cri) 819 : AIR 1972 SC 2020], *State of U.P. v. M.K. Anthony*, [(1985) 1 SCC 505 : 1985 SCC (Cri) 105] : (AIR 1985 SC 48) , *Bharwada Bhoginbhai Hirjibhai v. State of Gujrat*, [(1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753], *State of Rajasthan v. Om Prakash*, [(2007) 12 SCC 381 : (2008) 1 SCC (Cri) 411] : (AIR 2007 SC 2257) , *Prithu v. State of H.P.*, [(2009) 11 SCC 585 : (2009) 3 SCC (Cri) 1502] :

(AIR 2009 SC 2070) , State of U.P. v. Santosh Kumar, [(2009) 9 SCC 626 : (2010) 1 SCC (Cri) 88] : (2009 AIR SCW 6177) and State v. Saravanan, [(2008) 17 SCC 587 : (AIR 2009 SC 152) : (2010) 4 SCC (Cri) 580].

23. This Court in Vinod Kumar v. State of Punjab, (2015) 3 SCC 220 : (AIR 2015 SC 1206) had already dealt with a situation where a witness after rendering testimony in line with the prosecution's version, completely abandoned it, in view of the long adjournments given permitting an act of manoeuvring. While taking note of such situations occurring with regularity, it expressed its anguish and observed that:

"51. It is necessary, though painful, to note that PW 7 was examined-in-chief on 30-9-1999 and was cross-examined on 25-5-2001, almost after 1 year and 8 months. The delay in said cross-examination, as we have stated earlier had given enough time for prevarication due to many a reason. A fair trial is to be fair both to the defence and the prosecution as well as to the victim. An offence registered under the Prevention of Corruption Act is to be tried with all seriousness. We fail to appreciate how the learned trial Judge could exhibit such laxity in granting so much time for cross-examination in a case of this nature. It would have been absolutely appropriate on the part of the learned trial Judge to finish the cross-examination on the day the said witness was examined. As is evident, for no reason whatsoever it was deferred and the cross-examination took place after 20 months. The witness had all the time in the world to be gained over. We have already opined that he was declared hostile and re-examined.

52. It is settled in law that the testimony of a hostile witness can be relied

upon by the prosecution as well as the defence. In re-examination by the Public Prosecutor, PW 7 has accepted about the correctness of his statement in the court on 13-9-1999. He has also accepted that he had not made any complaint to the Presiding Officer of the court in writing or verbally that the Inspector was threatening him to make a false statement in the court. It has also been accepted by him that he had given the statement in the court on account of fear of false implication by the Inspector. He has agreed to have signed his statement dated 13-9-1999 after going through and admitting it to be correct. It has come in the re-examination that PW 7 had not stated in his statement dated 13-9-1999 in the court that recovery of tainted money was not effected in his presence from the accused or that he had been told by the Inspector that amount has been recovered from the accused. He had also not stated in his said statement that the accused and witnesses were taken to the Tehsil and it was there that he had signed all the memos.

53. Reading the evidence in entirety, PW 7's evidence cannot be brushed aside. The delay in cross-examination has resulted in his prevarication from the examination-in-chief. But, a significant one, his examination-in-chief and the re-examination impels us to accept the testimony that he had gone into the octroi post and had witnessed about the demand and acceptance of money by the accused. In his cross-examination he has stated that he had not gone with Baj Singh to the Vigilance Department at any time and no recovery was made in his presence. The said part of the testimony, in our considered view, does not commend acceptance in the backdrop of entire

evidence in examination-in-chief and the re-examination.

57. Before parting with the case we are constrained to reiterate what we have said in the beginning. We have expressed our agony and anguish for the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts:

57.1. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.

57.2. As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurise the witness and to gain over him by adopting all kinds of tactics.

57.3. There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial is to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of the rule of law and eventually turn such trials to a

farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

57.4. In fact, it is not at all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

57.5. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safeguarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute." Section 33 of the Indian Evidence Act:

"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.-Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided- that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation-A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

24. Section 33 is an exception to the general rule which mandates adequate facility for cross examining a witness. However, in a case where a witness after the completion of the chief examination and while subjecting him to a substantial and rigorous cross examination, did not choose to get into the witness box on purpose, it is for the court to utilize the said evidence appropriately. The issues over which the evidence is completed could be treated as such by the court and then proceed. Resultantly, the issues for which the cross

examination is not over would make the entire examination as inadmissible. Ultimately, it is for the court to decide the aforesaid aspect.

9. After hearing learned counsel for the parties and taking into consideration the fact that PW-1 has categorically nominated the applicant to be the assailant, I do not find it a fit case for grant of bail to the applicant.

10. The bail application is found devoid of merits and is, accordingly, **rejected**.

11. However, it is directed that the aforesaid case pending before the trial court be decided as early as possible in view of the principle as has been laid down in the recent judgments of the Apex Court in the cases of **Vinod Kumar vs. State of Punjab²**, and **Hussain and Another vs. Union of India³**, if there is no legal impediment.

12. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

(2023) 5 ILRA 1297

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 04.04.2023

BEFORE

THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Crl. Misc. Bail Application No. 25623 of 2022

Brijesh Yadav

...Applicant (In Jail)

Versus

State of U.P.

...Opposite Party

Counsel for the Applicant:

Sri Shesh Nath Singh Yadav, Sri V.P. Srivastava (Sr. Adv.)

Counsel for the Opposite Party:

G.A., Sri Atharva Dixit, Sri Aushim Luthra, Sri Manish Tiwari (Sr. Adv.)

1. Raj. Vs Balchand @ Baliay (1978) AIR 2447

2. Babu Ram & anr. Vs St. of Punj. (2008) CRLJ 1651

3. Manfool Singh Vs St. of Har. (2019)(105 ACC 284

(Delivered by Hon'ble Dr. Gautam Chowdhary, J.)

A. Criminal Law - Criminal Procedure Code, 1973-Section 439 - Section 7 CLA Act - Indian Penal Code, 1860-Sections 147] 149] 323] 302

-वादी मुकदमा अपने धारा 161 दंडप्रसंग के बयान में कथन किया है कि उसका तथा उसके पट्टीदार से बँटवारे को लेकर काफी दिनों से विवाद चल रहा है, कथित घटना की तिथि एवं समय पर स्कार्पियो गाड़ी सं० यूपी 61 एपी 4999 से विपक्षी का बहनोई दरवाजे पर आये जहाँ पर दो मोटरसाईकिल से हरeram यादव, हरकृष्ण यादव, हरिशंकर यादव व केशव यादव मौजूद थे, मौके पर सभी लोग आपस में बात किये, वह बगल में खड़ा था तो सभी लोग उसे मारने पीटने लगे। तब तक उसकी माँ रेनू यादव उसे बचाने आयी तो उनको भी मारने पीटने लगे। शोर सुनकर उसके पिता अवधेश यादव मौके पर आये तो सभी लोग उनसे उलझ गये और मारने पीटने लगे तथा आवेदक बृजेश यादव ने उसके पिता को गोली मार दिया तथा उन्हें अस्पताल ले जाते समय रास्ते में उनकी मृत्यु हो गयी। गाँव के लोग आवेदक बृजेश यादव व किशन यादव को पकड़ लिये थे और काफी मारपीट किया था तथा वे लोग उन्हें थाने लेकर गये थे, जहाँ से दोनों को अस्पताल भेजा गया। बयान मजरूबा रेनू यादव ने भी अपने बयान अन्तर्गत धारा 161 दंडप्रसंग में अभियोजन कथानक का समर्थन किया है तथा आवेदक बृजेश यादव द्वारा उसके पति को गोली मारने का कथन किया है। साक्षीगण धर्मादेवी, अरविन्द यादव, तहसीलदार यादव, तालुक राज यादव आदि ने भी आवेदक बृजेश यादव द्वारा मृतक अवधेश यादव को गोली मारने का कथन किया है। फर्द बरामदगी के अनुसार आवेदक की निशानदेही पर हत्या में प्रयुक्त आग्नेयास्त्र भी बरामद हुआ है। तर्कों के परिप्रेक्ष्य में पत्रावली पर उपलब्ध सारवान तथ्यों एवं परिस्थितियों का समग्र रूप से अवलोकन करने के बाद, सबूतों की प्रकृति और किसी भी ठोस विरोधात्मक सामग्री की अनुपस्थिति एवं उपलब्ध सामग्री से छेड़छाड़ की संभावना न होने के तथ्य को देखते हुए मेरी राय में आवेदक को जमानत पर मुक्त करने का उपयुक्त आधार है। (Para 1 to 16)

The application is rejected. (E-6)

List of Cases cited:

1^ण वर्तमान दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र, आवेदक बृजेश यादव की ओर से मु०अ०सं० 322 सन 2020, अन्तर्गत धारा 147, 149, 323, 302 भा०दं०वि० एवं धारा 7 सी०एल०ए० ऐक्ट, थाना नन्दगंज, जिला गाजीपुर में जमानत पर मुक्त करने हेतु प्रस्तुत किया गया है।

2^ण वाद के तथ्य संक्षेप में इस प्रकार हैं कि वादी मुकदमा अभिषेक यादव उर्फ गोलू यादव द्वारा संबंधित थाने में तहरीर दी गयी कि उसका तथा उसके पड़ोसी शैभनाथ यादव से जमीन के हिस्से को लेकर काफी दिनों से विवाद चल रहा है। दि० 21-10-2020 को सुबह 9.00 बजे के करीब स्कार्पियो गाड़ी सं० यू०पी० 61 ए०पी० 4999 से विपक्षी हरे राम यादव का बहनोई बृजेश यादव अपने एक साथी किशन यादव के साथ उसके दरवाजे पर आये जहाँ पर हरeram यादव, हरकृष्ण यादव, हरिशंकर यादव तथा केशव यादव मिले तथा आपस में बात किये और वह वहीं पर खड़ा था, उसे पकड़कर मारने लगे। उसकी माता रेनू यादव उसे बचाने आयी तो उनको भी मारने-पीटने लगे। शोर सुनकर उसके पिता अवधेश यादव मौके पर आये तो सभी लोग उनसे उलझ गये और मारने पीटने लगे तथा बृजेश यादव ने पिस्टल निकालकर उसके पिता को गोली मार दी जिनको लेकर वह लोग अस्पताल भागे लेकिन रास्ते में उनकी मृत्यु हो गयी। गाँव के लोग घेरकर बृजेश यादव और किशन यादव को पकड़कर थाने लाये हैं। घटना के समय गाँव में अफरा-तफरी मच गयी, सभी लोग डर कर अपने-अपने घर का दरवाजा बन्द करने लगे। मौके पर काफी भय का माहौल हो गया। सभी लोग घबड़ाकर इधर-उधर भागने लगे। प्रथम सूचना रिपोर्ट लिखकर कार्यवाही करने की कृपा करें। उक्त तहरीर के आधार पर अभियुक्तगण बृजेश यादव, किशन यादव, हरeram यादव, हरकृष्ण

यादव, हरिशंकर यादव तथा केशव यादव के विरुद्ध भारतीय दंड संहिता की धारा 147, 149, 323, 302 तथा धारा 7 सी0एल0ए0 ऐक्ट के तहत मु0अ0सं0 322 सन 2020, थाना नन्दगंज, जिला गाजीपुर में प्रथम सूचना रिपोर्ट पंजीकृत कर विवेचना प्रारम्भ की गयी।

3^ण आवेदक के विद्वान अधिवक्ता श्री शेष नाथ सिंह यादव एवं उनके वरिष्ठ अधिवक्ता श्री वी0 पी0 श्रीवास्तव, परिवादी के विद्वान अधिवक्तागण सर्वश्री अथर्व दीक्षित, ए0 लूथरा तथा उनके वरिष्ठ अधिवक्ता श्री मनीष तिवारी एवं विद्वान अपर शासकीय अधिवक्ता श्री अनिल कुमार कुशवाहा को सुना तथा पत्रावली का परिशीलन किया।

4^ण आवेदक के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि :-

1- आवेदक को इस प्रकरण में गलत एवं फर्जी तरीके से झूठा फँसाया गया है, उसने कथित अपराध कारित नहीं किया है।

2- वर्तमान जमानत आवेदन पत्र से संबंधित अपराध दि0 21-10-2020 को 9 बजे प्रातः का कहा जाता है और उसी दिन 9.48 पर संबंधित थाने पर प्रथम सूचना रिपोर्ट लिखायी जाती है। कुल मिलाकर 6 अभियुक्तों का नाम प्रथम सूचना रिपोर्ट में लिखाया गया है, जिसमें केवल आवेदक को पिस्टल निकालकर सूचनाकर्ता के पिता को मारना कहा जाता है एवं दो घायल को अन्य द्वारा मारने हेतु नामित किया गया है।

3- मृतक अवधेश यादव को शव विच्छेदन आख्या के अनुसार मृतक को एक गोली की चोट है, अन्य घायलों के चिकित्सीय परीक्षण आख्या के अनुसार लाठी डण्डे से मारा गया है।

4- आवेदक अपने सास की सर्पदंश की सूचना पर अपने ससुराल जा रहा था कि रास्ते में पहले से घात लगाकर बैठे वादी मुकदमा व उसके दोस्त व उसके परिवार के सदस्य आवेदक व चचेरे भाई किशन यादव को मारने पीटने लगे। इसी दौरान मृतक बीच बचाव करने लगा कि वादी

मुकदमा के दोस्त ने फायर कर दिया जिससे मृतक को गोली लग गयी और उसकी मृत्यु हो गयी।

5- इस घटनाक्रम का एक कास केस भी है, जिसे धारा 156(3) दं0प्र0सं0 के अन्तर्गत सात आदमियों के विरुद्ध प्रस्तुत किया गया, जिसे अवर न्यायालय ने परिवाद के रूप में पंजीकृत किया तथा आदेश दि0 15-5-2022 द्वारा दूसरे पक्ष को धारा 323, 325, 379, 427, 504, 506 भा0दं0वि0 के अन्तर्गत तलब किया गया।

6- इस मामले में आवेदक बृजेश यादव को दि0 21-10-2020 को ही अपराहन 2.35 बजे बी0एच0यू0 के हास्पिटल में उपचार कराया गया, आवेदक को एक्स-रे के लिए भी भेजा गया और उसका दाहिना अलना फ्रैक्चर पाया गया, दाहिना Navicular Fracture पाया गया एवं बांया distal fibula fracture पाया गया।

7- उसी दिन आवेदक की ओर से दूसरे घायल किशन यादव का भी उपचार बी0एच0यू0 में कराया गया।

8- घटना घटित होने के समय आवेदक भी घायल अवस्था में था ऐसी स्थिति में उसके द्वारा किसी को चोट नहीं पहुँचायी जा सकती।

9- विद्वान अधिवक्ता का कथन है कि न्यायहित में यह आवश्यक है कि अभियोजन पक्ष इस बात को बतावे कि आवेदक/अभियुक्त पक्ष को चोटें कैसे आयीं, यदि अभियोजन इस बात को नहीं बताता है तो जैसा कि माननीय सर्वोच्च न्यायालय ने सीउपैपदही टेणैजंजम वठिपीतए ;1976^{६६};4^{६६} 397^{६६} में निर्धारित किया है कि अभियोजन सही तथ्य को सामने नहीं ला रहा है तो ऐसी स्थिति में निम्नलिखित तीन धारणाएँ स्थापित की गयीं।

1- अभियोजन सही तथ्यों को छुपा रहा है।

2- घटना की शुरुआत क्या है इसे वादी पक्ष छुपा रहा है।

3- गवाह झूठ बोल रहे हैं।

10— यह व्यवस्था आज भी सर्वमान्य है तथा Babu Ram & Another Vs. State of Punjab 2008 CRLJ 1651 तथा 2019;105) ACC 284 Danfool Singh Vs. State of Haryana एवं अन्य बहुत से वाद के निर्णयों में भी मान्यता प्राप्त है।

11— आवेदक निर्दोष है तथा वह इस प्रकरण में दि० 21-10-2020 से कारागार में निरुद्ध है, इसलिए आवेदक को जमानत पर छोड़ दिया जाय।

5^ण परिवादी के विद्वान अधिवक्तागण एवं विद्वान अपर शासकीय अधिवक्ता ने आवेदक के विद्वान अधिवक्ता के तर्कों का प्रबल विरोध करते हुए तर्क प्रस्तुत किया कि:-

1— मृतक के शव परीक्षण आख्या के अवलोकन से पाया गया है कि मृतक अवधेश यादव की मृत्यु का कारण भ्रमजन्तुवर्तीहृत्पक्षीवर्ती तमेनसज व दिजमजवतजमउ पितमंतउ पदरनतल दर्शित किया गया है तथा मृतक के एण्टीमार्टम इंजरीज के रूप में निम्नलिखित चोटें पायी गयी हैं।

3. A fire arm lacerated. Inverted wound of entry size 0.7cm X 0.5 cm in diameter. Oval in shape, 0.25cm black tattooing present around wound, 7.5cm Above right nipple of Chest. After dissection it travels through ribs no. between 3rd and 4th upper lobe of right side pleura, lung and upper lobe of left side pleura, lung, yellow metallic bullet recovered between left pleura and left chest wall.

4. A fire arm lacerated, inverted wound of entry size 0.7cm X 0.5cm in diameter. Oval in Shape, 0.25cm black tattooing present around wound, 12cm above right wrist joint (inner lateral aspect) & 14cm from elbow joint and passes through radius and ulna bone fractured, inverted exit wound of size 1.25cm X 1 cm. 15cm, 15cm below elbow joint and 10 cm above right wrist joint (outer lateral aspect)

2— घटना के संबंध में वादी मुकदमा अभिषेक यादव उर्फ गोलू यादव ने अपने धारा 161 दं०प्र०सं० के बयान में कथन किया है कि उसका तथा उसके पट्टीदार शोभनाथ यादव से बेटवारे को लेकर काफी दिनों से विवाद चल रहा है, पूर्व में भी बातचीत हो चुकी है।

3— कथित घटना की तिथि एवं समय पर स्कार्पियो गाड़ी सं० यूपी 61 एपी 4999 से विपक्षी हरेशम यादव का बहनोई बृजेश यादव, किशन यादव दरवाजे पर आये जहाँ पर दो मोटरसाईकिल से हरेशम यादव, हरेशकृष्ण यादव, हरिशंकर यादव व केशव यादव मौजूद थे, मौके पर सभी लोग आपस में बात किये, वह बगल में खड़ा था तो सभी लोग उसे मारने पीटने लगे। तब तक उसकी मौं रेनू यादव उसे बचाने आयी तो उनको भी मारने पीटने लगे।

4— शोर सुनकर उसके पिता अवधेश यादव मौके पर आये तो सभी लोग उनसे उलझ गये और मारने पीटने लगे तथा आवेदक बृजेश यादव ने उसके पिता को गोली मार दिया तथा उन्हें अस्पताल ले जाते समय रास्ते में उनकी मृत्यु हो गयी।

5— गाँव के लोग आवेदक बृजेश यादव व किशुन यादव को पकड़ लिये थे और काफी मारपीट किया था तथा वे लोग उन्हें थाने लेकर गये थे, जहाँ से दोनों को अस्पताल भेजा गया।

6— बयान मजरूबा रेनू यादव ने भी अपने बयान अन्तर्गत धारा 161 दं०प्र०सं० में अभियोजन कथानक का समर्थन किया है तथा आवेदक बृजेश यादव द्वारा उसके पति को गोली मारने का कथन किया है।

7— साक्षीगण धर्मादेवी, अरविन्द यादव, तहसीलदार यादव, तालुक राज यादव आदि ने भी आवेदक बृजेश यादव द्वारा मृतक अवधेश यादव को गोली मारने का कथन किया है।

8— फर्द बरामदगी के अनुसार आवेदक की निशानदेही पर हत्या में प्रयुक्त आग्नेयास्त्र भी बरामद हुआ है।

9— परिवादी द्वारा आवेदक एवं अन्य अभियुक्तगण को झूठा आरोपित करने का कोई हेतुक नहीं है।

10— आवेदक द्वारा कारित अपराध संज्ञेय एवं गम्भीर प्रकृति का है, इसलिए आवेदक को जमानत पर न छोड़ा जाय।

6^ण मैंने पत्रावली पर उपलब्ध साक्ष्य का गहनतापूर्वक परिशीलन किया तथा उभय पक्ष के विद्वान अधिवक्ताओं के तर्कों पर सम्यक रूप से विचार किया। मेरा अभिमत है कि :-

1. Rajasthan Vs. Balchand alias Baliay (AIR 2447, 1978) के ऐतिहासिक फैसले में 1978 के मामले में सटीक रूप से कहा गया है कि रु षूल नियम को शायद जमानत के रूप में रखा जा सकता है जेल नहीं।^७ इसे आधार बनाने के लिए भारत के संविधान के तहत एक अभियुक्त को गारंटीकृत अधिकारों पर जोर दिया। इन अधिकारों में सबसे विशिष्ट अधिकार संविधान के अनुच्छेद 21 के तहत दिया गया अधिकार है। किसी व्यक्ति की हिरासत उसके जीवन और स्वतंत्रता के अधिकार को प्रभावित करती है और हिरासत का मुख्य उद्देश्य बिना किसी असुविधा के मुकदमे के लिए आरोपी की आसानी से उपलब्धता सुनिश्चित करना है।

2. इस प्रकार यदि यह सुनिश्चित किया जाता है कि अभियुक्त विचारण चरण के लिए आवश्यक होने पर उपलब्ध होए तो व्यक्ति को हिरासत में लेना अनिवार्य नहीं है। इसलिए यह माना गया कि अदालतों को ऐ किसी व्यक्ति की गिरफ्तारी से संबंधित दंड प्रक्रिया संहिता, सी०आर०पी०सी० के प्रावधानों की व्याख्या करते समय हिरासत से बचना चाहिए जब तक कि यह अपरिहार्य न लगे और आरोपी को जमानत दे देनी चाहिए।

3. मानवाधिकार सक्रियता पिछले कुछ वर्षों में अधिक विकसित हुई है और वर्तमान में जेल में डाले जा रहे किसी व्यक्ति की स्वतंत्रता और समाज के हित के बीच संतुलन की समझ की आवश्यकता है। इसलिए दोनों के बीच इस तरह के संतुलन को बनाए रखने के लिए यह विचार करना बहुत महत्वपूर्ण है कि जब तक कोई मजबूत आधार न हो जैसे कि एक अभियुक्त के न्याय से भागने की संभावना या उसके द्वारा सबूतों से छेड़छाड़ करने या मामले के गवाह या पीड़ित को धमकी देने की संभावना ऐ किसी अभियुक्त को हिरासत में लेने से संविधान के

अनुच्छेद 21 के तहत उसे दिए गए उसके मौलिक अधिकार यानी जीवन और व्यक्तिगत स्वतंत्रता के अधिकार का उल्लंघन होगा।

4. इसके अलावा सजा के सुधारवादी सिद्धांत का प्रयोग दंड के दो अन्य सिद्धांतों क्रमशः निवारक सिद्धांत और दंडात्मक सिद्धांत के बीच संतुलन बनाए रखने के लिए समान रूप से महत्वपूर्ण है। सुधारवादी सिद्धांत का मुख्य उद्देश्य एक अभियुक्त को सुधारना और उसे जेल में आदतन अपराधियों से दूर रखना है ऐ जिन्हें अपराधों की विविधता माना जाता है।

5. यह सिद्धांत इस धारणा पर आधारित है कि दंड एक निवारक के बजाय अधिक उपचारात्मक होना चाहिए। इस प्रकार के सिद्धांत के तहत किसी अपराध को एक बीमारी माना जाता है जिसे मारने से ठीक नहीं किया जा सकता है बल्कि इस तरह के रोग को सुधार की प्रक्रिया ; चतवर्ग वित्तमवित्तजंजणवदद्ध के नाम की दवा की सहायता से ठीक किया जा सकता है।

6. इसके अलावा सुप्रीम कोर्ट द्वारा अर्नेश कुमार बनाम बिहार राज्य ; 1977 2 2014 के मामले में पारित ऐतिहासिक फैसले में उच्चतम न्यायालय ने गिरफ्तारी से पहले और गिरफ्तारी के बाद पुलिस की शक्तियों पर कई नियंत्रण और संतुलन लगाए। माननीय उच्चतम न्यायालय ने देश भर की सभी राज्य सरकारों को निर्देश दिया कि वे पुलिस अधिकारियों को निर्देश दें कि वे मामले के सभी तथ्यों और परिस्थितियों की जांच किए बिना किसी आरोपी को गिरफ्तार न करें और गिरफ्तारी से पहले प्रारंभिक जांच करें।

7. एक सार्वभौमिक सत्य यह भी है कि गिरफ्तारी अपने साथ बहुत अपमान भी लाती है ऐ किसी की स्वतंत्रता को कम करती है और एक अभियुक्त के चरित्र पर हमेशा के लिए एक निशान छोड़ जाती है। एक जेल में बंद अभियुक्त अपनी नौकरी छूटिष्टा खो देता है। इस तरह उसकी नजरबंदी का बोझ उसके परिवार के निर्दोष सदस्यों पर भी पड़ता है। स्थिति तब और भी खराब हो जाती है जब जेल में बंद व्यक्ति परिवार में एकमात्र कमाने वाला होता है और उसके कारावास से उसके निर्दोष आश्रितों को अनावश्यक पीड़ा होती है।

8. इस प्रकार न्यायालय को सबूतों की प्रकृति और किसी भी ठोस विरोधाभास सामग्री की अनुपस्थिति एवं उपलब्ध सामग्री से छेड़छाड़ की संभावना न होने के तथ्य को देखते हुए अभियुक्त को जमानत पर मुक्त कर दिया जाना चाहिए।

7^ण इस प्रकार उपरोक्त अभिमत के मद्देनजर आवेदक के विद्वान अधिवक्ता के तर्कों के परिप्रेक्ष्य में पत्रावली पर उपलब्ध सारवान तथ्यों एवं परिस्थितियों का समग्र रूप से अवलोकन करने के बाद, सबूतों की प्रकृति और किसी भी ठोस विरोधात्मक सामग्री की अनुपस्थिति एवं उपलब्ध सामग्री से छेड़छाड़ की संभावना न होने के तथ्य को देखते हुए मेरी राय में आवेदक को जमानत पर मुक्त करने का उपयुक्त आधार है।

8^ण अतः वाद के गुण दोष पर बिना कोई टिप्पणी किए हुए आवेदक को उपरोक्त वर्णित अपराध में संबंधित न्यायालय की सन्तुष्टि पर व्यक्तिगत बंध-पत्र एवं अधिक धनराशि के दो स्थानीय प्रतिभू प्रस्तुत करने पर निम्नलिखित शर्तों के साथ जमानत पर छोड़ दिया जाय।

1— आवेदक विवेचना या परीक्षण के दौरान अभियोजन साक्ष्यों के साथ छेड़छाड़ नहीं करेगा।

2— आवेदक अभियोजन साक्षियों व पीड़ित/शिकायतकर्ता को डरायेगा/धमकायेगा नहीं।

3— आवेदक न्यायालय के आदेशों का पालन करेगा, वह परीक्षण के दौरान बिना कोई अनावश्यक स्थगन लिए नियत तिथि पर न्यायालय में उपस्थित होगा तथा परीक्षण में ईमानदारी से सहयोग करेगा।

4— आवेदक जमानत पर रिहा होने के बाद जमानत की स्वतंत्रता का दुरुपयोग नहीं करेगा और किसी भी अपराधिक गतिविधि में लिप्त नहीं होगा न कोई अपराधिक कृत्य करेगा।

5— आवेदक प्रत्यक्ष या अप्रत्यक्ष रूप से मामले के तथ्यों से परिचित किसी भी व्यक्ति या पुलिस अधिकारियों को कोई प्रलोभन या धमकी नहीं

देगा न ही उनसे कोई वायदा करेगा, जिसके कारण उन्हें न्यायालय में तथ्यों को उजागर करने से विरत रहना पड़े।

9^ण उपरोक्त शर्तों में से किसी के उल्लंघन के मामले में, परीक्षण न्यायालय आवेदक की जमानत नियमानुसार रद्द करने को स्वतंत्र है।

(2023) 5 ILRA 1302
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 1323 of 2022

Juvenile - X Legal Guardian/ Vinod Pandey
...Revisionist

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:

Sri Chanchal Kumar Rai, Sri Mangala Prasad Rai (Sr. Adv.)

Counsel for the Respondents:

G.A., Sri Manvendra Nath Singh, Sri Nar Singh Narayan Verma

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302, 396 & 412 - The Juvenile Justice Act, 2015 - Section 102 - Revision - Section 12 - Bail to a person who is apparently a child alleged to be in conflict with law - gravity or seriousness of the offence should not be taken as an obstacle or hindrance to refuse the bail to delinquent juvenile - Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law - justice should be done not only to the accused, but also to the accuser - Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right.(Para - 6,7,12)

(B) Words and Phrases - 'ends of justice' - cannot stand in a vacuum - 'Principle of Best Interest' - ends of justice phrase is crucial in balancing the demands of both sides - Courts must consider factors such as the nature of the crime, methodology applied, mental state, involvement, and available evidence when evaluating bail entitlement - phrase may include seemingly irrelevant or unimportant factors for the purposes of Section 12(1) of the Juvenile Justice Act.(Para -13)

Juvenile found complicit in a frightful crime - involving a Branch Manager's life for looting public money - Juvenile above 16 years old - considered borderline adult - If released on bail - likely fall into the same hands and surroundings that contributed to their criminal behavior - Juvenile Justice Board and appellate Court dismissed bail applications – hence revision. **(Para - 15,16)**

HELD:- Juvenile requires professional supervision and guidance to develop healthy habits. Juvenile left studies and is not interested in academic pursuits, suggesting a need for a positive direction in their life. Appellate Court and Board found the revisionist not entitled to bail, stating effective protection and supervision is needed. Case is not fit for bail.**(Para - 17,18)**

Revision dismissed. (E-7)

List of Cases cited:

1. Amit Kumar Vs St. of U.P., Criminal Revision No. 2732 of 2010
2. Kanchan Sonkar Vs St. of U.P., Criminal Revision No. 1266 of 2020
3. Amit Vs St. of U.P., Criminal Revision No. 1852 of 2015
4. Prakash Vs St. of Raj., 2006 Cri.L.J. 1373.
5. Amit Vs St. of U.P., Criminal Revision No. 1852 of 2015
6. Vijendra Kumar Mali Vs St. of U.P., 2003 (1) J.I.C. 103

7. Om Prakash Vs St. of Raj. & anr., (2012) 5 SCC 201

8. Mangesh Rajbhar Vs St. of U.P. & anr., 2018 (2) ACR 1941

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

1. Heard Sri Chanchal Kumar Rai, learned counsel for the revisionist, Sri O.P. Mishra, learned AGA for the State as well as Sri Manvendra Nath Singh, learned counsel for the respondent no. 2 and perused the record.

2. This criminal revision under Section 102 of the Juvenile Justice Act, 2015, has been filed on behalf of the minor 'X' through his natural guardian/father Vinod Pandey S/o Late Basant Pandey R/o Village-Khutahan Namjad Karmaita (Babhnauli), Police Station Shadiyabad, District Ghazipur with the prayer to admit the minor on bail alongwith the prayer to set aside the order dated 16.11.2021 passed by the Juvenile Justice Board, Varanasi and order dated 06.01.2022 passed by the Additional District and Sessions Judge/Special Judge, POCSO Act, Varanasi in Misc Case No. 331/2021 arising out of Case Crime No. 188 of 2021 under Section 302, 396, 412 IPC, Police Station-Phoolpur, District-Varanasi by which the criminal appeal was rejected.

3. As per the version of the FIR lodged by Smt. Bindu Devi wife of deceased Phoolchand Ram, who was holding the post of the Branch Manager of Punjab National Bank, Branch-Karkhiyaon, Phoolpur, Varanasi at the time of his death; after attending his Office, he was returning to his house on 09.06.2021 at about 6 pm; he had last conversation with his wife at about 6 pm, however, some unknown

persons kidnapped and murdered him. On the basis of the FIR Case Crime No. 0188/2021 under Sections 364 and 302 IPC was registered and investigated upon. During the investigation, after collection of some evidence and recording of statement under Section 161 Cr.P.C. of the witnesses, the present revisionist, minor son of Vinod was arrested and a total of Rs. 12,50,500/- out of the looted amount of Rs. 47 lakhs, bearing the seal of Punjab National Bank and some other incriminating articles like the I-Card of Phoolchand Ram, the deceased and firearms were recovered. Three of the other arrested co-accused persons namely, Alok Rai, Arun Mishra and Rahul Tiwari, in their confessional statements before the Police, also named the revisionist, a juvenile.

4. During the proceedings before the Juvenile Justice Board, the revisionist was found to be of the age of 17 years, 8 months and 14 days on the date of the incident and was declared juvenile vide order dated 17.09.2021. A bail application through guardian was moved before the Juvenile Justice Board, Varanasi, but the same was rejected. Thereafter, a criminal appeal no. 123/2021 was preferred by the real father and guardian of the juvenile and the same was also dismissed.

5. Aggrieved by the above orders, this criminal revision has been preferred to set aside the same and to admit the juvenile to bail.

6. First and foremost contention is that gravity of the offence is not relevant consideration for refusing bail to the juvenile as has been held by a coordinate Bench of that Court in **Criminal Revision No. 2732 of 2010 (Amit Kumar vs. State of U.P.) decided on 14.09.2010, Criminal**

Revision No. 1266 of 2020 (Kanchan Sonkar vs. State of U.P.) decided on 01.12.2020, Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.) decided on 16.03.2016 and held by the Apex Court in **Prakash vs. State of Rajasthan, 2006 Cri.L.J. 1373.**

7. In **Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.)** decided on 16.03.2016, the Court referred to the earlier judgement in **Vijendra Kumar Mali vs. State of U.P., 2003 (1) J.I.C. 103**, wherein it was observed that in a number of judgements, it has been categorically held that bail to the juvenile can only be refused if one of the grounds as provided in proviso to Section 12(1) of the Juvenile Justice Act, 2015 exist. So far as the ground of gravity is concerned, it is not covered under the relevant provisions. If the bail application of the juvenile was to be considered under the provisions of Cr.P.C., there would have been absolutely no necessity for the enactment of the aforesaid Act. The Section 12 of the Act contains a non-obstante clause, which indicates that the general provisions of Cr.P.C. shall not apply. Therefore, the gravity or seriousness of the offence should not be taken as an obstacle or hindrance to refuse the bail to delinquent juvenile.

8. It is contended that there existed no material to justify rejection of bail on the grounds envisaged in Section 12 of the Act. In view of the above provisions, the 'child in conflict with law', who has been in custody for quite some time deserves to be released on bail otherwise, the purpose of provisions of Section 12 of the Juvenile Justice Act shall stand defeated. It is also contended that care of the juvenile in a child care institution cannot be preferred over his care in his biological family.

9. Learned AGA and learned counsel for the respondent no. 2 have opposed the prayer for bail.

10. In **Om Prakash vs. State of Rajasthan and another; (2012) 5 SCC 201**, the Hon'ble Apex Court observed that the Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of juvenile as it was felt that child become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. It was further observed that in cases when an accused is involved in grave and serious offence which he committed in a well planned manner reflecting his maturity of mind the court ought to be more careful. Thus, the Hon'ble Apex Court has clearly brought in focus the nature of crime, conduct of an accused as reflected in the method employed in the commission of crime as a relevant consideration while considering the matters of juvenile.

11. It may be noted that the Hon'ble Apex Court gave this view in the background of the facts that age of the juvenile as determined by the courts below was not free from doubts. In the circumstances, the Court observed that where accused commits grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording his age, is not acceptable. It is also observed that the shelter of the principle of benevolent legislation of the Juvenile Justice Act is meant for minors, who are innocent law breakers. Nevertheless, in my view, the nature of

crime the juvenile was found involved in, is again at the center stage.

12. In **Mangesh Rajbhar vs. State of U.P. and Another; 2018 (2) ACR 1941**, a coordinate Bench of this Court noted down very important observations which I choose to refer avidly:

"13. No doubt, the Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law, but the law also demands that justice should be done not only to the accused, but also to the accuser."

25. It is not that this aspect of the gravity of the offence has been considered irrelevant to the issue of grant or refusal of bail to a minor in the past and before the present Act of 2015 came into force. In a decision of this Court under the Juvenile Justice Act, 2000 where the interest of the society were placed seemingly not on a level of playing field with the juvenile, this Court in construing the provisions of Section 12 in that Act that were pari materia to Section 12 of the Act in the matter of grant of bail to a minor held in the case of Monu @ Moni @ Rahul @ Rohit v. State of U.P., 2011 (74) ACC 353 in paragraph Nos. 14 and 15 of the report as under:

"14. Aforesaid section no where ordains that bail to a juvenile is a must in all cases as it can be denied for the reasons".....if there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."

15. In the light of above statutory provision bail prayer of the juvenile revisionist has to be considered on the surrounding facts and circumstances. Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformatory approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile offender and therefore if, it is found that the ends of justice will be defeated or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him. This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile."

13. I am in respectful agreement with the above observations. Ordinarily, the merits of the matter may not be important where the Courts are inclined to give benefit of bail as envisaged in Section 12 of the Juvenile Justice Act, I am of the firm view that nature of crime including other merits of the matter may assume ample significance when the Court has to form an opinion about the ends of justice. It may be noted that the phrase 'ends of justice', cannot stand in a vacuum. The manner of commission of the crime, the nature thereof cannot be ignored while striking a balance between the demands of justice of either of the sides. Hence, it cannot be said that the

nature of the crime, the manner or methodology applied, the extent of involvement and evidence available are of no relevance when judging the entitlement of a juveniles to bail in cases where heinous crimes are committed. The ends of justice is undoubtedly a meaningful phrase with multidimensional implications. The Courts are under obligation to address the concerns of both the sides and strike a delicate balance between the competing and often conflicting the demands of justice. When viewing the matters of bail from this particular angle of deciphering the ends of justice not only the nature of crime, but the manner of commission thereof, methodology applied, the mental state, the extent of involvement, the evidence available shall be the factors to reckon with. The phrase 'ends of justice' may bring in within its interpretation such factors which may otherwise seem not so material or may be seemingly extraneous, irrelevant or unimportant at first glance for the purpose of applicability of last part of the proviso to Section 12(1) of the Juvenile Justice Act.

14. Following facts cannot go in oblivion that a Branch Manager of Punjab National Bank, Varanasi was fatally assaulted and murdered when he was carrying about Rs. 47 lakhs from one Branch to another as part of his official duties, the investigating officer recorded the statement of cashier of the Bank, the driver of the vehicle and some other witnesses and it was found that he was shot at and killed and one of the bag containing cash amount, was looted. During investigation, the present revisionist was arrested and cash of Rs. 12,50,500/- bearing seal of Punjab National Bank, Mariahu, I-card belonging to the deceased and a firearm was also recovered.

15. In nutshell, it can be inferred that the juvenile was found to have complicity in this frightful crime where the life of a Branch Manager was taken for looting of public money. The juvenile was found above 16 years i.e., 17 years 8 months and 14 days on the date of the occurrence. It was a borderline case where the accused was reaching the age of adulthood. The manner, in which, the crime was committed and the nature thereof impels me to draw a conclusion that in case the juvenile is released on bail, he shall fall of in the same hands and environs which most probably contributed towards his criminal bent of mind.

16. It clearly appears that the Juvenile Justice Board as well as the appellate Court, while dismissing the bail applications, definitely had in mind the fact that in case the juvenile is released to his family, any chance of him turning into a better and healthy person shall be stalled and that he shall certainly fall of in the same kind of things from where, perhaps he is needed to be rescued for his own welfare. It is worth notice that though the 'Principle of Best Interest', described in Section 3 of the Juvenile Justice Act, 2015 has been specifically brought in the provisions of the Act but broadly it is covered in the phrase 'ends of justice' too.

17. In my view, the aim and object of the Juvenile Justice Act cannot be achieved if crimes committed by the juveniles are not viewed from the angle of their own welfare and concerns of the society at large are not addressed. The social investigation report, though, has been prepared on a printed format rather mechanically may not be very useful. Nevertheless, there are some indicators therein which imply that the juvenile needed effective supervision

and indulgence of a professional counselor so that from here onwards he grows into an adult with healthy habits. The social investigation report indicates that he left his studies in in-between and is not interested in any academic pursuit. This is enough to give a clue to the Court that his mind needs to be diverted towards positive direction.

18. The learned appellate Court and the Board have given concurrent view and have found him not at all entitled to bail and have given observation that an effective protection and supervision is needed. Such an observation for declining the bail cannot be faulted in the totality of the circumstances of the matter. I am of the view that it is not a fit case to grant bail to the present revisionist.

19. The revision is, accordingly, **dismissed.**

(2023) 5 ILRA 1307
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 1856 of 2022

Rajesh Gond **...Revisionist**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Revisionist:
 Sri Arvind Singh Sengar

Counsel for the Respondents:
 G.A., Sri Ajeet Kumar Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision , Section 319 - Power to proceed against other persons appearing to be

guilty of offence , Indian Penal Code, 1860 - Section 307, 34 - To exercise powers under U/s 319 Cr.P.C., strong and cogent evidence must show the revisionist's complicity, surpassing prima-facie cases - It is not to be exercised in a casual or a cavalier manner .(Para - 9,10)

Summoning revisionist accused to face trial under U/s 319 Cr.P.C. - revisionist's presence at a different location than incident's location - prosecution witnesses (mother and brother of injured) - identified revisionist in footage - contradicts the witnesses' testimony - trial court failed to appreciate evidence collected during investigation - leading to cavalier order - not fulfill Apex Court's test - trial court relied on statements of two - who verified identity of revisionist accused in the footage.(Para - 10)

HELD:- Trial court failed to appreciate the entire facts, evidence, and material available on record, and failed to record the degree of satisfaction required to summon an accused under U/s 319 Cr.P.C.. Resulted in the impugned order being unsustainable in the eye of law and liable to be set aside. No strong and cogent reasons to summon the revisionists-accused to face trial in exercise of powers U/s 319 Cr.P.C.(Para - 11,12)

Revision allowed. (E-7)

List of Cases cited:

1. Hardeep Singh Vs St. of Punj., AIR 2014 Supreme Court page 1400,
2. Brijendra Singh & ors. Vs St. of Raj., (2017) 7 SCC page 706
3. Smt. Neelam Devi & ors. Vs St. of U.P. & another
4. Hardeep Singh Vs St. of Punj., AIR 2014 Supreme Court page 1400

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

1. Heard learned counsel for the revisionist learned AGA for the State and learned counsel for opposite party no.2.

2. This criminal revision has been filed against the order dated 23.12.2021 passed by Additional Sessions Judge Court no.3 Ballia in S.T. No.297 of 2017 (State vs. Gulab Gond) crime no.745 of 2017, U/s 307, 34 IPC, P.S. Ubhaon, District Ballia. By the impugned order, the learned court below on an application of prosecution in exercise of powers U/s 319 Cr.P.C. has summoned the revisionist accused to face trial.

3. With regard to incident dated 17.06.2017 at about 9:00 pm, an FIR was lodged by first informant Preetam on the same date at 20:30 O'clock alleging therein that the complainant is resident of village Jam Basnai P.S. Rasra, District Ballia. He had come at his nanihal village Babbhnauli in connection with marriage of his maternal uncle Sunil to be held on 18.06.2017. Today on 17.06.2017 at about 9:00 pm, he with his maternal uncle Sonu alias Rohit was going on a motorcycle. When they reached near the Pt. Deen Dayal Upadhyaya Inter-college, and was talking with a vendor then a motorcycle on which three persons were riding came from the side of Shahpur Afgah road. Two persons came down from the motorcycle and reached near them, one of them asked his maternal uncle whether his name is Sonu, he replied that his name is Rohit, on this he said that he tease his sister and opened fire on him. The other person also opened fire on his maternal uncle and both of them riding the motorcycle ran away from the spot. The maternal uncle of the complainant fell down, due to darkness the complainant could not identify the assailants. The injured was taken to Sier

Hospital from where he was referred to District Mau. It is further alleged that the complainant has dispute about the landed property with neighbour Gulab Gond and he suspect his hand in this incident. During investigation the names of Guddu Gond and Rajesh Gond came into light. After investigation, charge sheet was submitted against Gulab Gond and Guddu Gond. The revisionist Rajesh Gond was exonerated. The trial commenced before the sessions court and after examination of four prosecution witnesses, an application U/s 319 Cr.P.C. was moved to summon the revisionist Rajesh Gond for trial. The learned court below by the impugned order has allowed the application and summoned the revisionist accused for trial.

4. Learned counsel for the revisionist contended that the revisionist is not named in the FIR. The complainant in his statement has reiterated the version of the FIR and has not named the revisionist accused. He has also stated that due to darkness he could not identify the assailants. The name of the revisionist came at the first time in the statement of injured after 22 days of the incident and 15 days after discharge from the hospital. It is further contended that the complainant P.W.-1 in his statement has specifically stated that he identify the family members of Gulab Gond. It is further contended that there are major contradictions and discrepancies in the oral evidence produced before the trial court. Further the Investigating Officer during trial has collected the evidence about the fact that revisionist was not present at the place of occurrence. At the time of incident, he was at Bombay, the CCTV footage of the mall from where he was shopping was produced before the Investigating Officer, the photo of this CCTV footage was get identified by

Investigating Officer from the injured and her mother and they have identified the revisionist accused in it. The CDR of the mobile of the revisionist also shows his presence at some other place and not at the place of occurrence at the time of incident. From the aforesaid evidence, the Investigating Officer has submitted final report against the revisionist but during trial on the basis of statement of injured Rohit Kumar alias Sonu, the learned trial court has passed the impugned summoning order, While his testimony is not worth reliable. The incident is of the night and it has come in the evidence that there was darkness at the time of incident due to which the complainant was not able to identify the assailants. The FIR was lodged only on the basis of suspicion. It is further contended that regarding motive of the incident there are different versions put by the prosecution. So the evidence produced by the prosecution is not cogent and sufficient. Lastly it is contended that the Apex Court in a catena of decisions has held that the power U/s 319 Cr.P.C. is an extra-ordinary power which should be exercised sparingly and not in a routine manner. There must be sufficient and cogent reasons. Learned counsel placed reliance on the case of **Hardeep Singh Vs. State of Punjab AIR 2014 Supreme Court page 1400, Brijendra Singh and others Vs. State of Rajasthan (2017) 7 SCC page 706 and Smt. Neelam Devi and two others vs. State of U.P. and another** decided on 28.01.2023 by this Court.

5. Learned counsel appearing for opposite party no.2 contended that FIR has been lodged by Preetam, the maternal nephew of the injured. He is resident of another village so he could not identify the assailants by their names. But the injured in his statement U/s 161 Cr.P.C. has clearly

stated about the complicity of the revisionist accused, he has also assigned the role of firing to the revisionist accused. In his statement before the trial court he has reiterated his statement recorded U/s 161 Cr.P.C. and stated about the active participation of the revisionist in the incident. It is further contended that CCTV footage and CDR does not contain the certificate required under section 65 of IT Act. It is a matter of trial, it cannot be appreciated at this stage. Sonu alias Rohit has suffered gun shot injuries in the incident, he was hospitalized, after discharge his statement was recorded by the Investigating Officer in which he has clearly implicated the revisionist accused. So there is sufficient and cogent evidence on record on the basis of which the learned trial court has exercised his powers U/s 319 Cr.P.C. and has summoned the revisionist accused. There is no illegality in the impugned summoning order.

6. The Apex Court in the case of **Hardeep Singh Vs. State of Punjab AIR 2014 Supreme Court page 1400** has prescribed the standard of evidence required for exercising powers under section 319 Cr.P.C. The relevant paras 98 and 99 are as follows:

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

be exercised and not in a casual and cavalier manner."

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

7. The FIR of this case has been lodged against unknown persons U/s 307, 120B IPC. Gulab Gond is named in the FIR on the basis of suspicion with the allegations that he may be involved in the incident as there is enmity with him. The complainant Preetam in his statement U/s 161 Cr.P.C. has narrated the same facts as alleged in the FIR, he has not named the assailants who have opened fire. In the FIR no eye witness is named. The Investigation Officer has recorded the statement of injured Rohit, after 21 days of the incident and in this statement, the name of the

assailants including revisionist has come into light. Regarding the alleged incident, the witness Mansha Ram Gupta in his statement U/s 161 Cr.P.C. has stated that at about 9:00 pm Rohit with Preetam came at his house and asked him to carry his thela but he refused and went inside of his house. Meanwhile he heard the sound of firing. When he came out, he saw the motorcycle lying on the spot. He could not identify anyone. Rohit alias Sonu has suffered gun shot injury and he was lying there. His brother Ashish Kumar on getting information came there and took him to the hospital. Ashish in his statement recorded U/s 161 Cr.P.C. claims himself to be an eye witness. During the trial, the complainant Preetam has reiterated the version as stated in his statement U/s 161 Cr.P.C. P.W. 2 Rohit alias Sonu the injured has implicated the revisionist Rajesh Gond and has stated that with intention to kill him, he opened fire. P.W.-3 Usha Devi is not an eye witness, she is mother of the injured. Ashish Kumar (P.W.-4) claims himself to be an eye witness and he has also implicated the revisionist. It also appears that during investigation the revisionist has moved an application to Superintendent of Police Ballia alleging therein that since last 10-15 years he is living at Bombay and engaged in construction work. He has come to know that in the investigation of this case, his name has also come in the light. While the real fact is that on 17.06.2017 the date of the incident, he was at Bombay and he was engaged in shopping at Korum Mall Metro Shoes, Thane. He has also used his credit card for shopping. He has collected the CCTV footage. He has also withdrawn the money from the ATM of SBI adjacent to Kesar Mill at Thane. The Investigating Officer may obtain the CCTV footage of ATM booth. His mobile bearing no.8652101111 and his location can be

traced from this. The CCTV footage is attached with this application. The Investigating Officer made it part of the case diary. The CCTV footage was displayed on CD player of the laptop and Usha Devi the mother and Ashish the brother of injured- Rohit has identified Rajesh Kumar Gond in this CCTV footage. The Investigating Officer has mentioned these facts in the case diary. He has further mentioned that a letter was written to get the call details of mobile number of Rajesh Kumar Gond but the surveillance cell informed that as the incident is more two years old, it cannot be retrieved. Neither the CCTV footage of ATM Thane of SBI can be obtained. The Investigating Officer has also recorded the statement of some other witnesses and they have denied the presence of the revisionist at the place of occurrence at the time of incident.

8. The revisionist is neither named in the FIR nor the first informant who is also an eye witness has named anyone in his statement recorded U/s 161 Cr.P.C. It has also come in the evidence that at the time of incident it was darkness. The revisionist has been implicated by Rohit Kumar the injured in his statement recorded U/s 161 Cr.P.C., after 21 days of the incident. The revisionist has provided the evidence about the alibi to the Investigating Officer during the investigation in the form of CCTV footage of Korum Mall, Thane. The Investigating Officer has displayed this CCTV footage before the Usha Devi the mother and Ashish the brother of the injured Rohit and they have identified the revisionist Rajesh Kumar Gond in this CCTV footage.

9. The case of Brijendra Singh vs. State of Rajasthan (2017) 7 SCC 706 (*Supra*), the Apex Court while reiterating

the principles laid down in Hardeep Singh case has made the following observations:

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

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

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

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

10. The facts of the case in hand are almost identical to Brijendra Singh case (Supra). The CCTV footage of Koram Mall, Thane establishes the presence of the revisionist at a different place faraway from the place of occurrence at the relevant point of time. The two prosecution witnesses the mother and brother of injured have duly identified the revisionist in the CCTV footage. So this piece of evidence which is part of investigation fully contradict the testimony of the witnesses regarding complicity of the revisionist in the incident. The learned trial court has failed to appreciate the matters collected during the course of investigation regarding the presence of the accused at a place faraway from the place of occurrence. So the impugned order has been passed in a cavalier manner and it does not fulfill the test as laid down by the Apex Court. The learned trial court has relied on the statement of Usha Devi (P.W.-3) and Ashish Kumar (P.W.-4) while these witnesses have verified the identity of the revisionist accused in the CCTV footage of Koram Mall, Thane. For exercising the powers U/s 319 Cr.P.C. there

must be strong and cogent evidence showing the complicity of the accused which is more than that of prima-facie case.

11. Considering the entire facts, evidence and material on record, it appears that there is no strong and cogent reasons to summon the revisionists-accused to face trial in exercise of powers U/s 319 Cr.P.C. While deciding the application U/s 319 Cr.P.C. the learned trial court has failed to appreciate the entire facts, evidence and other material available on record. The court below has also failed to record the degree of satisfaction which is required to summon an accused U/s 319 Cr.P.C. The degree of satisfaction is not one of prima-facie case. Consequently, trial court has failed to exercise its power in accordance with parameters laid down by the Apex court in a catena of decisions. The impugned order is not sustainable in the eye of law and is liable to be set aside.

12. In view of the above discussion, the impugned order suffers from material illegality and is not sustainable in the eye of law.

13. The revision is **allowed** and the impugned order dated 23.12.2021 is hereby set aside.

(2023) 5 ILRA 1313
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.04.2023

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 917 of 2022

Chhotey Lal

...Appellant

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Appellant:

Sri Vipin Kumar Mishra

Counsel for the Opposite Parties:
G.A.

Criminal Law - U.P. Gangster & Anti-social Activities (Prevention Act), 1986-Section 18-Appellant was issued show-cause notice u/s 14 (1) of the Act- Appellant prayed for release of vehicle with relevant paper and source for purchasing the alleged tractor-tractor not released and matter was referred Special Judge Gangster Act-Application rejected-ownership was not in dispute-only dispute is source of purchase-explained but not considered-court should have considered the question of entitlement-prima facie-tractor not purchased from the sources acquired as a member of gangster-source of money fully established.

Appeal allowed. (E-9)

List of Cases cited:

Badan Singh @ Baddo Vs St. of U.P. & ors. 2002 CrL L.J. 1392

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

1. Heard Mr. Vipin Kumar Mishra, learned counsel for the applicant, Mr. Vinay Kumar Shahi, learned AGA for the State and perused the material available on record.

2. By means of this criminal appeal under Section 18 of the U.P. Gangster & Anti-social Activities (Prevention Act), 1986, (hereinafter referred as Gangster Act) the appellant has challenged order dated 05.04.2021 passed by learned District Magistrate, Lucknow under Section 14 (1) of the U.P. Gangster & Anti-social Activities (Prevention Act), 1986 whereby the District Magistrate issued show cause notice to the appellant. The appellant prayed for release of vehicle in question

along with relevant paper and source for purchasing of alleged tractor but the District Magistrate Lucknow did not release the tractor and by means of order dated 11.09.2021 the District Magistrate, Lucknow referred the matter to the learned Special Judge Gangster Act/Additional Sessions Judge, Lucknow under Section 16 (1) of the U.P. Gangster & Anti-social Activities (Prevention Act), 1986, which was registered as Criminal Misc. Case No. 659 of 2021 under Section 16 (2) of the Gangster Act. Learned Sessions Judge after conducting the enquiry passed the order dated 17.02.2022 under Section 17 of the U.P. Gangster & Anti-social Activities (Prevention Act), 1986 and rejected the application of the appellant. The appellant has further challenged the judgment and order dated 17.02.2022 passed by learned Special Judge Gangster Act/Additional Sessions Judge, Lucknow whereby the application, for release of the tractor in favour of the appellant, has been rejected. Being aggrieved with the aforesaid impugned orders, the appellant has preferred this criminal appeal.

3. Brief facts of the case are that the applicant is owner of Tractor No. U.P.32 LR 0454, Chassis No. MEA11FA1KK2271719, Engine No. S33411404, which was purchased on 21.02.2020 from Santosh Service Station, Sitapur Road, Itaunja, Lucknow to the tune of Rs.5,15,000/-. Prior to obtaining Tractor, the applicant had given Rs.1,00,00/- from his account in cash to Santosh Service Station, Sitapur Road, Itaunja, Lucknow on 21.02.2020 and for the remaining amount, equal instalment to the tune of Rs.20,000/- per month was fixed and the same was repaid to the dealer. All the aforesaid amount was debited from Account No. 38937795036 of State Bank of India. It is

further alleged that on 25.03.2021 the Station House Officer, Police Station Itaunja wrote a letter to S.P. Lucknow to attach the Tractor of appellant bearing No. U.P.32 LR 0454, Chassis No. MEA11FA1KK2271719, Engine No. S33411404 under Section 14 (1) of the U.P. Gangster Act. The S.P. Lucknow on 26.02.2021 forwarded the letter to the District Magistrate Lucknow for further direction to attach the said property of the appellant stating therein that four cases i.e. (i) Case Crime No. 10 of 2013, under Sections 402/211 IPC, (ii) Case Crime No. 133 of 2014, under Sections 457, 380 and 411 IPC, and (iii) Case Crime No. 176 of 2014, under Sections 457, 380, 411 IPC and (iv) Case Crime No. 95 of 2015, under Sections 2/3 of the U.P. Gangster Act are pending against the appellant. Consequently, on the basis of four cases, the District Magistrate, Lucknow took cognizance and issued a show cause notice to the appellant vide order dated 5.4.2021.

4. It is further submitted that earlier on 16.11.2019 the appellant sold the land bearing Gata No. 1727/1 measuring area 0.0400 hectare and land Gata No. 1727/2 measuring 0.9670 situated at Village Shivpuri, B.K.T. Lucknow to Alok Kumar Verma and he had received two cheques of Rs.12,00,000/-. The said amount was credited in the account of appellant on 21.11.2019 and 04.01.2020 by cheque No. 136176 and 136177. The aforesaid Tractor was purchased by the appellant by earning of the aforesaid amount.

5. Pursuant to show cause notice of District Magistrate, Lucknow, the appellant had submitted reply stating therein that the appellant had purchased the said Tractor UP32 LR 0454 from Santosh Service Station, Sitapur Road, Itaunja, Lucknow on

21.02.2020 and the same was registered on 04.09.2020. The tractor was purchased to the tune of Rs.5,15,000/- He had given Rs.1,00,000/- on 21.02.2020 in cash and for the remaining amount, equal installment to the tune of Rs.20,000/- per month was fixed and the same was repaid to the dealer. All the aforesaid amount was debited from Account No. 38937795036 of State Bank of India. Despite of it, learned District Magistrate, Lucknow passed the order of attachment of aforesaid Tractor vide order dated 11.09.2021 and seized the same in police station concerned. After seizing the vehicle in question, the appellant approached before the learned Special Judge, Gangster Act/Additional Sessions Judge, Lucknow by means of Criminal Misc. Case NO. 659 of 2021 under Section 14 (1) of the U.P. Gangster & Anti-social Activities (Prevention) Act, 1986 the learned trial court rejected the case of the appellant and affirmed the order of learned District Magistrate.

6. The contention of learned counsel for the appellant is that the appellant has been falsely implicated in the present case. The applicant regularly deposited the installment of the vehicle in question. Further contention is that the source from whom, the vehicle in question was purchased by the applicant, is explained by the appellant before the District Magistrate as well as before Special Judge, but without recording any finding, the impugned orders has been passed, which is illegal, improper and against the material available on record. Further contention is that the vehicle in question was purchased by the applicant with valid source, therefore, the provision of Section 14 (1) will not be applicable in the present case. Further contention is that from perusal of order passed by District Magistrate, Lucknow as

well as the trial court, it is clear that the impugned orders have been passed without application of judicial minds as well as well as material available on record. Further contention is that during course of investigation, the investigating without collecting any cogent piece of evidence, directly link the applicant to the alleged crime, therefore, the impugned order is liable to be quashed. Further contention is that unless the seized vehicle is released in favour of the applicant, he will be seriously prejudiced and there is no useful purpose to keep the vehicle during pendency of trial, hence, the applicant is ready to give the sureties for releasing the vehicle.

7. Opposing the submissions advanced by learned counsel for the applicant, on the other hand, learned AGA vehemently opposed the prayer for release of the vehicle and has submitted that the District Magistrate as well as the trial court have rightly passed the impugned, which is just and proper and does not suffer from any illegality or infirmity.

8. I have considered the rival submissions advanced by learned counsel for the parties and perused the material available on record.

9. To deal with the issue involved in the present writ petition, the discussion of provisions of Act, 1986, Section 14 to 18 is essential and same is reproduced as under:-

14. Attachment of property. -

(1) If the District Magistrate has reason to believe that any property, whether moveable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not

cognizance of such offence has been taken by any Court.

(2) The provisions of the Code shall, mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under subsection (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property. - (1)

Where any property is attached under Section 14, the claimant thereof may within three months from the date of knowledge of such attachment make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by Court.- (1)

Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such Court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3)(a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under subsection (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3) the Court, shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No. 5 of 1908), in respect of the following matters, namely :-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;

(e) issuing commission for examination of witness or documents;

(f) dismissing a reference for default or deciding it ex parte

(g) setting aside an order of dismissal for default or ex parte decision.

(5) In any proceedings under this section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence Act, 1872 (Act No. 1 of 1872), notwithstanding.

17. Order after inquiry. - If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.

18. Appeal. - The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgment on order of a Court passed under the provisions of this Act.

10. In the present case, the ownership of the said vehicle was not in dispute at all. The only dispute is that the source, from which the applicant purchased the vehicle in question explained by the applicant, has not been considered by the District Magistrate as well as Special Judge. Consequently, once the prayer before the court below was made for release of the said vehicle and the applicant has shown the source of income from which he purchased the vehicle in question, the Court should have considered only the question of entitlement of possession.

11. In the case of ***Badan Singh alias Baddo Vs. State of U.P. & others 2002 CrL. L.J. 1392, a learned Single Judge observed as follows:***

"..... There must be nexus between his criminal act and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words, what is necessary to find is whether his acquisition of property was as a result of commission of any offence enumerated in the Act being a member, leader or organizer of a gang. One might have committed several offences, but if the property acquired by him was with the aid of his earning from legal source, no action under S. 14 of the Act can be taken against him."

12. The aforesaid view certainly support the contention of the learned counsel for the applicant that no useful

purpose will be served in keeping the vehicle detained at the police station itself.

13. Prima facie, it comes out that the tractor purchased by the appellant has not been purchased from the sources acquired as a member of gangster and the appellant has fully established his source of money from where the aforesaid tractor has been purchased.

14. In view of the aforesaid discussion, ***the instant criminal appeal is hereby allowed.*** The trial court as well as District Magistrate Lucknow is hereby directed that the vehicle in question i.e., the tractor of appellant bearing No. U.P.32 LR 0454, Chassis No. MEA11FA1KK2271719, Engine No. S33411404 shall be released in favour of the appellant immediately subject to the following conditions:-

1. He shall produce the original registration certificate, insurance paper before the concerned Police Station which shall be verified properly and true attested copies thereof.

2. He shall execute a bond with two solvent sureties to the satisfaction of the Chief Judicial Magistrate concerned.

3. He shall keep the vehicle insured at all times till the conclusion of the trial and produce the Insurance Certificate before the Trial Court as and when required; he must satisfy the Court that he is the registered owner of the vehicle.

4. He shall not change the colour or any part of the engine and chassis number of the vehicle.

5. He shall produce the vehicle either before the Court or before such other authorities as the Court may direct.

6. He will not transfer the vehicle to anybody else nor possession of the same be parted with until disposal of the case.

7. He shall not allow the vehicle to be used in the commission of any offence.

(2023) 5 ILRA 1319
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.05.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 1496 of 1995

Kamal Singh **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:
Sri Mahesh Kumar Kuntal, Sri R. Bhargava

Counsel for the Opposite Party:
G.A.

Criminal Law - Indian Penal Code, 1860
- Section 307-conviction- 3 years of rigorous imprisonment- informant submitted a written report –he was witness in a case relating to murder of Sohan Singh-accused threatened him -two gun shots fired at the informant and on the chest of Rohan Singh- mere use of lethal weapon is sufficient to invoke the provision of sec. 307-not necessary that attack should result in an injury-prosecution proved beyond reasonable doubt the charge u/s 307 IPC-more than 32 years have passed since the offence was committed-no criminal history produced by prosecution-punishment reduced to two years rigorous imprisonment.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Chimanbhai Jagabhai Patel Vs St. of Guj., (2009) 11 SCC 273
2. St. of Maharashtra Vs Kashirao, (2003) 10 SCC 434,
3. Prakash Chandra Yadav Vs St. of Bihar, (2007) 13 SCC 134
4. St. of M.P. Vs Kedar Yadav, 2011 (1) SCC (Cri) 108
5. Ranjeet Kumar Ram Vs St. of Bihar, 2015 SCC OnLine SC 500
6. Ram Bali Vs St. of U.P., AIR 2004 SC 2329
7. Dayal Singh & anr. Vs St. of Uttaranchal, (2012) 8 SCC 263

(Delivered by Hon'ble Surendra Singh-I, J.)

1. This criminal appeal has been instituted against the judgment and order dated 02.09.1995 passed by the VI Additional Sessions Judge, Mathura in Sessions Trial No. 94 of 1992 (State vs. Ratan Singh & others) arising out of Case Crime No.138 of 1990, under Sections 307 & 506 IPC Police station Farah, District Mathura. By the impugned judgment and order the trial court convicted appellant Kamal Singh under Section 307 IPC and sentenced him to three years rigorous imprisonment. He was acquitted of the charge under section 506 IPC.

2. The prosecution story in brief is that informant Shiv Singh s/o Than Singh r/o Mahuan, Police Station Farah submitted a written report dated 21.07.1990 in Police Station Farah, Mathura to the effect that he is a witness in the case relating to murder of Sohan Singh. On account of which

residents of his village accused Ratan Singh s/o Pyare, Kamal Singh and Bharat Singh both sons of Ratan Singh have enmity with him. They have threatened him that if he gives evidence against them, he will be killed. In the intervening night of 20/21.07.1990 at about 12:00 pm, on the terrace of Rohan Singh s/o Jyoti of his village, informant Shiv Singh was having conversation with Rohan Singh. The above-mentioned accused came on the terrace and threatened him that he should desist from giving evidence against them otherwise he will repent later on. Informant Shiv Singh told them that he will give evidence of the facts which he has seen. Hearing this, accused Ratan Singh exhorted his sons Kamal Singh and Bharat Singh to kill the informant by firing. On his exhortation, appellant Kamal Singh and Bharat Singh with the intention of causing death, fired two gun shots on the informant. The pellets from the bullet hit near the eyes of the informant Shiv Singh and on the chest of Rohan Singh. On alarm being raised by the informant and Rohan Singh, villagers Ram Hans s/o Netram, Soran s/o Nathiya, Man Singh s/o Ram Khiladi and Balram s/o Khachera reached at the place of occurrence. Accused ran away from the spot threatening the informant that today his life has been spared but on some-other day they will kill him.

3. Informant, Shiv Singh submitted his written report (Exhibit Ka-1) on 21.07.1990 at 06:15 am at Police Station Farah by which Case Crime No.138 of 1990 was registered under Section 307 and 506 IPC. The chick FIR is Exhibit Ka-4.

4. Injured Rohan Singh and Shiv Singh were medically examined on 21.07.1990 at 8:00 am and 08:30 am respectively by Dr. G.S. Awasthi in

Primary Health Centre, Farah, Mathura. According to the injury report (Exhibit Ka-6), the following injuries were found on the person of Shiv Singh :

“1. Multiple abrasions of firearm on right side of face scattered, oval in shape size, 0.5 cm X 0.5 cm red in colour. Blackening is present, 3.5 cms above, from right angle of mouth.

2. Firearm abrasion on right side of forehead 0.5 cm X 0.5 cm, red in colour, oval in shape. Blackening is present, 1.5 cm above from right eyebrow.”

In the opinion of the doctor, injury nos. 1 and 2 were caused by friction. Injury was simple in nature, duration about half day old. Injuries could be caused by firearm.

5. According to the injury report (Exhibit ka-7), the following injuries were found on the person of Rohan Singh :

“ 1. Gun shot lacerated wound on right side, upper part of chest, oval in shape, size 0.5 cm X 0.5 cm X muscle deep. Blackening is present. Clotted blood around the injury, 3 cm away from medial end of collar bone, red in colour, present.”

In the opinion of the medical officer, the injury has been caused by blunt object and is simple in nature, duration about half day old. Injuries could be caused by fire arm.

6. T he investigation of the case was done by S.I. Kishan Singh, who visited the place of occurrence and prepared site plan (Exhibit Ka-2), recorded statements of witnesses and after investigation submitted charge-sheet under Sections 307 and 506

IPC (Exhibit Ka-3) against accused Ratan Singh, Bharat Singh and Kamal Singh.

7. After committal of the case, on 03.07.1992 the Court framed charge under Sections 307/34 and 506 I.P.C. against accused Ratan Singh, Kamal Singh and Bharat Singh, who denied the charge and claimed trial.

8. During trial, accused Bharat Singh died and criminal case has been abated against him.

9. To prove the charge against the accused persons, the prosecution examined P.W.-1 Shiv Singh, P.W.-2 Rohan Singh, P.W.-3 Ram Hans and P.W.-4 Soran as witnesses of facts, who have deposed regarding the occurrence. The prosecution has also examined P.W.-5, Investigating Officer S.I. Kishan Singh and P.W.-6 Medical Officer, Dr. G.S. Awasthi as formal witnesses.

10. P.W.-1 Shiv Singh has proved his written report (Exhibit Ka-1), Investigating Officer S.I. Kishan Singh (PW-5) proved the Chick FIR (Exhibit Ka-4), site plan (Exhibit Ka-2) and the charge-sheet (Exhibit Ka-3).

11. On 22.06.1994 the Court recorded the statement of the accused under Section 313 Cr.P.C. They have denied the charge stating that the witnesses are giving false evidence against them. They have also stated that the injured have got forged medical report prepared and wrong charge-sheet has been submitted against them. The accused have further stated that due to village politics they were falsely implicated in a murder case which was earlier lodged against unknown accused. They did not produce any evidence in their defence.

12. It has been argued by learned counsel for the accused-appellant that according to the prosecution version the incident took place on 20/21.07.1990 at 12 o'clock at night but no source of light is stated in the written report and the Investigating Officer has not shown source of light in his site plan. Therefore, it is not possible for the witnesses to recognize the appellant-accused in the dark night. It has also been argued on behalf of the appellant-accused that according to the prosecution case, the accused-appellant Kamal Singh and co-accused Bharat Singh (since deceased) used firearm and caused injury to Shiv Singh and Rohan Singh but according to the injury report of Rohan Singh, the doctor has opined that the injury was caused by blunt object and is simple in nature. There is no supplementary medical report or x-ray report, therefore, firearm injury is not proved. It has also been submitted that the police has not recovered from the place of occurrence empty cartridge or any other article related to the incident. No weapon or other article was recovered from the possession or the pointing out of the appellant. The Investigating Officer has also not recovered blood stained soil or plain soil from the place of occurrence. Therefore, merely on the basis of oral evidence charge against the accused is not proved.

13. Per contra, it has been argued by learned A.G.A. for the state that the injury report of both injured PW-1 Shiv Singh and PW-2 Rohan Singh clearly mentions firearm injuries on their person. The opinion of the doctor regarding nature of injuries is not conducive and not binding on the Court. No benefit to the accused appellant can be granted merely due to default on the part of Investigating Officer in not seizing/recovering weapons of

offence, Katta and used or unused cartridges from the custody of accused-appellant or from the place of occurrence.

14. I have heard Shri Mahesh Kumar Kuntal, learned counsel for the appellant, learned A.G.A. For the State and perused the record.

15. The definition of attempt to murder and punishment therefor has been provided under Section 307 I.P.C. In the case of **Chimanbhai Jagabhai Patel vs. State of Gujarat, (2009) 11 SCC 273** considering the judgment in **State of Maharashtra vs. Kashirao, (2003) 10 SCC 434**, the Apex Court has held that the prosecution has to prove following elements to constitute an offence under Section 307 I.P.C.:

“20.....The essential ingredients required to be proved in the case of an offence under Section 307 are:

(i) that the death of a human being was attempted;

(ii) that such death was attempted to be caused by, or in consequence of the act of the accused; and

(iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as : (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having

no excuse for incurring the risk of causing such death or injury.”

16. To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some over act in execution thereof. To bring a case within the ambit of section 307, the prosecution has to make out the facts and circumstances envisaged by section 300. If the ingredients of Section 300 are wholly lacking, there can be no conviction under Section 307. The ingredients of the Section are (1) intention or knowledge relating to commission of murder; and (2) the doing of an act towards it.

17. Attempt mentioned in Section 307 I.P.C. is an intentional preparatory action which fails in its object – which is so fails through circumstances independent of the person who seeks its accomplishments. In **Prakash Chandra Yadav vs. State of Bihar, (2007) 13 SCC 134** the Apex Court held:

“Doing of an act with intention or knowledge to cause death is a necessary ingredient. Receipt of injury by the victim is not a pre-requisite for conviction under the first part of Section 307 I.P.C. The second part is attracted when the victim receives an injury.”

18. The mere use of lethal weapon is sufficient to invoke the provisions of Section 307. It is not necessary to constitute the offence that the attack should result in an injury. An attempt is itself sufficient if there is requisite intention. An intention to murder can be gathered from circumstances other than the existence or nature of the injury.

19. In **State of M.P. vs. Kedar Yadav, 2011 (1) SCC (Cri) 108**, the Apex Court has held that:

“The section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307 I.P.C., cannot be acquitted merely because the injuries inflicted on the victim were in nature of a simple hurt.”

In the light of the law propounded by the Apex Court, the evidence adduced by the prosecution is to be analysed.

20. Informant injured PW-1 Shiv Singh deposed in his evidence dated 27.11.1992 that the occurrence took place about two years four months earlier. It was 12 p.m. night. He was having conversation with Rohan Singh on his terrace. Accused Kamal Singh, Ratan Singh and Bharat Singh came on their terrace. Ratan Singh

threatened him not to give evidence in the murder case of Sohan Singh, otherwise he will have to repent later on. Shiv Singh answered him that he will give correct evidence what he has seen. Hearing this, accused Ratan Singh asked his sons to kill the informant, Shiv Singh. Acting on this, accused Bharat Singh and Kamal Singh with the intention to kill the informant, fired two gun shots upon the informant, which hit near the eyes of the informant and on the chest of Rohan Singh. The injured hid themselves and raised alarm, on which Ram Hans, Soran, Maan Singh and Balram of his village reached there, thereupon accused threatened that today you have managed to save yourself but on the next occasion you will not be spared and went back to their home. PW-1 Shiv Singh proved one of the country made pistol which was used in firing on them. He also deposed regarding lodging of FIR and also that injured were accompanied by the police to PHC where their medical examination was done.

21. PW-1 Shiv Singh deposed in his cross-examination that house of Rohan Singh is towards South of that of accused Ratan Singh. There are three or four rooms towards the east of Ratan Singh's house. Towards South of the house of Ratan Singh a *Kharanja* road is situated. Between the house of Ratan Singh and *kharanja* road a platform (*chabutara*) of 3-4 ft. width is situated. Towards the South of *kharanja* 4-5 ft. width platform (*chabutara*) of Rohan is situated. After Rohan's platform (*chabutara*), his house is situated which is of 8 ft. width. At the time of firing, PW-1 Shiv Singh and Rohan were sitting on the terrace of his house. P.W.-1 denied that towards the South of Kotha his rooms are situated. PW-1 denied that at the time of firing they were sitting in the room. He

stated that he had told the Investigating Officer about the place where they were sitting and that electric light was lit on in the *Kotha* of Rohan. PW-1 stated that he and Rohan were sitting in a bed on the terrace of *Kotha*. After firing, blood was spread on his clothes. The Investigating Officer did not ask or took possession of his blood stained clothes. PW-1 has also deposed in his cross-examination that the house of Ram Hans is adjacent to the place of occurrence. He has also deposed in his evidence that the motive of enmity between him and the accused was the murder of his son Sohan Singh. PW-1 has given the reason for not lodging the FIR soon after the occurrence. He said that due to fear of the accused he could not lodge the FIR instantly. He visited the police station in the morning. PW-1 denied that the distance between the house of Ratan Singh and the place of occurrence is 50-60 ft.

22. Thus, informant injured PW-1 has deposed in his evidence, the date, time, place of occurrence and the presence of injured Rohan Singh, Ram Hans and Soran Singh at the place of occurrence. He also proved the distance between the house of Ratan Singh and the place of occurrence which was about 15-20 ft. PW-1 has also deposed about the participation of accused and the manner of their causing injury to him and Rohan Singh.

23. Injured PW-2 Rohan Singh has deposed in his evidence dated 27.11.1992 that the occurrence took place about two years and four months back at 12:00 o'clock night, while he was having conversation with Shiv Singh on his terrace. Ratan Singh threatened Shiv Singh not to give evidence in Sohan Singh's murder case and in case he gave evidence, he will have to repent later on. Shiv Singh

told that he will give evidence what he has seen, therefore, Ratan Singh exhorted his sons to fire and kill Shiv Singh. On his exhortation, Kamal Singh and Bharat Singh fired upon Shiv Singh. The pellet from their country made pistol hit near the eyes of Shiv Singh and on his chest. PW-2 has further deposed that on their raising alarm Soran Singh, Ram Hans and other witnesses reached there. He deposed that at about 6-6:30 am report was lodged in police station concerned.

24. PW-2 has stated in his cross-examination that the distance between his house and that of accused Ratan Singh is about 15 ft. It was dark night but light was on in his house and that in the house of Shiv Singh. He has also deposed that he informed the Investigating Officer about the two firing shots done by the accused. He has stated that blood from the wound fell on the body as well as on the ground. He stated in his cross-examination that the witnesses reached immediately on the place of occurrence. Rohan Singh has also deposed that due to fear of the accused, they did not immediately visit the police station for lodging the FIR. PW-2 has emphatically denied that distance between his house and that of Ratan Singh is about 50-60 ft.

25. Thus, PW-2 injured Rohan Singh has corroborated the evidence of PW-1 Shiv Singh regarding the time, place, manner of occurrence, the participation of accused in the incident and the firearm used by them, injuries received by him and PW-1 Shiv Singh, lodging of FIR after the incident and his as well as Shiv Singh's medical examination done in the PHC Farah, Mathura.

26. P.W.-3 Ram Hans and PW-4 Soran reside adjoining the place of

occurrence. Their presence at the place of occurrence is proved by the evidence of PW-1 Shiv Singh and PW-2 Rohan Singh. PW-3 Ram Hans has stated in his evidence that hearing the hue and cry raised by the family members of injured Rohan Singh, he reached at the place of occurrence. He has stated in his evidence dated 05.12.1992 that the occurrence took place about two years four months ago at 12 o'clock at night. PW-4 Soran was present there. He saw bullet injuries below the eyes of Shiv Singh and on the chest of Rohan Singh. When he asked them about the injuries Rohan Singh told him that appellant-accused Kamal and co-accused Bharat (since deceased) had fired on him. PW-3 Ram Hans has stated in his evidence that electric light was lit on the terrace and in the room of Rohan. PW-3 Ram Hans admitted in his cross-examination that he had himself not seen the accused firing at the injured Shiv Singh and Rohan Singh. He reached there after hearing the hue and cry of the family members of Rohan. When he reached there, Rohan, his wife, brother and children were present on the terrace. Blood was spread outside on the terrace of the room.

27. PW-4 Soran has also given evidence regarding the date, time and place of occurrence. PW-4 Soran has stated that he awoke hearing the voice coming from the house of Rohan and Shiv Singh. He reached there after Ram Hans had reached there. Shiv Singh and Rohan had received injuries. Blood was oozing from the chest of Rohan and from the forehead of Shiv Singh. Both injured were telling persons present there that appellant-accused Kamal Singh and co-accused Bharat Singh had caused them injuries by firing on them. PW-4 stated that light was burning there. He has stated in his cross-examination that the Investigating Officer did not ask him

about presence of light at the place of occurrence, therefore, he did not tell him about the light lit there. PW-4 Soran stated that when he reached on the place of occurrence, the injured were on the terrace and a khat (Cot) was lying there nearby on the terrace.

28. Thus, PW-3 Ram Hans and PW-4 Soran by their evidence have corroborated the evidence of PW-1 Shiv Singh and PW-2 Rohan Singh regarding the date, time and place of occurrence, participation of accused, the manner of their causing injury to PW-1 Shiv Singh and PW-2 Rohan Singh, the lodging of FIR and medical examination of injured Shiv Singh and Rohan Singh in PHC Farah, Mathura. The evidence of PW-1 Shiv Singh, PW-2 Rohan Singh, PW-3 Ram Hans and PW-4 Soran is cogent, truthful and reliable. Nothing comes out in their cross-examination that may raise doubt regarding the truthfulness and reliability of their evidence.

29. A country made pistol is a lethal weapon. Firearm injury caused by country-made pistol may be fatal in nature. Appellant-accused Kamal Singh and co-accused Bharat Singh on the exhortation of their father Ratan Singh to kill Shiv Singh and Rohan Singh fired on them with country-made pistol causing them injury one on their forehead and chest, respectively. Considering the facts and circumstances of the case, weapon used in causing injury and the part of body on which injury was caused, it can be concluded that appellant-accused Kamal Singh with co-accused Bharat Singh fired on injured Shiv Singh and Rohan Singh with the intention to cause them to death.

30. Regarding the argument submitted on behalf of the appellant-accused

regarding alleged default/irregularity by the Investigating Officer in doing the investigation, it has been established by a catena of judgments of Apex Court that such default cannot be the basis of acquittal and the accused will not get any benefit of it, if case is proved by other oral and documentary evidence.

31. The Apex Court in **Ranjeet Kumar Ram vs. State of Bihar, 2015 SCC OnLine SC 500** has held as under:

“21. It is well settled that in criminal trials even if the investigation is defective, the rest of the evidence must be scrutinized independently of the impact of the defects in the investigation otherwise the criminal trial will plummet to the level of the investigation. Criminal trials should not be made casualties for any lapses committed by the investigating officer. In State of M.P. v. Mansingh, (2003) 10 SCC 414, it was held that even if there was deficiencies in the investigation that cannot be a ground for discrediting the prosecution version. The same view was reiterated in Sheo Shankar Singh v. State of Jharkhand, (2011) 3 SCC 654 and C. Muniappan v. State of Tamil Nadu, (2010) 9 SCC 567.”

32. In **Ram Bali vs. State of U.P., AIR 2004 SC 2329** the Apex Court has held as under :

“12. The investigation was also stated to be defective since the gun was not sent for forensic test. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating

officer if the investigation is designedly defective.”

33. In **Dayal Singh and another vs. State of Uttaranchal, (2012) 8 SCC 263** the Apex Court has propounded as under:

“34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a “fair trial”, the Court should leave no stone unturned to do justice and protect the interest of the society as well.”

34. PW-3 Ram Hans and PW-4 Soran, who reside adjoining to the place of occurrence and whose presence at the time of occurrence is proved by evidence of PW-1 Shiv Singh and PW-2 Rohan Singh have also corroborated the evidence of PW-1 and PW-2 regarding the date, time, place of occurrence, manner, participation of accused, manner of their causing injury to PW-1 and PW-2, lodging of the FIR and medical examination of the injured Shiv Singh and Rohan Singh in PHC, Farah,

Mathura. The evidence of PW-1, PW-2, PW-3 and PW-4 is cogent, truthful and reliable. Nothing comes out in their cross-examination that may raise doubt regarding the truthfulness and reliability of their evidence.

35. The oral evidences of PW-1 Shiv Singh, PW-2 Rohan Singh, PW-3 Ram Hans and PW-4 Soran have been corroborated by documentary evidence, written report, chick FIR, injury report of Shiv Singh and Rohan Singh, site plan and charge sheet filed against the accused Kamal Singh and Bharat Singh (since deceased).

36. Considering the facts and circumstances of the case in the light of the law propounded by the Apex Court regarding the defective investigation, the argument advanced by learned counsel for the appellant cannot be accepted and it is accordingly rejected.

37. As regards the argument advanced by learned counsel for the appellant that in the injury report of the injured Rohan Singh the doctor has opined that injury was caused by hard and blunt object and is in simple in nature, from the perusal of the medical report it is seen that it further mentions that "injuries could be caused by firearm". Therefore, the argument of learned counsel for the appellant does not hold much ground. Apart from this, Medical Officer PW-6 Dr. G.S. Awasthi has stated in his evidence regarding Injury No. 2 found on the person of Shiv Singh and the injury found on the person of Rohan Singh it is possible that it may be caused on 20/21.07.1990 by firearm.

38. Considering the medical report along with oral evidence of Medical

Officer P.W.-6, Dr. G.S. Awasthi the arguments of the learned counsel for the appellant on this point does not hold much ground and is not accepted.

39. From the analysis of the oral and documentary evidence on record it is concluded that the prosecution has proved beyond reasonable doubt that on the date, time and place of occurrence the accused-appellant Kamal Singh with co-accused with the intention to cause death, fired on Shiv Singh and Rohan Singh causing fatal injuries to them. The prosecution has proved beyond reasonable doubt charge under Section 307 I.P.C. against the accused-appellant and the Trial Court has rightly convicted the appellant-accused under that section.

40. Learned counsel for the accused-appellant has also submitted that in case the appeal is not allowed against conviction then considering that incident took place more than 32 years back in the year 1990 and that the appellant-accused has no criminal antecedent to his credit or he has not involved in any other criminal activity, he may be released on probation.

41. Learned A.G.A. For the State has opposed the prayer of the accused-appellant being enlarged on probation and submitted that the appellant has committed an offence under Section 307 I.P.C. which is punishable with life imprisonment, therefore, he is not entitled to the benefit of probation.

42. Considering the facts and circumstances of the case and the fact that the appellant-accused had asked injured P.W.-1 Shiv Singh not to give evidence in a case in which appellant-accused was undergoing trial for the murder of

informant's (P.W.1) son Sohan and when informant Shiv Singh refused to do so, the accused-appellant Kamal Singh with co-accused fired on Shiv Singh and Rohan Singh by a country-made pistol causing injuries to them on their vital parts. There is no ground to release the appellant on probation.

43. Considering the facts and circumstances of the case, especially that more than 32 years have passed since the offence was committed and prosecution has not produced any criminal history of the appellant-accused, the period of sentence awarded to appellant-accused is reduced from three years to two years rigorous imprisonment without modifying the fine imposed on him. The criminal appeal is partly allowed.

44. The appellant-accused will surrender before the Trial Court concerned within 30 days. The Trial Court shall take him into custody and sent him to appropriate jail for serving the sentence. The period which the appellant-accused has already undergone during investigation and trial shall be set off according to the provisions of Section 428 Cr.P.C. against the sentence awarded to him.

45. Let a copy of this judgment along with the trial court record be sent to the court concerned for compliance.

(2023) 5 ILRA 1328

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 03.03.2023

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Criminal Appeal No. 2198 of 2018

Satta @ Satya Prakash **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:

Sri S.P.S. Chauhan, Smt. Meenakshi Chauhan

Counsel for the Opposite Party:

G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860- Sections 377 - Section 5/6 Protection of Children from Sexual Offences Act-2012- Challenge to-Conviction- medical report and the supplementary medical report prepared by Dr. (PW-4), it is proved that the victim sustained injuries - the statements of PW-1 and PW-2 gets corroboration from the medical report-the accused-appellant was also medically examined wherein 'alcoholic smell was found present in his breath' and he also sustained the injuries but the injuries of the accused-appellant have not been proved-The statement of PW-2) is natural, without material contradiction and inspires confidence-Her statement gets corroboration from the statement of PW-1and PW-3 and medical reports- Thus, the learned lower court had rightly convicted and sentenced the accused-appellant.(Para 1 to 43)

B. It is for the accused to prove the contrary that he has not committed or abetted the commission of an offence under sections 3, 5, 7, and section 9 of the POCSO Act and, in case, he fails to do so, presumption would operate against him leading to his conviction under the provision of the Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be said that the presumption under Section 29 of the POCSO Act is absolute. It will come into operation only when prosecution is first able to establish the fact and that would form the foundation of the presumption under Section 29 of the

POCSO Act to operate. Otherwise, entire burden would be on the accused to prove the contrary. Such position of law or interpretation of presumption under section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate and no person can be deprived of liberty, except in accordance with the procedure established by law. (Para 29)

The appeal is dismissed. (E-6)

List of Cases cited:

1. St. of AP Vs Thummala Anjaneyulu (2010) 14 S.C.C. 621
2. Jai Prakash Singh Vs St. of Bih. (2012) 4 SCC 379 para 12
3. Thulia Kali Vs St. of T. N. (1972) 3 SCC 393
4. St. of Punj. Vs Surja Ram (1995) Supp 3 SCC 419
5. Girish Yadav Vs St. of M.P. (1996) 8 SCC 186
6. Takdir Samsuddin Sheikh Vs St. of Guj.(2011) 10 SCC 158.) }
7. Woolmington Vs Dir. of Public Prosecutor (1935) UKHL1
8. Rex Vs Abramovitch (1914) 11 Cr. App. R 45
9. Babu Vs St. of Ker. (2010) 9 SCC 189 para 27,28

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

1. Heard Shri S.P.S. Chauhan learned counsel for the appellant and Shri Rajkamal, learned Government Advocate for the State of U.P. and perused the record.

2. The instant criminal appeal is preferred under Section 374 (2) Cr.P.C. by the accused-appellant against the judgement of conviction and order of

sentence dated 30.03.2018 passed by the learned Additional Sessions Judge, Court No.8, Aligarh in Criminal Case No.67 of 2014 (State v. Satta @ Satya Prakash) (arising out of Case Crime No.76/2014) under Section 377 I.P.C. and Section 5/6 Protection of Children from Sexual Offences Act-2012 (hereinafter referred to as 'the POCSO Act') Police Station- Lodha, District-Aligarh. The accused-appellant Satta @ Satya Prakash was convicted and sentenced to undergo rigorous imprisonment for a term of 10 years and fine of Rs.10,000/-, in default of payment of fine to undergo one year of additional imprisonment for offence punishable under Section 5/6 POCSO Act.

3. The prosecution case, in brief, is that Rakesh Kumar (PW-1) S/o of Ramji Lal resident of village Lahausara, Police Station-Lodha, District Aligarh lodged the First Information Report on 21.03.2014 at 06:30 PM on the basis of the written complaint (Ex. Ka -1) alleging therein that on 21.03.2014, the informant and his wife (Satyavati) (PW-2) had gone to the market at 12 'o' clock in the day to purchase some household articles. They had left their son aged about three years at home. When they returned from the market at about 5 PM, their son was not present in the house. When they made search for their son, they found the victim in the house of their neighbour-Satta @ Satya Prakash, resident of Lahausana, Police Station-Lodha, District-Aligarh. The victim was found naked and the accused-appellant Satta @ Satya Prakash was committing the act of sodomy on him. When they raised alarmed, uncle of the informant-Sunil and his wife had forcefully taken the victim in their custody and they took the accused-appellant to the police station to lodge the First Information Report. Constable Manish

Kumar (PW-5) prepared chik report (Exhibit Ka-6) on the basis of written complaint of the informant on 21.03.2014 at 6:30 PM and had registered the case as Case Crime No.76 of 2014 under Section 377 IPC and Section 5/6 POSCO Act by making necessary entry in the G.D and the accused-appellant was taken in the custody. The majroobi chitthi of the victim was prepared by the Constable Manish Kumar and the victim and the accused-appellant Satta @ Satya Prakash were sent to the Primary Health Centre from where they were referred to the District Malkhan Singh Hospital-Aligarh on the same day. Dr. M.K. Mathur conducted the medical examination of victim on 21.3.2014 at 8:20 PM. At the time of medical examination, the age of the victim was found to be of three years.

4. Following injuries were found on the body of the victim at the time of medical examination:-

"No external injury seen over the body except Anal part.

Lucal examination of Anal part.

-Abraded mucosa of Anal Sphincter.

-Abrasion present Anterior of part of Anal orifice.

-Discharge mucus present in Anal Canal & two slides of discharge preserved for Histopathological examination.

Opinion-*Sign of some hard long thing invasion in Anal canal present & Two slides of Discharge from anal part preserved for histopathological examination.*

Duration: fresh."

5. Dr. M.K. Mathur (PW-4) prepared injury report (Ex. Ka -5) in his handwriting and under his signature at the time of medical examination. In the pathological examination, no spermatozoa was detected in the smear by the Senior Consultant Pathologist, Malkhan Singh District Hospital-Dr. Saeed Mohammad. On the basis of pathological report of the victim, a supplementary report (Ex. Ka-4) was prepared by Dr. M.K. Mathur. He opined that no confirmed opinion can be given about active sexual assault due to spermatozoa not seen in the anal smear.

6. Accused-appellant Satta @ Satya Prakash was also sent for medical examination and was medically examined by Doctor Charan Singh on 21.03.2014 at Malkhan Singh District Hospital.

7. Following injuries were found on the body of the accused Satta @ Satyaprakash at the time of medical examination:-

"General condition -conscious oriented

Alcoholic smell in breathing of patient found present

Pulse Rate-100 per minute,

B.P. 126/ 80hg

Post polio residual paralysis present in left lower limb.

Injuries:- 1. Contusion 11 cm X 3 cm on left side mid of scapula on back- red in colour.

2. Contusion 15 cm X 3 cm on left side back 4 cm below left scapula-red in colour.

3. Contusion mid of back 25 cm X 3 cm from left side to right side scapula 5 cm below injury no. 1.

Examination of genital -pubic hair present.

-penis and scrotum are normally developed.

-Prepuce easily retractable.

-no external injury over penis, glans and external meatus

-Two slides prepared from Glans and external meatus for spermatozoal and microscopic examination.

Opinion -above said consumed alcohol, above injuries are simple in nature and caused by blunt and hard object, duration fresh. Two slides prepared, sealed, labelled and handed over for microscopic examination, underwear sealed, labelled and handed over for microscopic examination to the concerned constable."

8. After the pathological report, Doctor Charan Singh prepared supplementary report. He stated that no spermatozoa was found. In the supplementary report, Dr. Charan Singh reported that microscopic examination of underwear was awaited, hence, opinion could only be given after report of underwear. But injury report and supplementary injury report of the accused-appellant was not proved by the prosecution in the lower court.

9. The investigation of the case was undertaken by the Sub-Inspector Dori Lal Yadav on 21.3.2014. He copied the written complaint of informant in C.D and G.D. registering the case and also recorded the statements of Constable Manish Kumar, informant Rakesh Kumar, mother of victim-Satyavati. He also tried to record the statement of victim but due to tender age, he could not speak and narrate the incident. He also recorded the statement of the accused-appellant Satta @ Satya Prakash in police lock-up of Police Station Lodha. He copied the injury report of victim and the accused Satta @ Satya Prakash. On 22.3.2014, he visited the place of occurrence i.e. house of accused-appellant-Satta @ Satya Prakash alongwith the informant and prepared the site plan (Ex. Ka-3). He also copied supplementary medical reports of the victim and the accused-appellant. He also recorded the statements of Dr. M.K. Mathur and Dr. Charan Singh and after completing investigation submitted the charge-sheet (Ex. Ka-2). The cognizance of offence under Section 377 IPC and Section 5/6 POCSO Act was taken by the learned Additional Sessions Judge, Court No.8, Aligarh.

10. The court of learned Additional Sessions Judge, Court No.8, Aligarh had framed the charges for offence punishable under Section 377 IPC and Section 5/6 POCSO Act. The accused-appellant pleaded not guilty and claimed to be tried.

11. In order to prove its case, the prosecution had examined the informant Rakesh Kumar, father of the victim as Rakesh Kumar (PW-1), Satyavati, mother of the victim as PW-2 as the witnesses of fact, S.I. Dorilal Yadav as PW-3 to prove steps taken in the investigation, charge-

sheet (Ex. Ka-2) and site plan (Ex. Ka-3), Dr. M.K. Mathur as PW-4 to prove the supplementary injury report (Ex. Ka-4) and injury report of the victim (Ex. Ka-5) and Constable Manish Kumar as PW-5 to prove chik report (Ex. Ka-6) and G.D. registering the case (Ex. Ka-7).

12. Learned lower court recorded the statement of accused-appellant under Section 313 Cr.P.C. wherein he had denied the prosecution case and had stated that witnesses are falsely deposing against him and he was falsely implicated. It is stated by the accused-appellant that the informant-Rakesh Kumar had lodged false case because Bua (aunt) of the informant alleged to have gone with Kalu (bhanja) of the accused-appellant in which the accused was also falsely nominated and police had filed Final Report in it and due to this enmity the appellant has been falsely implicated in this case.

13. Learned court below after appraisal of the evidence found the testimonies of Rakesh Kumar-informant (PW-1) and Satyavati, mother of the victim (PW-2) trustworthy which gets corroboration from the medical report prepared by Dr. M.K. Mathur (PW-4) and materials available on record and held that the prosecution had established the guilt of the accused beyond reasonable doubt for offence punishable under Section 377 IPC and Section 5/6 POCSO Act, convicted and sentenced the accused-appellant vide impugned judgement and order dated 30.03.2018 as mentioned above.

14. Feeling aggrieved, the accused-appellant has preferred this appeal under section 374 (2) Cr.P.C.

15. Learned counsel for the appellant pointed out at the very outset that the

medical evidence in this case does not corroborate the prosecution case and accused was solely convicted on the concocted story and the evidences tendered by Rakesh Kumar (PW-1) and Satyavati (PW-2) do not get corroboration from the prosecution case. It is also contended by learned counsel for the appellant that there were inconsistencies in the testimonies of the witness PW-1 and PW-2. It is further contended that no spermatozoa was found in the anal smear taken for pathological examination. It is further submitted that on this account, supplementary report (Ex. Ka-4) was prepared by Dr M.K. Mathur where he opined that no confirmed opinion can be given about active sexual assault due to spermatozoa not seen in the anal smear. It is further contended that the injury sustained by the victim were not established by the evidence on record that the said injuries were caused due to sodomy committed by the accused-appellant. Learned counsel for the appellant also submitted that if the accused had committed the act of sodomy, victim would have sustained injuries in other parts of the body also but there was no visible injury found except the injury in the anal canal which belies the prosecution case. It is further submitted that PW-1 in his testimony had admitted that mother of the accused-appellant Durga Devi was present in the house when the act of sodomy was alleged to have been committed. It is further submitted that on 5.2.2016, PW-1 and PW-2 had submitted their affidavits to the trial judge wherein they have denied the prosecution case. It is further submitted that there is material contradiction in the statements of PW-1 and PW-2 as Rakesh Kumar (PW-1) had admitted in his examination-in-chief that he alongwith his wife found his son victim in the house of the accused-appellant and at that time

accused was committing unnatural offence with the victim after disrobing him while Satyavati (PW-2) in her cross-examination stated that she had first gone in search of her son and when she found her son in the house of accused-appellant, thereafter, she called her husband. It is submitted by learned counsel for the appellant that the above contradictions in the statement goes to the root of the case and establishes that above named two witnesses have not seen the occurrence and their testimonies are unreliable and learned lower court has wrongly believed on their testimonies and convicted and sentenced the accused-appellant on the basis of conjectures and surmises. The judgement of learned lower court is liable to be set aside. It is further submitted that Rakesh Kumar (PW-1) stated in examination-in-chief that when he saw the accused-appellant, he was actually assaulting his son but contrary to this, in his cross-examination, he admitted that when he saw the accused-appellant he was wearing jeans pant and t-shirt. He had further admitted that appellant is handicapped from his leg and he can only move with support of his knee and hand. In above circumstances, the prosecution has utterly failed to prove its case beyond reasonable doubt. Sub-Inspector Dori Lal Yadav (PW-3) had admitted that at the time of alleged incident there was a party bandi in the village. It is further submitted that except father and mother of the victim, no independent witness was produced by prosecution to prove the case against the accused-appellant. It is further submitted that allegations in the First Information Report are false and baseless and there is no evidence on record which could substantiate the charge against the appellant. It is further submitted that trial court has misread the evidence and without considering the facts and evidence on

record illegally passed the impugned judgement and order which is liable to be set aside and the appeal is liable to the allowed.

16. *Per contra*, learned Government Advocate appearing on behalf of the State has, vehemently, opposed the contentions raised by learned counsel for the appellant and contended that the occurrence had taken place on 21.3.2014 at about 05:00 PM and the First Information Report was lodged at Police Station Lodha, District Aligarh on the same day i.e. 21.3.2014 at 06:30 PM. It is further submitted that the First Information Report was lodged promptly which ruled out any sort of concoction and deliberation for false implication of the accused. It is further submitted that the victim was taken to the Primary Health Centre along with majroobi chitthi on 21.3.2014 and, thereafter, he was referred to Malkhan Singh District Hospital-Aligarh. The victim was medically examined promptly at 08:20 PM on 21.3.2014 at Malkhan Singh District Hospital by Dr. M.K. Mathur (PW-4) who found injuries on 'anal sphincter and another was on anterior part of anal orifice' and prepared the injury report (Ex. Ka-5). The doctor had opined that 'sign of some hard long thing invasion in anal canal was found present'. It is contended by learned Government Advocate that the said injuries were proved beyond reasonable doubt. It is further contended that the contradictions in the statements of Rakesh Kumar (PW-1) and Satyavati (PW-2) are of minor nature and do not go to the root of the case. It is further submitted that it is not necessary that in every case of penetrative sexual assault, the spermatozoa shall always be found in the anal smear of the victim. It is further contended by learned Government Advocate that Rakesh Kumar (PW-1) and

Satyavati (PW-2) had given detailed description about the time of their proceeding to market and time of their return from market. They had also given detailed description that they had visited market to purchase household articles. They have also told the distance of Aligarh market from their village and by which vehicle they had gone to the market. It is further submitted that from the perusal of the record, it was proved beyond doubt that accused has committed sodomy or in other words have committed penetrative sexual assault on victim and learned lower court has rightly held him guilty and has awarded appropriate sentence which requires no interference in this appeal.

17. In this case, the occurrence as alleged to have taken place at about 5 PM on 21.3.2014 and the FIR was lodged at 06:30 PM on the same day. The FIR was lodged by Rakesh Kumar (PW-1) on the basis of written complaint (Ex. Ka-1). Rakesh Kumar (PW-1) deposed that he got ascribed the written report by dictating, thereafter, he signed on it. No question was asked regarding concoction of FIR. It was not challenged by the learned counsel for the appellant that written complaint was ascribed on the dictation of Rakesh Kumar (PW-1). No question was asked regarding enmity of the complainant with the accused. No question was asked about time of lodging of FIR. In the cross-examination, no question was asked regarding concoction or deliberation in the FIR.

18. Hon'ble Apex Court in Baby Alias Sebastain & Anr. v. Circle Inspector of Police, Adimaly (2016) SCC OnLine SC 742 held that prompt lodging of the FIR precludes the possibility of deliberation to falsely implicate any person. In this case,

the prompt lodging of FIR has not been challenged. It was also not stated that FIR was an outcome of concoction and due deliberation.

19. In above circumstance, prompt lodging of FIR is of great significance which rule out any sort of possibility of deliberation, concoction and false implication of the accused. From the perusal of FIR, it is clear that the accused was apprehended on the spot while committing the act of sodomy on the victim. From the depositions of Rakesh Kumar (PW-1) and Satyavati (PW-2), it is proved that Sunil (chachia sasur) also accompanied them and apprehended the accused, beaten him, took him to the police station and lodged FIR which also gets corroboration from the medical report of the accused-appellant. From the perusal of his injury report, it is apparent that the accused-appellant sustained three contusions but it is unfortunate that the said medical report is not proved by the prosecution.

20. Section 53 of Cr.P.C. provides for examination of accused by medical practitioner at the request of police officer which is as follows:-

"53. Examination of accused by medical practitioner at the request of police officer. --(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of the police officer not below the rank of Sub-Inspector, and

for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation-In this Section and in Sections 53-A and 54,-

(a)" examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and fingernail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possesses any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

21. From the perusal of the record it is proved that Investigating Officer got the accused medically examined but it is a sorry state of affair that in the court, the medical examination report of accused-appellant was not proved.

22. Hon'ble Apex Court in **State of Andhra Pradesh v. Thummala Anjaneyulu (2010) 14 S.C.C. 621** held that

where First Information Report was lodged promptly with independent eyewitness included in the First Information Report and the spontaneity of the FIR also supports eyewitness account, the prosecution case is liable to be relied on. Hon'ble Apex Court in **Jai Prakash Singh v. State of Bihar (2012) 4 S.C.C. 379** in para '12' has observed as follows:-

"12.The FIR in a criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of the eyewitnesses present at the scene of occurrence. If there is a delay in launching the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. {(Vide Thulia Kali v. State of Tamil Nadu, (1972) 3 SCC 393, State of Punjab v. Surja Ram (1995) Supp (3) SCC 419, Girish Yadav v. State of M.P. (1996) 8 SCC 186, and Takdir Samsuddin Sheikh v. State of Gujarat (2011) 10 SCC 158.) }

23. On going through the depositions of Rakesh Kumar (PW-1) and Satyavati (PW-2), it appears that nothing came in their cross-examination which suggest that

there was any enmity which prompts them to falsely implicate the accused-appellant. It is stated by the accused-appellant in his statement under Section 313 Cr.P.C. that Bua of Rakesh had gone with Kalu (Bhanja of the accused-appellant). The witness Rakesh Kumar (PW-1) had admitted that Reshamiya was sister of accused and Omkar @ Kalu was her son. He had denied the contention that Omkar had enticed away the daughter of Chirmauli Das. He denied the contention that accused-appellant was falsely implicated due to enmity.

24. At this juncture, I find it necessary to discuss the law regarding proof of the criminal case. Section 3 of the Indian Evidence Act-1872 defines 'Proved', 'Disproved' and 'Not Proved' as under:-

"Proved". -A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of particular case, to act upon the supposition that it exists.

"Disproved". -A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not Proved". -A fact is said not to be proved when it is neither proved nor disproved.

25. The required standard of proof in criminal case is beyond reasonable doubt and in civil cases, it is preponderance of

probabilities. This distinction is basically made through judicial pronouncement in **Woolmington v. Director of Public Prosecutor (1935 UKHL1), Rex v. Abramovitch (1914) 11 Cr. App. R 45).**

26. The case relates to the menace of sexual crime against children, therefore, motive plays no role in such crime. Oral testimony of a witness can be appreciated by considering his cross-examination, if he remains uncontroverted in the cross-examination, by weighing his testimony with the testimonies of the other witnesses, whether his testimony gets corroboration from the reliable testimonies of other witness and by analysing and evaluating whether his testimony is contradictory or corroborated by the documentary evidence, adduced in the case, then his testimony is reliable.

27. In light of aforesaid, it is necessary to examine the effect of presumption arising under Section 29 POCSO Act.

Section 29 of the POCSO Act reads as follows:

"Section 29-Presumption as to certain offences -Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of the this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

28. Perusal of the above provision does indicate that it is for the accused to prove the contrary that he has not committed or abetted the commission of an

offence under sections 3, 5, 7, and section 9 of the POCSO Act and, in case, he fails to do so, presumption would operate against him leading to his conviction under the provision of the Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be said that the presumption under Section 29 of the POCSO Act is absolute. It will come into operation only when prosecution is first able to establish the fact and that would form the foundation of the presumption under Section 29 of the POCSO Act to operate. Otherwise, entire burden would be on the accused to prove the contrary. Such position of law or interpretation of presumption under section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate and no person can be deprived of liberty, except in accordance with the procedure established by law.

29. The manner in which such presumption would operate against the accused has been analysed and deliberated upon by the courts, because such a presumption is also provided for in various statutes such as Prevention of Corruption Act- 1988. In the case of **Babu versus State of Kerala, (2010) 9 SCC 189** held in para 27 and para 28 as follows:-

(IV) Burden of Proof and Doctrine of Innocence.

"27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of the criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must

be on guard to see that merely an the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like the Negotiable Instrument Act, 1881; The Prevention of Corruption Act, 1988, and the Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as of those is statutes as referred to hereinabove, that the burden of proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution. "

30. Keeping the aforesaid position of law in mind, evidence of the prosecution witnesses in the present case will have to be examined to find out whether the prosecution has established a presumption under Section 29 of the POCSO Act.

31. In this case, the informant and the father of the victim-Rakesh Kumar (PW-1) had stated in his examination-in-chief that on 21.3.2014 at about 12 'o' clock in the day, he alongwith his wife Smt. Satyavati (PW-2) went to the Aligarh market to purchase some household articles leaving the victim at home alongwith his two other

sons and when they returned back from the market at about 05:30 PM, they did not found the victim at home. On search being made by them, they found the victim in the house of accused-appellant. They apprehended the accused-appellant and saw that the accused-appellant was committing the act of sodomy with the victim by disrobing him. They raised alarm and other villagers also got collected there. The accused-appellant was beaten by the public and was taken to the police station where FIR was lodged against him. The written complaint was ascribed as (Ex. Ka-1). In the cross-examination, he disclosed the names of his sons including the victim. He also disclosed the distance of the market from his village and stated that he lives with his wife and three children. He is mason by profession and he usually leaves home at 08:30 AM in the morning for work and returns back at 06:00 PM. He corroborates that on the day of occurrence he alongwith his wife went to the market and mother of the accused-appellant (Durgadevi) was present in the house of the accused at the time of occurrence. He further stated that when he alongwith his wife returned back, they enquired about the victim and they were told that the victim might be playing outside. They gave him call at the high-pitch but nobody responded. They heard the sound of weeping of his son from the house of accused-appellant. At that time the accused-appellant was wearing jeans pant, t-shirt and the accused-appellant is handicapped and he creeps on knee. He further stated that the victim was wearing t-shirt and underwear. When they reached there, they apprehended the accused-appellant. The accused was committing the act of sodomy with the victim and mother of the accused-appellant did not came out of her room. He had clearly stated that he

did not had any enmity with the accused-appellant and had stated that the accused had fallen on the ground from the side of his buttock and, as a consequence thereof, he had sustained injuries. He further clarified that signatures on the affidavit (Ex.Kha/2) denying the incident were obtained fraudulently.

32. From the above evidence on record, it transpires that there is no contradiction in the deposition of Rakesh Kumar (PW-1) and on reading the whole statement it is clear that signature on the affidavit was obtained by fraud. They being illiterate people could hardly read the contents of affidavit.

33. Insofar as the argument of learned counsel for the appellant regarding his statement that he alongwith his wife went to the house of accused-appellant is concerned, the PW-1 in his cross-examination had clarified that first of all his wife (PW-2) went to the place of occurrence and when she raised alarm, he alongwith Sunil and other persons reached there and apprehended the accused-appellant. The statement of Rakesh Kumar (PW-1) is, thus, reliable.

34. So far as the statements of Satyavati (PW-2) is concerned, she had supported the prosecution version and stated that on 21.3.2014 at 12 'o' clock in the day, she alongwith her husband went to the Aligarh market for purchasing certain household articles. They left their children at home. When they returned from the market at about 05:00 pm, they saw the victim missing. They started search for the victim and found the victim at the house of the accused-appellant who was doing wrong act with the victim. She further deposed that police had got her son medically examined and in the cross-

examination she had stated that the house of the accused-appellant is in front of their house. She had also stated that while she was going to the market she asked one Munni Devi to look after her children. She stated that her mother-in-law was living separately with them and when they proceeded for their house, her mother-in-law also came to the house. She further deposed that she found blood in the underwear of the victim and she handed over it to the police. She also corroborated that signature in the affidavit denying incident was obtained through deceitful means by playing fraud.

35. From the perusal of medical report (Ex.Ka-5) and the supplementary medical report (Ex. Ka-4) prepared by Dr. M.K. Mathur (PW-4), it is proved that the victim sustained injuries as 'abraded mucosa of anal sphincter and abrasion was present in the anterior part of anal orifice and two slides were taken for histopathological examination' where no spermatozoa was found in the anal smear.

36. The above evidence shows that the statements of PW-1 and PW-2 gets corroboration from the medical report.

37. It is pertinent to note here that the accused-appellant was also medically examined wherein 'alcoholic smell was found present in his breath' and he also sustained the injuries which are already mentioned above in the body of judgment. It is a matter of strange and sheer lapse on the part of the official concerned that the injuries of the accused-appellant have not been proved.

38. The statement of Satyavati (PW-2) is natural, without material contradiction and inspires confidence. Her statement gets corroboration from the statement of Rakesh Kumar (PW-1) and medical reports. S.I. Dori Lal Yadav (PW-3) proved the charge-sheet (Ex.Ka-2), site plan (Ex. Ka-3) and also the

steps taken in the investigation whereas Constable Manish Kumar (PW-5) has proved the chik report (Ex. Ka-6) and G.D. (Ex. Ka-7) which are formal in nature.

39. It is also pertinent to note here that the accused-appellant had tried to manipulate and temper with the evidence as the signatures of PW-1 and PW-2 were fraudulently obtained in the affidavit denying the incident.

40. From the evidence available on record, it is proved beyond reasonable doubt that the accused-appellant Satta @ Satya Prakash had committed grave offence punishable under Section 377 IPC and Section 5/6 POCSO Act and the learned lower court had rightly convicted and sentenced the accused-appellant as mentioned above.

41. In above circumstance, I do not find any merit in the appeal.

42. The judgement and order dated 30.03.2018 passed by the court of Additional Sessions Judge, Court No.08, Aligarh is hereby affirmed.

43. The appeal is *dismissed*, accordingly.

44. Let the Lower Court Record be returned to the court concerned forthwith.

(2023) 5 ILRA 1339
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2023

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Criminal Appeal No. 3169 of 2020

Amrita Nand @ Tribhuvan Arjariya @ Baba
...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:

Sri Ram Krishna Chaurasia, Sri Brijesh Sahai (Sr. Adv.),

Counsel for the Opposite Parties:

G.A.

A. Criminal Law - Criminal Procedure Code, 1973-Section 374(2)-Indian Penal Code, 1860-Sections 376 & 511-Protection of children from Sexual Offences (POCSO) Act, 2012-Sections 7, 9(m) & 10-challenged to – conviction- The appellant aged 60 lured a four year old girl-the trial court convicted the accused under section 10 of the POCSO Act-The delay in filing the FIR was satisfactorily explained as the father of the victim was away at the time of incident-the child testimony was held reliable, the absence of competency certificate did not render her testimony inadmissible if it demonstrates rationality and understanding-Thus, the conviction upheld.(Para 1 to 50)

B. A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. (Para 30)

The appeal is dismissed. (E-6)

List of Cases cited:

1. P. Ramesh Vs St. repd. by Insp. of Police (2019) 20 SCC 598

2. Woolmington Vs Dir. of Public Pros. (1935 UKHL1), Rex Vs Abramovitch (1914 11 Cr. App. R 45).

3. Babu Vs St. of Ker. (2010) 9 SCC 189

4. Dattu Ramrao Sakhare Vs St. of Mah. (1997) 5 SCC 341

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

1. Heard Sri Brijesh Sahai, Senior Counsel assisted by Sri Ram Krishna Chaurasia, learned counsel for the accused-appellant, learned A.G.A. for the State and perused the record.

2. The instant appeal has been moved by accused-appellant under Section 374(2) of Cr.P.C. against the impugned judgment of conviction and order of sentence dated 21.10.2020 passed by Additional Sessions Judge-IV/Special Judge (POCSO Act), Banda in Special Case No.68 of 2015 (State Vs. Amrita Nand @ Tribhuvan Arjariya), arising out of Crime No.617 of 2015, under Sections 376, 511 I.P.C. & Sections 8, 10 of POCSO Act, P.S. Kotwali Nagar, Banda, by which the accused-appellant has been convicted under Section 10 of POCSO Act and was sentenced to undergo rigorous imprisonment for 7 years with a fine of Rs.10,000/- under Section 10 of POCSO Act, in default thereof, to further undergo simple imprisonment for two months.

3. The brief facts necessary for disposal of this appeal is that informant Avadhesh Kumar Soni son of Raja Ram Soni resident of Chhoti Bazar, Thatharahi, Police Station Kotwali Nagar, District Banda has lodged a first information report on 23.8.2015 at 20:50 p.m. at Police Station Kotwali Nagar on the basis of written complaint with the allegation that on

22.8.2015 at 05:00 p.m., his daughter victim X aged about 4 years was playing in front of the house. The accused Amrita Nand @ Tribhuvan Arjariya aged about 60 years, who is his neighbourer called Baba by the people of the locality, called his daughter victim X and gave her toffee and took her inside his house and tried to commit bad act with her. On being called by the mother of the victim X in high pitch, she was driven out by the accused from his house and the victim X after coming to her mother narrated the entire incident to her mother. After that Smt. Khusbu wife of the informant visited the accused and asked him that what you have done uncle with her daughter, thereafter, he locked his house and went somewhere else and did not return back to his house. The informant requested that his first information report be lodged and necessary action be taken against the accused.

4. Head Constable Moharrir Ram Prasad Pal has scribed the check of Crime No.617 of 2015 against the accused Amrita Nand @ Tribhuvan Arjariya for offence punishable under Section 376, 511 I.P.C. and Section 4 of POCSO Act. The investigation was given to S.I. Ram Babu Yadav. He went to Lucknow on account of Government work, therefore, the investigation was conducted by S.S.I. Pankaj Kumar Pandey on behalf of S.I. Ram Babu Yadav and the case was registered on 23.8.2015. He copied the check report and GD entry no.64 at 20:50 p.m. in CD on 23.8.2015 and has recorded the statement of check scribe and GD writer Head Constable Moharrir Ram Prasad Pal and also recorded the statement of Ct. Shashank/Computer Operator, who scribed the check at the direction of Head Constable Moharrir Ram Prasad Pal. The statement of victim X was recorded by S.O.

Reeta Singh under the videography. On the same day, he recorded the statement of informant Avadhesh Kumar Soni and has taken the Chaddhi (underwear) of cream colour in police custody and prepared memo of the same in presence of the witnesses Rajan Sen and Kalpana Singh. He also copied the memo of taking Chaddhi in police possession in CD on the same day.

5. The victim X was medically examined by Dr. Usha Singh (PW-5) at District Women Hospital, Banda on 23.8.2015, where she has stated to the doctor that on 22.8.2015 at 05:00 p.m. the accused by giving allurement of toffee took her inside his house and tried to commit bad deed with her. No mark of any injury was found on the body of the victim X and her clothes were sealed and sent to the police station. Dr. Usha Singh (PW-5) has prepared medical report at the time of medical examination. On 25.8.2015, the medical report of the victim X was copied and on return of S.I. Ram Babu Yadav from Lucknow the investigation was resumed on 27.8.2015. He recorded the statement of Smt. Khusbu mother of the victim X and inspected the place of occurrence and prepared site plan Ex.Ka-5 on 27.8.2015 and recorded the statement of witnesses Ajay Kumar Gupta and Atul Soni on 12.9.2015. He visited the house of accused where he found the lock on the door of his house and came to know that after the day of occurrence he is absconding. He received information from the informer that accused is standing at the shop of Bapu Misthan Bhandar station road having white beard wearing red colour clothes. On receiving the information of the informer, he along with S.I. Rakesh Kumar Saroj, Ct. Shiv Kumar Yadav and informant visited the place at Station Road Tiraha where Bapu written illegible in CD

and on seeing the police party, accused tried to run here and there and was apprehended by the police at 07:30 p.m. and on inquiry he told his name as Amrita Nand @ Tribhuvan Arjariya son of Laxmi Narayan Arjariya resident of Mohalla Thathrahi, Chhoti Bazar, Police Station Kotwali Nagar, District Banda and after informing him the ground of arrest, the police party arrested him. The Investigating Officer has recorded the statement of the accused, wherein he has denied the occurrence and stated that he will produce the defence through counsel in the court. Later on victim X was produced before the court by L/Ct. Sandhya Sahu for recording her statement under Section 164 Cr.P.C. The statement of the victim X under Section 164 Cr.P.C. was recorded by Additional Civil Judge (Junior Division)/Judicial Magistrate, Banda on 7.10.2015, who has also attested the photographs of the victim X on the statement under Section 164 Cr.P.C. In statements under Sections 161 & 164 Cr.P.C., the victim X has supported the prosecution case. After arrest of the accused, he was medically examined by EMO, District Hospital, Banda on 1.10.2015 where no visible injury was found on his body. After completing the investigation, S.I. Ram Babu has submitted charge-sheet under Sections 376, 511 I.P.C. and Section 4 of POCSO Act against the accused.

6. The cognizance was taken by learned Additional Sessions Judge, Fast Track Court, Banda on 21.12.2015 and the copy of the police papers were given to the accused. After hearing the learned counsel for the accused, charges under Sections 376, 511 I.P.C. and Section 8 of the POCSO Act were framed against the accused by learned Additional Sessions

Judge, Fast Track Court, Banda on 18.2.2016 to which accused has not pleaded guilty and claimed to be tried. Later on the charge was amended by learned Special Judge/Additional Sessions Judge, Court No.4, Banda on 1.9.2016 and the charge under Section 10 of the POCSO Act was framed against the accused to which he has also not pleaded guilty and claimed to be tried.

7. In order to prove its case, prosecution has examined informant Avadhesh Kumar Soni as PW-1 (father of the victim X), who has also proved the tahriri report Ex.Ka-1, Smt. Khusbu (mother of the victim X) as PW-2, victim X as PW-3, witness Ajay Kumar as PW-4, who has turned hostile in cross examination, as witnesses of the fact. Prosecution has also examined Dr. Usha Singh as PW-5 to prove medical report and Ct. Anup Kumar Sachan to prove the charge-sheet Ex.Ka-4 and site plan Ex.Ka-5 in secondary evidence and has closed its evidence.

8. The statement of the accused under Section 313 Cr.P.C. was recorded to which he has denied the prosecution case and has stated that the victim X was deposing falsely against him under the influence of her mother. He has also stated that the case was wrongly investigated and the wrong charge-sheet was submitted against him. He has further stated that no occurrence has taken place and due to enmity he has been falsely implicated.

9. Learned lower court after hearing the argument of learned counsel for the accused-appellant and learned Additional Public Prosecutor has held that delay in lodging the first information report has been explained by prosecution from the

depositions of Avadhesh Kumar Soni (PW-1) and Smt. Khusbu (PW-2). It has further held that the victim X is a child witness and she was found to be competent witness and her statement has not been shaken in cross examination. Her statement was found to be truthful and inspires confidence and also held that in sexual offences the accused can be convicted on the basis of statement of the victim. It has also held that the prosecution has proved its case beyond reasonable doubt and has presumed that accused has committed the offence and has convicted and sentenced him to undergo rigorous imprisonment for 7 years with a fine of Rs.10,000/-, in default thereof, to further undergo imprisonment for two months by impugned judgment.

10. Learned counsel for the accused-appellant has contended that the witnesses Avadhesh Kumar Soni and Smt. Khusbu are not eye witnesses and the witness Ajay Kumar (PW-4) also not eye witness, who in his cross examination has stated that he has not given any statement to the Investigating Officer and has further stated that he could not remember whether on the day of occurrence he was at his house or not and has admitted that he has not seen the occurrence. He has further stated that he has no knowledge whether Smt. Khusbu told her husband regarding the occurrence. He has further stated that he could not tell how his name has been mentioned in the charge-sheet as eye witness. Learned counsel for the accused-appellant has further contended that no injury was found on the body or on the private part of the victim X as per the statement of Dr. Usha Singh (PW-5). He has further contended that statement of the witness victim X was not recorded in compliance of legal provisions. He has further contended that the lower court has not given any certificate regarding competency of the witness victim

X, who is a child witness, therefore, her statement cannot be relied on and in support of his contention he placed reliance on the law laid down by Hon'ble Supreme Court in "**P. Ramesh Vs. State represented by Inspector of Police (2019) 20 SCC 598**" and has referred paras 13, 14 & 16 of the aforesaid ruling. He has further contended that the victim X has admitted in her cross examination that she was tutored by her parents and counsel to give statement whatever they told her, therefore, she is tutored witness and no reliance can be placed on her testimony. He has further contended that the first information report was lodged after delay of more than 26 hours of the occurrence. He has further contended that the occurrence has taken place on 22.8.2015 at 17:00 p.m. and the first information report was lodged on the next day i.e. on 23.8.2015 at about 20:50 p.m. i.e. after a gap of 26 hours and the delay in lodging the report has not been explained by prosecution. He has further contended that the ground put forward by the prosecution for delay that on the day of occurrence the informant went to Kanpur and returned on the next day is after thought. Alternatively he has further contended that as per statement of victim X recorded under Section 164 Cr.P.C. she has stated that accused called her and told her to put off her clothes and thereafter the accused has also put off his clothes and told her to show her private parts and then he went to take rope, meanwhile she fled away from there. Learned counsel for the accused has further contended that the entire statement shows that he has not touched the private part of the victim X and it cannot be said that he has committed sexual assault on child below 12 years of age and this act will not come within the purview of Section 9(m) of the POCSO Act, maximum this act goes up to the offence of sexual

harassment, which is punishable under Section 12 of the Act with imprisonment of either description which may extend up to three years and fine also.

11. Learned A.G.A. has supported the prosecution case and has contended that from the evidence of informant Avadhesh Kumar Soni (PW-1), it is proved that he was doing the work of goldsmith and went to Kanpur for taking raw material of gold and silver to which he after preparing the ornaments returns the same to the jewellers. He has further contended that the informant Avadhesh Kumar Soni (PW-1) has stated that on 22.8.2015 he went to Kanpur for taking raw material of gold in the evening and returned on the same day at 09:30 p.m. and proceeded to the police station for lodging the first information report along with his wife Smt. Khusbu (PW-2) and daughter victim X. He has further contended that the informant has given a written complaint to the police and thereafter returned from there and his statement has been recorded by the police on 23.8.2015. He has further contended that there is no substance in the arguments of the learned counsel for the accused-appellant that the informant was unemployed while he was doing the job of goldsmith and preparing the ornaments, therefore, his going to Kanpur for taking raw material for preparing ornaments is natural and, therefore, the delay has been explained by prosecution satisfactorily. He has further contended that in this case the informant Avadhesh Kumar Soni (PW-1), Smt. Khusbu (PW-2) and witness Ajay Kumar (PW-4) are not eye witnesses, the only eye witness is victim X, who has given detailed description at the time of recording of her statement by S.O. Reeta Singh and the victim X was produced before the court of Magistrate for recording

her statement under Section 164 Cr.P.C., where she has narrated the entire story and has also given the details of the occurrence in her statement as PW-3. He has further contended that the accused has only touched her private part and got touched his private part from her and thereafter went to take rope, meanwhile, the victim X escaped herself from there, therefore, non finding of any injury at the time of medical examination is of no consequence. He has further contended that the age of the victim X was shown in the first information report as four years. He has further contended that the victim X has stated to Dr. Usha Singh at the time of medical examination that on 22.8.2015 at 05:00 p.m. accused called her by alluring to give her toffee and tried to commit bad deed with her and she has also supported the prosecution case in her statement given under Section 164 Cr.P.C. which is Ex.Ka-2. He has further contended that in above circumstances, it is proved beyond reasonable doubt that the sexual assault was committed by the accused-appellant to a child of about four years, which according to Section 9(m) of POCSO Act comes within the definition of aggravated sexual assault.

12. I have gone through the file. Before appreciating the evidence on record, I find it necessary to reproduce Section 7 of the POCSO Act, which defines sexual assault, Section 7 of POCSO Act reads as follows:-

"7. Sexual Assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

13. Aggravated sexual assault is defined in Section 9 of POCSO Act. The relevant portion of Section 9 of POCSO Act is reproduced below:-

"9. Aggravated Sexual Assault.- (a) Whoever, being a police officer commits sexual assault on a child-

.....(m) whoever commits sexual assault on a child below twelve years of age, meaning thereby if any sexual assault is defined in Section 6 of the POCSO Act, whoever commits sexual assault from the point of reading of the Section 7 of the POCSO Act and Section 9(m) of the POCSO Act, it is abundantly clear that whoever commits sexual assault on a child below twelve years is said to have committed sexual assault for which punishment is provided under Section 10 of the POCSO Act."

14. Section 10 of the POCSO Act reads as follows:-

"10. The punishment for the aggravated sexual assault.- Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine."

15. Here it is also pertinent to mention that special provision has been made for recording of statement of a child. Section 25 of the POCSO Act provides for recording of statement of a child by Magistrate which reads as follows:-

"25. Recording of statement of a child by Magistrate.- (1) If the statement of the child is being recorded under section

164 of the Code of Criminal Procedure, 1973 (2 of 1974), (hereinafter referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:

Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code."

16. Section 26 of POCSO Act also provides additional provision regarding recording of the statement of a child witness, which are as follows:-

"(1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the

manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

(4) Wherever possible, he Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means."

17. Section 36 of the POCSO Act provides that child not to see accused at the time of testifying, which are as follow:-

"(1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device."

From above provision, it is clear that some departure by law has been made regarding the child witness in POCSO Act and even her statement shall be recorded in presence of her parents or any other person in whom the child has trust or confidence. As per section 26 additional safeguard has been given.

18. Section 33(2) & (3) provides special protection to the child which speaks as follows:-

"(2). The Special Public Prosecutor, or as the case may be, the

counsel appearing for the accused shall, while recording the examination-in-chief, cross examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial."

From the above provision, it is clear that some departure has been made in law regarding recording of the evidence of a child witness so he or she can give fair and formal evidence before the court.

19. The procedure for recording of the deposition under 164 Cr.P.C. is provided in the POCSO Act, therefore, that procedure will mutatis mutandis apply at the time of the recording of the evidence of the child witness at the time of trial also.

20. At this juncture, I find it necessary to discuss the law regarding proof of the criminal case. Section 3 of the Indian Evidence Act, 1872 defines "Proved", 'Disproved' and 'Not Proved' as under:-

"Proved". -A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of particular case, to act upon the supposition that it exists."

"Disproved". -A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the

particular case, to act upon the supposition that it does not exist."

"Not Proved".-A fact is said not to be proved when it is neither proved nor disproved."

21. The required standard of proof in criminal case is beyond reasonable doubt and in civil cases, it is preponderance of probabilities. This distinction is basically made through judicial pronouncement in **"Woolmington Vs. Director of Public Prosecutor (1935 UKHL1), Rex Vs. Abramovitch (1914 11 Cr. App. R 45)"**.

22. The case relates to the menace of sexual crime against children, therefore, motive plays no role in such crime. Oral testimony of a witness can be appreciated by considering his cross-examination, if he remains uncontroverted in the cross-examination, by weighing his testimony with the testimonies of the other witnesses, whether his testimony gets corroboration from the reliable testimonies of other witnesses and by analysing and evaluating whether his testimony is contradictory or corroborated by the documentary evidence, adduced in the case, then his testimony is reliable.

23. In light of aforesaid, it is necessary to examine the effect of presumption arising under Section 29 POCSO Act. Section 29 of the POCSO Act reads as follows:-

"Section 29-Presumption as to certain offences -Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of the this Act, the Special Court shall presume, that such person has committed or abetted or

attempted to commit the offence, as the case may be, unless the contrary is proved."

24. Perusal of the above provision does indicate that it is for the accused to prove the contrary that he has not committed or abetted the commission of an offence under sections 3, 5, 7, and section 9 of the POCSO Act and, in case, he fails to do so, presumption would operate against him leading to his conviction under the provision of the Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be said that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when prosecution is first able to establish the fact and that would form the foundation of the presumption under Section 29 of the POCSO Act to operate. Otherwise, entire burden would be on the accused to prove the contrary. Such position of law or interpretation of presumption under section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate and no person can be deprived of liberty, except in accordance with the procedure established by law.

25. The manner in which such presumption would operate against the accused has been analysed and deliberated upon by the courts, because such a presumption is also provided for in various statutes such as Prevention of Corruption Act, 1988. In the case of **"Babu Vs. State of Kerala, (2010) 9 SCC 189"** held in para 27 and para 28 as follows:-

(IV) Burden of Proof and Doctrine of Innocence.

"27. Every accused is presumed to be innocent unless the guilt is proved.

The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of the criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely an the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like the Negotiable Instrument Act, 1881; The Prevention of Corruption Act, 1988, and the Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as of those is statutes as referred to hereinabove, that the burden of proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution."

26. Keeping in the aforesaid position of law in mind, evidence of the prosecution witnesses in the present case will have to be examined to find out whether the prosecution has established a presumption under Section 29 of the POCSO Act.

27. Section 118 of the Evidence Act provides as follows:-

"118. Who may testify.- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

28. The principle and scope is enshrined in Section 118 of the Evidence Act regarding who may testify under this section, all persons are competent to testify unless there any information of the court.

(a) unable to question put to them or (b) to give rational answer to those questions owing- i) tender age, ii) extreme old age, iii) disease of mind or body or, iv) any other such cause even lunatic, if he is capable of understanding the question put to him and giving rational answer is the competent witness.

29. So far the submission of Sri Brijesh Sahai, learned Senior Counsel is concerned that no certificate was appended after ascertaining her competency regarding competence of the victim X as competent witness, therefore, her evidence cannot be read and he has placed reliance on the law laid down by Hon'ble Supreme Court in "P. Ramesh Vs. State represented by Inspector of Police." The fact in that case was that PW-3 & PW-4 were the child witnesses in that case and it was observed that they were unable to understand before whom they were standing and even they did not know the judge or lawyer and the statement was not recorded and it was held

that they were not competent witnesses, which was challenged before the High Court. Learned lower court came to the conclusion that there was sufficient evidence on record to sustain the charge under Section 302 I.P.C. as well as Section 498 I.P.C. and that the prosecution has brought home guilty of the accused beyond reasonable doubt. Aggrieved by the said judgment of conviction, the accused preferred an appeal before the High Court. The High Court has set aside the judgment of the trial court and remanded the case to the trial court with direction to examine the child witnesses PW-3 and PW-4 after objectively ascertaining their capacity to depose. Thereafter, the same was challenged before the Hon'ble Supreme Court and the Hon'ble Supreme Court had rejected it.

30. So far observation of para 13 of the aforesaid judgment is concerned, it is mentioned in para 13 that if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation and the rule was stated in "Dattu Ramrao Sakhare Vs. State of Maharashtra (1997) 5 SCC 341", wherein the Hon'ble Supreme Court, in relation to child witnesses, held as under:- (SCC p. 343, para 5)

"5....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the

circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

31. He has also contended that it is mandatory for the court to record the certificate regarding competency of the witness and has relied on para 14 & 16 of the aforesaid judgment, which are as follows:-

"14. A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in Wheeler v United States 7, wherein it was held thus:

"... While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous..."

(emphasis supplied)

"16. In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. 9 A child becomes incompetent only in case the court considers that the child was unable to understand the 8 (2004) 1 SCC 64. Subsequently, relied upon in Nivrutti Pandurang Kokate v State of Maharashtra (2008) 12 SCC 565 Dalsukhbhai Nayak v State of Gujarat (2004) 1 SCC 64 questions and answer them in a coherent and comprehensible manner. 10 If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

32. From para 16 of the judgment it is clear that judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness and the competency of a child witness can be ascertained by questioning her or him to find out the capability to understand the occurrence witnessed and to speak the truth

before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if he or she had the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her or him and gives rational answers to those questions, it can be taken that she or he is a competent witness to be examined.

33. Para 15 of the aforesaid judgment is as follows:-

"7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion

that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness." (emphasis supplied)

34. From the above ruling, nowhere it is provided that certificate regarding the competency of the child witness is mandatory if it is recorded it is so far so good, but if the court has put the question to understand his intellect to understand the question and if he replied the rational answer and thereafter his examination was recorded without recording the certificate regarding the competency of the witness and he was thereafter cross examined by counsel for the accused and had replied satisfactorily and given rational answer, therefore, in above circumstances not appending the certificate by the trial judge regarding the competency of the witness is of no consequence and it will not make his statement inadmissible.

35. Section 29 of the POCSO Act speaks as follows:-

"29. Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

36. Hon'ble Supreme Court in the case of **"Dattu Ramrao Sakhare Vs. State of Maharashtra 1997 5 SCC 341"** has observed that if the court is satisfied that the child witness below the age of twelve years is competent witness, such a witness can be examined without oath or affirmation and the court has further held that as under:-

".....Even in the absence of oath, the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions, and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

37. In this case, the informant PW-1 is the father of the victim X, who has deposed before the court that incident took place on 22.8.2015 at 05:00 p.m. and he went to Kanpur for taking raw material for preparing the ornaments and his wife informed him on phone regarding the occurrence that victim X was playing in front of the house and his neighbour Amrita Nand @ Trihuvan Arjaria aged about 60 years tempting her for toffee and called her inside his house and closed the door, thereafter, when his wife called her daughter in high pitch, the accused has driven out the victim from his house. The accused has tried to molest the victim X inside his house. The victim X has told the entire story to her mother on which she went to the house of the accused and asked him about his bad act what he did with her daughter. Thereafter, accused locked his door and absconded somewhere and later on the accused was arrested after gap of months. He has also proved the written complaint Ex.Ka-2. PW-2 is the mother of the victim, who has also deposed that the incident has taken place on 22.8.2015 at 05:00 p.m. when her daughter was playing outside the house, the accused offered her

laddoo as prasad and took her inside his house and threatened the victim X not to tell to anyone about the incident. The accused asked the victim to take off her clothes and he also took off his clothes and then asked the victim X to shake his private part and also asked her not to tell to anyone. Her daughter came her and told her the entire incident. PW-2 mother of the victim X thereafter went to the house of the accused and complained about the incident, the accused has denied the incident and thereafter he absconded by locking his house at the time. On the day of occurrence her husband had gone to Kanpur and on his arrival she along with her husband and victim X went to the police station and lodged the first information report.

38. It is proved that the victim X (PW-3) was about four years at the time of occurrence and has narrated the entire incident to her mother, which is admissible.

39. Section 8 of the Evidence Act states as follow:-

"8. Motive, preparation and previous or subsequent conduct.- Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

40. Illustrations (i) & (j) of Section 8 of Evidence Act states as follows:-

(i). A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j). The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157."

41. From the evidence of PW-1 informant Avadhesh Kumar Soni and PW-2 Smt. Khusbu and from the statement of Investigating Officer that during raid several times at the house of accused, he was found absent, proved that he was absconded after the occurrence.

42. The above conducts as mentioned also corroborates the fact that the accused has committed the crime and has got touched his private parts from her by asking her to take off her clothes and show her private parts.

43. The star witness of this case is victim X (PW-3), her statement was recorded by learned Presiding Officer by asking certain questions, she told her name and also told the name of her mother and told that she was studying in class LKG in Guru Ram Public School. On inquiry, she also disclosed that she prayed the God and she has also clarified that she prayed *Ganesh Ji* and *Laxmi Ji*. She knew that one should not tell a lie. She has further stated that she will tell the fact truly. She has further stated that after taking oath one should not tell a lie. Thereafter, without recording a certificate by the then Presiding Officer of the court below the witness was handed over to the Public Prosecutor for putting questions in examination-in-chief.

44. In view of above, it appears that victim X could understand the question put to her and was able to give rational answer and has sufficient intellect and understanding the question put to her and give rational answer, therefore, in such circumstances in absence of certificate, it cannot be said that she was not competent witness. Here it is also clarified that Section 118 of the Evidence Act is couched in negative words. Therefore, if the court declares anybody as not competent witness, he or she will be incompetent witness. Regarding competence of the witness no certificate is needed as per Section 118 of the Evidence Act. PW-3 victim X in examination-in-chief has deposed that accused Amrita Nand @ Tribhuvan Arjariya, who is present in the court is that Baba who called her in his house and on his calling she entered into his house and, thereafter, he laid her on the bed. She has further stated that at that time she was weeping and accused has given her toffee and taken off her chaddhi and also lured for giving laddoo. She has further stated that

accused has touched her private parts and clarified that accused has touched her urinal place (susu) with his finger. She has further stated that accused has also put off her clothes. She has also corroborated the testimony given under Section 164 Cr.P.C. and deposition in cross examination that the police has inquired from her and her mother and father gave her pajama to the police. She has also corroborated in her cross examination that Baba has taken off her clothes and she has not urinated there. Further she has stated that she was told by his father and mother what statement she has given.

45. Keeping in view the facts and circumstances of the case, it is quite apparent that the mother and father and the counsel may, to create confidence in the mind of a child witness, inquire her regarding what evidence she has to give. In such circumstances, it cannot be said that she is tutored witness. She has supported the entire incident and told the entire incident to her mother, which was testified by her mother, which is admissible under Section 8 of the Evidence Act. On the day of occurrence informant was not at his house and has gone to Kanpur to take raw material for preparing the ornaments and when he returned from there, thereafter, on the next day the first information report was lodged, therefore, sufficient explanation has been given by prosecution regarding delay in lodging the first information report.

46. In this case the accused was about 60 years and from the evidence it transpires that he laid victim X on the bed and taken off her clothes and also taken off his clothes and has touched her private parts and he got touched his private part from her and thereafter he has gone to bring the

rope, which shows that in meanwhile if the victim did not escape from there, what could would happened to her it cannot be imagined.

47. In view of above, the statement of victim X (PW-3) is believable and corroborated by the evidence of her mother which is admissible under Section 8 of the Evidence Act and her mother has informed her husband on phone in the evening of the same day which is also relevant and thereupon first information report was lodged on the next day.

48. The POCSO Act was legislated to eradicate the menace of the children who becomes the victim of the sexual offence. So in view of above, the provision of the POCSO Act shall be interpreted in such a way so that this menace can be eradicated and in above circumstances the interpretation of the provision shall be taken with the help of mischief ruling.

49. In above circumstances, it is proved that the accused has committed sexual assault with a girl aged about 4 years, therefore, learned lower court has rightly relied on the testimony of the witness victim X and has rightly held the accused guilty and has convicted him under Section 10 of the POCSO Act and has also rightly sentenced him to undergo rigorous imprisonment for 7 years with a fine of Rs.10,000/- under Section 10 of the POCSO Act.

50. In such circumstances, no interference is required in the impugned judgment of the court below and the appeal is liable to be dismissed, accordingly, the appeal is **dismissed**.

51. Lower court record be returned back to the concerned court forthwith.

(2023) 5 ILRA 1354

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 25.04.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Appeal No. 3175 of 2017

Sanjay Kumar **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:

Sri Rajesh Yadav, Sri Dileep Kumar Singh,
Sri Mukhtar Alam, Sri Saquib Mukhtar, Sri
Keshari Nath Tripathi

Counsel for the Opposite Party:

G.A.

Criminal Law - Indian Penal Code, 1860 -

Sections 363 & 366-allegation by informant-minor daughter was kidnapped by seducing and enticing by accused-St.ment of victim u/s 164 Cr.P.C.-St.d she loved him-on the alleged day-she went with accused to the place of relative-no forceful act by accused-X-ray report of victim-16 years-no evidence in support of allegations -charge u/s 363 IPC cannot be said to have been proved against the Appellant-offence u/s 366 IPC automatically fails as victim has not levelled any allegations of mala fide or sexual intent against the accused-prosecution failed to prove beyond reasonable doubt.

Appeal allowed. (E-9)

List of Cases cited:

1. MAFAT LAL & ANR VERSUS THE ST. OF RAJASTHAN 2022 Live Law SC 362

2. S. Varadarajan Vs St. Of Madras 1964, 1965 SCR (1) 243

3. Reg. Vs Christian Olifier(1) (1866) 10 Cox CC 402

(Delivered by Hon'ble Ram Manohar
Narayan Mishra, J.)

1. Instant criminal appeal under Section 374(2) has been preferred by accused Sanjay Kumar against judgment and order dated 02.06.2017, passed by Addl. District and Sessions Judge, Court No.7, Gorakhpur in S.T. No. 89 of 2016 arising out of Case Crime No. 313 of 2015 under Sections 366 and 363 I.P.C., P.S.- Pipiganj, District- Gorakhpur, whereby the accused appellant have been convicted for charge under Sections 363, 366 I.P.C. and sentenced as under:

i) under Section 363 I.P.C., to undergo 5 years rigorous imprisonment and a fine of Rs. 5,000/- fine;

ii) under Section 366 I.P.C., to undergo 7 years rigorous imprisonment and a fine of Rs. 10,000/- fine;

all the sentences were directed to run concurrently and out of total amount of fine, fifty percent thereof is directed to be paid to the victim as compensation.

2. The factual matrix of the case, which is relevant for present appeal is that informant Shiv Kumar lodged an F.I.R. with P.S. concerned on 03.12.2015 at 06:45 hours, wherein he stated that in the night of 26.11.2015, his minor daughter aged around 15 years was kidnapped by seducing and enticing her by accused Sanjay, who also resides in his ward. When he made a complaint regarding this to his family members, his family members abused and threatened him. The contents of F.I.R. were opened in Report No. 10 at 06:45 hours on 03.12.2015 P.S.- Pipiganj, (exhibit KA -1). The police investigated the case, the victim was recovered by police on

03.12.2015, in the company of accused Sanjay near Boriganj Railway Station Trisection, Pipiganj, accused was also arrested on 03.12.2015 and sent to jail.

3. The victim stated in her statement recorded under Section 164 Cr.P.C. before Magistrate on 11.12.2015 that she is acquainted with accused for past four years and she loved him. On 27.11.2015, he visited her home where she, Sanjay and her younger sister were watching a video cassette of marriage of his sister together. In the meanwhile, her father and aunty appeared and they had seen accused Sanjay there and gave him beating, he also threatened her, therefore, she became scared. On that day, in the evening, she went to the place of a relative of Sanjay along with him. Police caught both of them after three days. The accused did not do any forceful act to her. The medico legal examination of the victim was conducted on 04.12.2015 at 06:20 P.M. which is placed on record as exhibit K-5. In description of the case, the doctor has stated "She has fled away from home alone, not with any boy". Her hymen was found torn, old and healed. For determination of age, the victim was subjected to radiological examination and C.M.O. in his report dated 07.12.2015, opined that according to X-Ray report and general appearance, he is of the opinion that she was about 16 years old. Exhibit K-13 is a X-Ray report of the victim. In radiological examination of vaginal smear of victim dated 05.12.15, doctor opined that after examination of both slides, no RBCs, spermatozoa or gonococci were seen. In High-School Marksheet, the date of birth of victim, exhibit K-17, is 17.08.2001. Accordingly, the Investigating Officer found that on the date of incident, victim was 14 years 3 months old, the accused was

enlarged on bail by orders of this Court dated 06.04.2016. The I.O. after completing investigation filed charge-sheet against accused with prayer to prosecute him for charges under Sections 363, 366 I.P.C. Learned Magistrate committed the case and Sessions Court taken up the case, charges were framed against accused appellant under Sections 363, 366 I.P.C. on 27.08.2015 by Addl. Sessions Judge, Court No.-7, Gorakhpur. The accused denied the charges. During prosecution cross-examination, P.W.-1 Shiv Kumar, the informant who is father of the victim proved written report filed by him on Police Station as exhibit K(1), the recovery cum arrest memo of accused and victim as exhibit K(2), which is prepared by Investigating Officer, Omkarnath Srivastava. He acknowledged his signature thereon along with his wife bearing signature of victim and accused also. He acknowledged his signature on custody papers regarding victim as per exhibit K(3). P.W. 2- Khusbhu, is victim who stated her age as 18 years 1 months on the date of her examination dated 21.09.2016. She acknowledged her statement under Section 164 Cr.P.C. which is marked as exhibit K(4). However, she declared hostile and was cross-examined by ADC(Crime) Cri Raj Kumar. The brother of the informant was also declared hostile when cross-examined by prosecution with permission to the Court. P.W.-4 Ranjana Jaiswal is aunt of the victim, P.W.-5 Jagdish is uncle of the informant, P.W.-6 Firoz Ali is neighbour of the informant, he has also declared hostile. P.W.7- Sri Mohan was also declared hostile, P.W.-8 Dr. Sushma Sinha has proved medical examination papers of the victim as exhibit K(5) and supplementary medical report as exhibit K(6). P.W.-9 Manju Devi is a witness of recovery of the victim and arrest of the

accused on 03.12.2015. P.W.-10 Constable Ram Vilas Bhaskar is author of F.I.R., exhibit K(7) and extracts of G.D. of registration of case as exhibit K(8). The I.O. was not produced during trial and the paper authored by him like site plan, chargesheet are accepted in evidence and exhibited on basis of their genuineness admitted by learned counsel for the accused during trial. Learned Trial Judge after hearing submissions of learned counsel for the parties and appreciating the evidence on record gave a finding that accused Sanjay kidnapped the victim and subsequently, married with her also. The prosecution has been successful to prove charges under Sections 363, 366 I.P.C. against the accused. The ingredients of Section 363, 366 I.P.C. are applicable in the case as the victim was minor at the time of the offence and she was seduced and enticed away by the accused, from lawful guardianship of her parents. Learned trial Judge also observed that although none of the witnesses of the fact including the victim have supported prosecution version, but as per date of birth mentioned in High-School Marksheet of the victim, she had not even completed age of 15 years, however, even after the witnesses of fact turning hostile, the facts and attending circumstances of the case and other evidence can be taken into account to find out as to whether cogent evidence is on record on the basis of which the accused can be convicted and in that situation, the accused cannot be acquitted on ground that witnesses of fact have turned hostile. He observed that P.W.-1, Shiv Kumar, father of the victim has stated in F.I.R. that his daughter was aged around 14 years and after appreciating the evidence on record, learned Trial Judge recorded verdict of guilt against accused and sentenced him as aforesaid.

4. Heard learned counsel for the appellant, learned A.G.A. for the State and perused the material on record.

5. Learned counsel for the appellant submitted that the learned Court below has recorded the verdict of guilt and sentenced the appellant against strength of evidence on record and the impugned judgment is not sustainable under eye of law. The appellant was enlarged on bail during trial as well as during pendency of present criminal appeal by order of this Court. None of the witnesses of fact have supported prosecution version, including the victim in spite of that the Trial Court has convicted the accused appellant and sentenced him without cogent evidence appearing against him. The victim in her statement before the Trial Court has specifically stated that she had gone with the appellant out of her own free will, she also stated that she had come with her husband Sanjay for evidence and also engaged a counsel after affixing her photo on Vakalatnama. She had also stated that she had not made any statement in police against her husband. P.W.1, Shiv Kumar has stated in his cross-examination before the Trial Court that his marriage was performed in the year 1995 and after two years of marriage in the year 1997, the victim Kushbu was born and at the time of incident, she was studying in Class-XI. Her age was around 18 years. He also stated that date of birth of victim recorded in her High-School Marksheet is less than 4 years and her actual age was wrongly entered by her teacher. The ingredients of offence under Section 363, 366 I.P.C. are not made out against the appellant on basis of evidence on record. Therefore, he deserves to be acquitted of these charges.

6. Per contra, learned A.G.A. appearing for the State submitted that

despite fact that witnesses of fact, including the victim have not supported prosecution version in their statement during trial, however, on basis of documentary evidence, this fact is established that victim was minor at the time of incident and she was less than 15 years of age at that time. She was seduced and enticed away by the accused to leave her parental place, out of guardianship of her parents and subsequently, the accused married her. This fact itself suggests that the victim was kidnapped by the accused from legal guardianship of her parents in order, she might be forced to seduce or sexual intercourse and, therefore, offence under Section 363, 366 I.P.C. is made out in the case. Learned Trial Court has rightly convicted and sentenced the appellant as aforesaid and no interference in impugned judgment is required in present criminal appeal.

7. From perusal of evidence on oath of P.W.2, it is found that she stated therein that she is eldest off spring of her parents, she was residing at her parental place in Ward No. 3, Pipiganj. Her date of birth is 17.08.2001 in her High-School Marksheet, on the date of incident on 26.11.2015, in the evening she was watching video cassette of marriage with her acquaintance Sanjay in her home, his sister came there and asked her to go to her home and she accompanied her, when this fact came to the knowledge of her father, he threatened to kill her and thereupon she called Sanjay in the evening and went to the place of his relative along with him. Subsequently, she came to know that her father had lodged a report at police station to the effect that she got missing, on 03.12.2015. She came to the place of her father and police reached there and performed some paperwork on which she appended her signature along

with her parents. The victim acknowledged her signature on exhibit K-2, recovery memo, but stated that she had not made any statement at police station and she was given to custody of her father by orders of Court. She has also acknowledged the photo impression of her photograph on her High-School Marksheet in which her date of birth is mentioned as 17.08.2001. She denied the fact that her parents had abused or threatened the accused. She also stated that she came to depose in the case along with Sanjay, who is now her husband. She acknowledged in her statement under Section 164 Cr.P.C., recorded by Magistrate on which exhibit K-4 was marked. After this statement the victim was declared hostile in her cross-examination by ADC, Government Counsel (Crime) Cri, she stated that she was aged about 18 years, she disowned her statement recorded under Section 161 Cr.P.C. by I.O. She clarified that the accused had not done anything wrong with her forcefully, she also stated her age as 16 years on instructions of her father, in her statement 164 Cr.P.C. She also stated that she got married with Sanjay on 20.07.2016, she dispelled suggestion made by prosecution that accused had enticed her away by luring her on pretext of marriage from lawful guardianship of her parents and subsequently, married with her and for that reason she was describing her age in enhanced manner. In cross-examination by defence, she admitted that presently she and accused are residing together as husband and wife. P.W.-3 Jay Kumar, P.W.-4 Ranjana Jaiswal, P.W.-5-Jagdish, P.W.-6 Firoz Ali and P.W.-7 Sri Mohan, have not made any statement in favour of prosecution and they were declared hostile by prosecution and permitted to cross-examination by the learned A.D.C. (Crime) but nothing material could be elicited in their cross-

examination, which would likely, benefit to the prosecution.

8. Learned counsel for the appellant placed reliance on judgment of Hon'ble Apex Court in **MAFAT LAL & ANR VERSUS THE STATE OF RAJASTHAN 2022 Live Law SC 362**, which is Criminal Appeal No. 592 of 2022 filed against High Court Judgment which refused to quash criminal proceedings against the appellant accused for abducting or kidnapping a girl. The appeal was allowed. In that case, the father of the victim lodged an F.I.R. with police station that his minor daughter has been abducted by the accused and case under Section 363/366 I.P.C. was registered against the accused. The abductee and accused could not be traced for long time and police filed a chargesheet against the father of the accused under Sections 363, 366, 120-B I.P.C. in the year 2020, the accused along with abductee filed a petition under Section 482 Cr.P.C. before the High Court praying for quashing of F.I.R. and all the proceedings arisen from there. The status therein is that they were well known to each other and were into deep love affairs, which relationship was not acceptable to the father of the abductee, under compelling circumstances, both of them parted from their family members in the year 2005 and later got married on 25.12.2006. They also stated that almost 15 years have passed, accused and abductee were living happily married life and they were also been blessed with a boy. They also stated that abductee was never victimized, abducted nor kidnapped but on her free volition left her parental home on account of unpleasant and disturbing circumstances created by her father. It is also stated that abductee was 17 years of age at the time when she left her home on

her own volition and that the accused had no role to play in her parting with her family. Hon'ble Apex Court found that the accused and victim has stated before High Court that she had left her parental home on her own volition, they were married since December, 2006 and have been living happily. **No fruitful purpose would be served by relegating the matter for conducting the trial as the same would not be conducive for either of the appellants. It would be a futile exercise.** Kidnapping would necessarily involve enticing or taking away any minor under eighteen years of age, if a female for the offence under Section 363 IPC. Section 366 IPC would come into play only where there is a forceful compulsion of marriage, by kidnapping or by inducing a woman. This offence also would not be made out once the appellant no. 2 the abductee has clearly stated that she was in love with the appellant no.1 and that she left her home on account of the disturbing circumstances at her parental home.

9. Hon'ble Apex Court in **S. Varadarajan vs State Of Madras 1964, 1965 SCR (1) 243**, considered Section 363 and 366 I.P.C. elaborately. Hon'ble Court observed in following paras:-

(9) *It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having*

capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

(10) *It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our, opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".*

Hon'ble Court also quoted an English judgment of **Reg. v. Christian Olifier(1) (1866) 10 Cox CC 402**, in which it was observed

"I am of opinion that if a young woman leaves her father's house without

any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parent's custody, yet his not doing so is no infringement of this Act of Parliament for the Act does not say he shall restore her, but only that he shall not take her away."

10. Section 363 of I.P.C. provides as under:-

363. Punishment of kidnapping.-

Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

363-A. Kidnapping or maiming a minor for purposes of begging.

1. Whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

2. Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment for life, and shall also be liable to fine.

3. Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be

employed or used for the purposes of begging.

4. In this section

1. "begging" means:

1.1. soliciting or receiving alms in a public place, whether under the pretence of singing, dancing, fortunetelling, performing tricks or selling articles or otherwise;

1.2. entering on any private premises for the purpose of soliciting or receiving alms;

1.3. exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;

1.4. using a minor as an exhibit for the purpose of soliciting or receiving alms;

2. "minor" means:

2.1. in the case of a male, a person under sixteen years of age; and

2.2. in the case of a female, a person under eighteen years of age

Thus, the ingredients of Section 363 I.P.C. can be carved out as below:

, (i) taking or enticing away a minor or a person of unsound mind; (ii) such minor must be under sixteen years of age, if a male, or under eighteen years of age if a female; (iii) the taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind; (iv) such taking or enticing

must be without the consent of such guardian. The taking need not be by force, actual or constructive. There must be a taking of the child out of the possession of the guardian. The Explanation to Section 361 provides that the words 'lawful guardian' in the said section include any person lawfully entrusted with the care or custody of such minor or other person. The word 'take' means to cause to go, to escort or to get into possession. It implies want of wish and absence of desire of the person taken. There is, however, a distinction between taking and allowing a minor to accompany a person. The word 'entice' involves an idea of inducement or allurement by exciting hope or desire in the other.

11. Section 366 of I.P.C. provides as under:-

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.- *Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;*

And whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

On examining the provisions of Section 366 I.P.C., its essential ingredients can be summarized as below:

kidnapping or abducting any woman; (ii) such kidnapping or abducting must be (a) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or (b) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse

The second part of the section 366 requires two things. (1) By criminal intimidation or abuse of authority or by compulsion inducing any woman to go from any place; and (2) such going must be with intent that she may be, or with knowledge that it is likely that she will be, forced or seduced to illicit intercourse, with some person. The word 'woman' has been defined in Section 10 of the code which denotes the word "woman" as female human being of any age. Thus, It includes a minor female. If the girl was eighteen or over, she could only be abducted and not kidnapped, but if she was under eighteen she could kidnapped as well as abducted if the taking was by force or the taking or enticing was by deceitful means. The intention of the accused is the basis and the grave men of offence under Section 366. The volition, the intention and the conduct of the woman do not determine the offence. Kidnapping and abduction are two distinct offences. Kidnapping is an offence against guardianship, it consists of enticing or removing a girl from the keeping of lawful guardians without her consent, abduction is an offence as defined under Section 362 I.P.C., when a person is by force compelled or by deceitful means induces to go from

any place. In abduction, the person abducted may be minor or major. Kidnapping is punishable per se in terms of Section 363 without any specific intent, on the other hand, abduction is not punishable per se, and is punishable only when accompanied by a particular purpose as contemplated in sections 364 to 366. Sometimes abducting and kidnapping is committed for the same purpose, but it is not necessary in each case.

12. In present case, the age of victim appears on basis of her High-School Marksheet below between 14 to 15 years and according to medical examination report 16 years as opined by C.M.O. In any case, it cannot be doubted that the victim was minor at the time of incident. The statement of her father on this point before the Court that her age was recorded as 4 years less than her actual age in school record is not based on any concrete logic or proof. However, if we peruse the statement of victim recorded under Section 164 Cr.P.C. before the Magistrate as well as before the Court during Trial, it cannot be stated that accused had taken or enticed away the victim out of the keeping of the lawful guardianship of her parents, as the victim has stated at both stages that on being threatened by her father and out of fear, she called the accused and went to the place of his one relative along with him. Therefore, if we take the statement of the victim, the role played by the accused in her going from parental place is of a nature of passive action and it cannot be discerned that he played active role in the going of the victim from place of her parents, without their consent. The mental attitude of the minor is immaterial in the case of taking when an accused takes a minor with him, whether he or she is willing or not. But the word 'entice' involves an idea of

inducement or allurement. One does not entice another unless the latter attempts to do a thing which she or he would not otherwise do. In the present case, there is no evidence whatsoever in support of the allegations that accused enticed the victim to leave her parental place and accompany to go somewhere else. If we go through the statement of victim recorded under Section 161 Cr.P.C., are not admissible in evidence, it is found that the victim herself enticed the accused and go with her to some other suitable place out of keeping of her parents. Therefore, the role of accused at best stated as a facilitator and cannot be held that he either took her or enticed her away from lawful guardianship of her parents. The element of initiative is lying at the end of the victim and not on the accused.

13. Now, on the basis of foregoing discussions this Court is of considered opinion that preponderance of probabilities indicate that the victim had voluntarily gone with the accused appellant and in the process accused did not play an active role, therefore, the charge under Section 363 I.P.C. cannot be set to have been proved against the appellant and once this conclusion is reached, the offence under Section 366 automatically fails as the victim has not levelled any allegations of mala fide or sexual intent against the accused. Consequently, it is held that prosecution failed to prove its case against the accused beyond reasonable doubt.

14. In view of the above discussion, the appeal is **allowed**. The conviction and sentence passed against the accused appellant under Sections 363 and 366 of the Indian Penal Code is set aside and the appellant is acquitted of both the charges as same are not found to be proved against him as beyond reasonable and doubt. The

fine, if realised, be refunded to him forthwith. The case property shall be dealt with in a manner as directed by the trial court.

15. The appellant is directed to file a personal bond and two sureties each in the like amount to the satisfaction of the court concerned, in compliance of Section 437(A) Cr.P.C. which shall be in force for 6 months.

(2023) 5 ILRA 1363
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Appeal No. 4124 of 2018

Pradeep Bind **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:

Sri Indrajeet Kumar Shukla, Sri Shailendra
Nath Tiwari

Counsel for the Opposite Party:
G.A.

Criminal Law - Indian Penal Code,1860 - Section 376-A-Allegation of developing intimacy on the pretext of marrying with the victim-after some time Accused refused from marrying her-radiological age was 18 years to 24 years-victim St.d in St.ment u/s 164 Cr.P.C. that she was 18 years old-physical relation for past 6 years prior to lodging the F.I.R.-relation was consensual-false promise to marriage is not proved.

Appeal allowed. (E-9)

List of Cases cited:

1. Shambhu Kharwar Vs St. of Uttar Pradesh & anr., 2022 LawSuit (SC) 973

2. Sonu @ Subhash Kumar v. St. of U. P.

(Delivered by Hon'ble Ram Manohar
Narayan Mishra, J.)

1. Heard Sri Indrajeet Kumar Shukla, learned counsel for the convict-appellant, learned A.G.A. appearing for the State and perused the material placed on record.

2. This criminal appeal has been filed against the judgment and order dated 4.6.2018, passed by learned Additional Sessions Judge, Court No.1, Ghazipur, in Sessions Trial No. 31 of 2016, State Vs. Pradeep Bind, arising out of Case Crime No. 2058 of 2015, under Section 376-A IPC & Section 3/5 of POCSO Act, Police Station Kotwali, District Ghazipur, whereby the appellant was convicted and sentenced under Section 376-A I.P.C. for seven year rigorous imprisonment, with fine of Rs.10,000/-, in default thereof he has to undergo six months additional rigorous imprisonment. The appellant has been acquitted of charge under Section 3/5 of POCSO Act, as being extended the benefit of doubt.

3. The brief facts of the case for the purpose of present appeal is that the first informant Smt. Jagrani, wife of Sri Narayan Bindh, resident of Mohalla Kapoorpur, Police Station Kotwali, District Ghazipur, lodged an FIR with police station concerned on 20.11.2015 at about 16:00 hours, on the basis of written report stating therein that her daughter, the prosecutrix used to visit her relative Jairam at Mahmudpur, where accused who was also frequenting as he is relative of Jairam. Pradeep used to sell 'Toddy' in Tadishop stalled by Jairam where he met prosecutrix

6 years ago and they developed intimacy. He would say that he would solemnize marriage with prosecutrix and his assurance was relied upon by prosecutrix as well as by her parents. He would also visit the home of the informant and used to make relations with prosecutrix on assurance of marriage. After some time, he got a job in CISF and even then he would assure prosecutrix to marry her but after some time he refused to marry her on pretext that he would not solemnize marriage against wishes of her parents. The medico legal examination of the prosecutrix was conducted on 21.11.2015 at Government Hospital, Ghazipur, in which Doctor opined that there are no signs/suggestion of recent vaginal intercourse, yet there is evidence/suggestion of old genital assault. No physical injury is found. In pathological examination of vaginal smear of victim, no live or dead spermatozoa is detected. The radiological age of the victim was found by Doctor as 18 years as epiphysis around the elbow and wrist joint were found to be fused in her X-ray report. Old healed hymen tear at 6 O'clock position was found in her internal examination. The prosecutrix supported the version set out in FIR lodged at the instance of her mother in her statement recorded under Sections 161 as well as 164 Cr.P.C. She in her statement recorded under Section 164 Cr.P.C. dated 2.12.2015 stated that she was aged around 18 years. She had gone to the place of her maternal uncle where the brother-in-law (saala) of her maternal uncle was also residing. He kept her in good humor and established physical relations with her for around six years on assurance of marriage and on his advice, she kept mum to this and went back to her home. He would visit her parental home and would make physical relations with her surreptitiously. She became pregnant two years before and he

gave her some medicine, which resulted in miscarriage. When her mother caught both of them, he stated to marry her but when he got job, he refused to marry her. He also expressed his refusal before Panchayat and subsequently he began to demand Rs.5 lacs as dowry for marriage. Police submitted the charge-sheet against appellant after completing the investigation, with prayer to prosecute him for charge under Section 376-A IPC and Section 3/5 of POCSO Act. The accused was enlarged on bail by orders of this Court during trial. After filing of charge-sheet, the case was committed to court of Sessions, Ghazipur. The charge-sheet was filed in the court of Special Judge, POCSO Act. At the stage of prosecution evidence, PW-1 Smt. Jagrani Devi, the mother of the prosecutrix, PW-2 prosecutrix, PW-3 Praveen Kumar, PW-4 Constable Muharrir Rajkumar, PW-5 Doctor Chandra Sinha, PW-6 Sri Narayan Pandey- father of the prosecutrix, PW-7 Lallan Singh Yadav, were examined in support of the prosecution case.

4. After conclusion of the prosecution evidence, the statement of accused were recorded under Section 313 Cr.P.C., in which he has not taken any specific defence. His defence is of denial.

5. Learned trial court heard submissions of learned counsel for the accused appellant and learned A.D.C.(Criminal) for the State and after appreciation of evidence on record and considering the submissions of learned counsel for the parties, gave a finding that the accused established physical relations with the prosecutrix on giving her assurance of marriage and her consent for establishing physical relations cannot be deemed as a free consent. The prosecutrix, in her cross-examination on 24.6.2017,

deviated from her stand in her examination-in-chief and tried to exculpate the accused and stated that her previous statements before the Court was outcome of pressure but she could not specify the person on whose pressure, she had previously given evidence against the accused. Learned court below also observed that although PW-7, Lallan Singh Yadav, the teacher in Phoolchand Yadav Inter College, Dandapur, Ghazipur had proved the date of birth of prosecutrix in scholar register, recorded as 10.8.1997 but he admitted in cross-examination that he has not brought the scholar register of year 2013, in which admission date of prosecutrix in his school has been recorded. He also admitted that the prosecutrix did not file the pass certificate of class 8 issued by her previous school and for that reason, her transfer certificate was not issued by his school. No document was filed by the parents of the prosecutrix in confirmation of her date of birth. He came to know that primary education of prosecutrix was carried out in Raiganj School, Second, Ghazipur and in the record of that school, her date of birth is mentioned. He subsequently, came to know that her date of birth in record of her previous school is recorded as 1.7.1993. Learned court below after considering the entire evidence of PW-7 and statement of prosecutrix in her cross-examination that her actual date of birth is 1.7.1993, she was found aged to be exceeding 18 years and the trial court has given categorical finding that the prosecutrix was major at the time of incident and she has stated that her first interaction with accused took place in the year 2012, however, learned court below concluded that on the basis of evidence, it is found that the consent given by the prosecutrix to accused to have physical relations with her was not a free consent and was given on assurance of the accused

that he would marry her in course of time, thus learned court below placing reliance on initial statement of prosecutrix, which was consistent with her statement under Section 164 Cr.P.C., found the accused guilty of charge under Section 376-A IPC but acquitted him of the charge under Section 3/5 of POCSO Act.

6. Learned counsel for the appellant submitted that the learned trial court has recorded a verdict of guilt against appellant for charge under Section 376-A IPC, which is against weight of evidence on record. Learned trial court has misappreciated the evidence on record while recording the finding of guilt and sentencing the appellant. He further submitted that from the perusal of allegations made in the FIR itself, it is clear that the same has been lodged after an unexplained delay of six years. Appellant was enlarged on bail during trial as well as by orders of this Court in present criminal appeal vide order dated 16.1.2019 by Co-ordinate Bench of this Court. The allegations against the appellant is that he had established physical relationship with the prosecutrix on false promise of marriage is unfounded. He further submitted that PW-5 Dr. Chandra Sinha, who had carried out medico legal examination of the victim on 21.1.2015 has stated before the Court that on the date of medical examination, the victim had stated that a boy namely Pradeep Kumar, who is her relative, has established physical relationship with her by enticing her. She met him at the place of her maternal uncle. He would make physical relations with her intermittently. However, when he secured a job, he refused to marry her and also refused to abide by decisions of Panchayat. The Doctor has further stated that no mark of injury was found on the person of victim. According to the X-ray

report dated 31.11.2015, epifices of her elbow and writ joints were found to be fused and accordingly, she was found to be exceeding 18 years. In cross-examination, the Doctor has clarified that between the age of 18 to 24 years, the fusion of writ and elbow joints occurs in girls, therefore, her age may be of between 18 to 24 years. The Doctor also clarified that old healed hymen tear, recorded by her, need not be due to sexual assault. The Doctor has also clarified that the old healed hymen torn may be due to sexual intercourse and may not be due to that, no definite opinion can be given in this regard. Learned counsel for the appellant further submitted that in FIR no date or time of occurrence has been mentioned. There is no consistency between statement of first informant and the prosecutrix recorded under Section 161 Cr.P.C. during investigation. The victim stated that the appellant and she had fallen in love and when she caught red handed by her mother, only then the accused stated for marriage. The accused has been falsely implicated in the case. He has committed no offence. He deserves to be acquitted of the charge, for which he has been convicted and sentenced, as above.

7. Learned counsel for the appellant placed reliance on a judgement of Apex Court in the case of **Shambhu Kharwar vs. State of Uttar Pradesh & Another, 2022 LawSuit (SC) 973**, whereby, vide order dated 5.10.2018, a Single Judge of the High Court of Judicature at Allahabad dismissed an application instituted by the appellant under Section 482 of the Code of Criminal Procedure 1973, for quashing Criminal Case No 785 of 2018 in the Court of the Addl. Chief Judicial Magistrate (First), Ballia arising out of Case Crime No 11 of 2018 registered at Police Station Rasra, District Ballia

for an offence punishable under Section 376 of the Indian. The appellant had also sought the quashing of a charge-sheet in that case. Hon'ble Apex Court observed that the facts of the case, as they stand, which are not in dispute, would indicate that the ingredients of the offence under Section 376 IPC were not established. The High Court has, therefore, proceeded to dismiss the application under Section 482 of CrPC on a completely misconceived basis. Hon'ble Apex Court has placed reliance on the case of Sonu @ Subhash Kumar v. State of Uttar Pradesh, wherein it is observed that :

"12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action... [...]"

14. [...] Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled... [...]"

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To 7 2019 (9)

SCC 608 8 2021 SCC OnLine SC 181 establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act... [...]

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

8. Learned AGA has vehemently opposed the submissions made by the learned counsel for the appellant and submitted that there is no error or infirmity in the impugned judgment and order passed by learned trial court and the same is in consonance with law and the evidence adduced during trial, which needs no interference in present criminal appeal.

9. I have gone through the sworn testimony of the witnesses recorded before the trial court and considered the same in the light of other documentary evidence on record. The accused was charged for offence punishable under Section 376-A IPC and section 3/5 of POCSO Act on 22.6.2016.

10. Smt. Jagrani Devi- the mother of the victim and informant of the case, as PW-1 has supported the FIR version and proved her written report as Ex.Ka-1. She has stated that the accused Pradeep Kumar Bind has established physical relations with her minor daughter on assurance of marriage and he used to say that he would love her. She got written report scribed by a person sitting outside the police station and affixed her thumb impression thereon, before producing the same for lodging of FIR. She got custody of her daughter by orders of Court in presence of her husband. Her marriage took place in childhood and she has been blessed with six children. The victim is her fourth issue. Her brother Jairam started the business of sale of toddy. She is not aware whether he has obtained any license for that. He used to visit her parental home. Her brother used to call her daughter (victim) in harvesting season. Whenever, she visit the place of Jairam, some family member would also accompany her. Her daughter used to go there once in a year.

11. PW-2, the victim admitted her statement under Section 164 Cr.P.C. recorded by the Magistrate during her evidence before court as PW-2. She stated that accused is brother-in-law of her maternal uncle Jairam Bind and she got acquainted with him at the place of her maternal uncle. 5 to 6 years before, once he established physical relations with her finding her alone, forcefully and thereafter he told her that he would love her and on assurance of marriage, he had made physical relations with her subsequently also. She was in telephonic contact with the accused also, when she returned to her parental place. He would also visit her parental place and continued making physical relations with her on assurance of

marriage. However, when he got a job in CISF, he refused to marry her in September, 2015 and also demanded Rs.5 lacs before Panchayat. In cross-examination, she stated that she received education from class Ist to VIth at Raiganj Second, Ghazipur. She is not passed out of Class VII. She stated that her medico legal examination was conducted at District Hospital, Ghazipur. She stated that in primary school record, her date of birth is recorded as 1.7.1993. She met accused Pradeep Bind in the year 2012 for the first time and they became friends. He is related to her. Her parents had spoken to his parents in connection with their marriage but the parents of Pradeep Bind refused their proposal. He is posted in CISF since year 2012. In cross-examination dated 24.6.2017, she stated that accused had never cheated her and he did not commit rape on her. The statements she has given prior too, were result of some pressure. After this statement, she was permitted to be cross-examined by learned ADC (Criminal), in which she has stated that she had given her previous statement in the court under pressure, however, she declined the suggestion that her subsequent statement was result of some sort of settlement with accused.

12. PW-3 Constable Praveen Kumar, proved chik FIR as Ex.Ka-4 and extract of G.D. of registration of case dated 20.11.2015 as Ex.Ka-5 and stated that these papers are in his writing and signature. PW-4 Moharrir Raj Kumar also proved these papers in his statements.

13. PW-5 Doctor Chandra Sinha, who conducted medico legal examination of the victim on 21.11.2015, stated that the victim told her that her relative Pradeep Bind enticed her and made physical relations

with her on the pretext of marriage and subsequently refused to marry her before Panchayat. She stated that in internal examination of the victim, her hymen was found in 6 O'clock position, bearing old mark of injury and on the basis of her X-ray report, her radiological age was found exceeding 18 years. Her age was determined on the basis of fusion of her elbow and writ joints and due to the fact that epyfices of these bones had fused. She might have been aged between 18 to 24 years.

14. PW-6 Ram Narayan Bind, father of the victim, stated that accused was close to his daughter and his entire family. Negotiations about their marriage were under way and even the time of their marriage were fixed but 6 to 7 months before, the accused got job in CISF and refused to marry her. He established physical relationship with his daughter. In the meanwhile, a Panchayat was also called in the matter. His daughter was aged around 17 years at the time of incident. However, in cross-examination, the witness stated that the Investigating Officer had never recorded his statement. His family members told her that accused established physical relations with his daughter on the pretext of marriage. The date of birth of his daughter is 1.7.1993 in primary school records. He also stated that when the accused secured a job, his family members refused to marry him with his daughter. He also admitted that as marriage could not be settled, this wrong FIR was lodged in the case, with a view to exert pressure for marriage of accused.

15. PW-7 Lallan Singh Yadav, a teacher of Phoolchand Yadav Inter college, Dandapur, Ghazipur has proved the academic records of the victim, in which

her date of birth recorded as 10.3.1997. However, in cross-examination, he has stated that the T.C. of previous school was not filed by the victim in spite of his directions and for that reason, T.C. was not issued to her by his school. Subsequently, he came to know that her actual date of birth is 1.7.1993.

16. In prosecution case based on FIR as well as statement of the informant as well as victim recorded during investigation, this fact emerged that FIR was lodged in the case on 20.11.2015 whereas in FIR, this fact surfaced that accused was having physical relations with the victim six years prior to lodging of the FIR but no prior report or complaint has been made in connection with said charge. The victim has stated in her statement recorded under Section 164 Cr.P.C. as well as in her statement before the court that she continued to have physical relations with accused, even when she came back her home from the place of her maternal uncle. In statement of informant, who is mother of the victim, this fact emerged that the victim used to visit once in a year in harvesting season the place of her maternal uncle and that too she was accompanied by some family member. On the basis of her date of birth recorded in school record of Phoolchand Yadav Inter College, she has attained age of majority 8 months before the lodging of the FIR. In medico legal examination report also, the Doctor has categorically stated that on the basis of X-ray report, her age was more than 18 years. On the basis of radiological examination, it might be with 18 years to 24 years. The victim, in her cross-examination has exculpated the accused for reasons best known to her. The victim has changed her stand from stage to stage. Therefore, it is difficult to place reliance on her version.

However, from perusal of evidence on record and version of victim including her statement recorded under Section 164 Cr.P.C., it is discerned that the relations of the victim and accused was consensual and this fact is not proved that the promise of marriage given by the accused to prosecutrix was false from very inception and the false promise borne a direct nexus to the decision of the prosecutrix to engage in sexual act with the accused. No specification of date, time and months of sexual acts is given by the prosecutrix in her various statements recorded under Section 164 Cr.P.C. as well as during trial. The father of the prosecutrix has stated during his evidence before the court that the FIR was lodged in the case due to the fact that the accused side refused to marry his daughter, after he secured a job. On meticulous examination of evidence on record, it is not proved beyond reasonable doubt that the accused appellant had given a promise to the prosecutrix to marry with him, which at the inception was false and on the basis of this, she was induced into a sexual relationship. Therefore, it can be held that the relationship between the parties were purely consensual in nature. This finding emerged after taking into consideration the testimony of prosecutrix as well as her parents recorded before the court in the light of facts and circumstances of the case. Taking into consideration, the evidence regarding age of prosecutrix as recorded in school records, the evidence of Head Master as well as her radiological age determined by the medical experts and evidence of the Doctor who conducted medico legal examination of the victim, it would be held definitely that at the time of alleged sexual interaction with the accused, she was not minor. Learned court below has lost sight of these facts while recording the verdict of guilt against the accused

appellant and sentencing him. In my considered opinion, the prosecution has failed to prove its case against accused appellant beyond reasonable doubt. Therefore, the judgement and order passed by learned court below is not sustainable and liable to be set aside.

17. Accordingly, this appeal succeeds and is allowed. Impugned judgment and order of conviction dated on 4.6.2018, passed by learned Additional Sessions Judge, Court No.1, Ghazipur, in Sessions Trial No. 31 of 2016, State Vs. Pradeep Bind, arising out of Case Crime No. 2058 of 2015, under Section 376-A IPC & Section 3/5 of POCSO Act, Police Station Kotwali, District Ghazipur is hereby, set aside and accused appellant Pradeep Bind is acquitted from charge under Section 376-A IPC.

18. It is directed that the accused appellant shall furnish a personal bond to the satisfaction of court concerned and two reliable sureties each in the like amount before the trial court, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellants on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

19. 22. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance and necessary action.

(2023) 5 ILRA 1370
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.04.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
 THAKER, J.**
THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 4697 of 2015

Ahmad Sher **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:

Sri Maohammad Nadeem, Sri Abhhishek Tripathi, Sri Durgvijay

Counsel for the Opposite Party:

G.A.

Criminal Law - Indian Penal Code, 1860 - Section 304 - deceased was tortured and harassed by her in laws-for which civil suit filed and continued for about seven years-ended in compromise-in between accused appellant re-married with someone-when deceased reached matrimonial home after the compromise-in laws started harassing her for taking back the given piece of land in compromise-deceased was done to death by her husband-accused appellant with help of his brother and second wife-death caused was not premediated-accused though had knowledge and intention-but did not wanted to do away with the deceased-falls under exception 1 & 4-culpable homicide not amounting to murder-life imprisonment reduced to 10 years of imprisonment.

Appeal partly allowed. (E-9)

List of Cases cited:

1. Criminal Appeal No. 4345 of 2014 (Nafa Singh Vs St. of U.P.) decided on 10.02.2023;
2. Criminal Appeal No. 5657 of 2011 (Santosh Vs St. of U.P.)[4] decided on 22.02.2021;
3. Criminal Appeal No. 1838 to 840 of 2019 2022 0 Supreme (SC) 564 decided on 12.07.2022.
4. Criminal Appeal No. 923 of 2011 arising out of S.L.P. (Crl.) No. 8847 of 2009 decided on 13.04.2011

5. Veeran & ors. Vs St. of M.P. Decided, (2011) 5 SCR 300

6. Mohd. Giasuddin Vs St. of A.P., [AIR 1977 SC 1926]

7. Deo Narain Mandal Vs St. of U.P. [(2004) 7 SCC 257]

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

9. Jameel Vs St. of UP [(2010) 12 SCC 532]

10. Guru Basavraj Vs St. of Karn., [(2012) 8 SCC 734];

11. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323],

12. St. of Punjab Vs Bawa Singh, [(2015) 3 SCC 441],

13. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

(Delivered by Hon'ble Dr. Kaushal
Jayendra Thaker, J.
&
Hon'ble Umesh Chandra Sharma, J.)

1. Heard learned counsel for the appellant and learned A.G.A. for the State.

2. Present criminal appeal challenges judgment and order dated 24.9.2015 passed by the Additional Sessions Judge, Fast Track Court, Kannauj in Sessions Trial No. 121 of 2013 (State vs. Ahmad Sher) whereby the learned Additional Sessions Judge has convicted the accused-appellant, Ahmad Sher for commission of offence under Section 304 of Indian Penal Code, 1860 (for short 'IPC') and sentenced him to undergo imprisonment for life with fine of Rs.20,000/- and in case of default in payment of fine, further to undergo four months' additional imprisonment.

3. Brief facts as culled out from the record are that the accused-appellant was married to the deceased 15-16 years prior to the incident but soon after the marriage deceased was being harassed and tortured by her in-laws for which a civil suit was filed which continued for about seven years and ended in a compromise between the parties. As per compromise, deceased was given teen beegha land by her in-laws, in between the years of civil suit accused-appellant married Hoorbano of his village Sataura. When deceased reached her matrimonial home after the compromise had taken place between the parties again her in-laws started harassing her for taking back the given piece of land and on 08.10.2012 at about 12:00 p.m deceased was done to death by her husband-accused appellant herein with the help of his brothers and second wife Hoorbano.

4. On the basis of F.I.R., the investigation started and charge-sheet was laid. The learned Magistrate summoned the accused and committed the case to the Sessions Court as the offences alleged to have been committed were triable by the Sessions Court. The learned Sessions Judge framed charges under Section 304 of I.P.C.

5. On being summoned, the accused pleaded not guilty and wanted to be tried.

6. The Trial started and the prosecution examined 7 witnesses who are as follows:

1	Deposition of Dildar Beg	PW1
2	" " Ansar	PW2
3	" " Km. Sarjuman	PW3
4	" " Mohd. Jahar Ali	PW4

5	" " Geetam Singh	PW5
6	" " Brij Kishor	PW6
7	" " Vinod Kumar Yadav	PW7
8	" " Vijay Kumar	PW8

7. In support of ocular version following documents were filed and proved by prosecution:

1	F.I.R	Ex.Ka.11
2	Written Report	Ex.Ka.1
3	Postmortem Report	Ex.Ka.3
4	Panchayatnama	Ex.Ka.2
5	Charge-Sheet	Ex.Ka.7
6	Site Plan with Index	Ex.Ka.8
7	Recovery memo of Blood stained & plain earth	Ex.Ka.9
8	Recovery memo of 'Takora'	Ex.Ka.10

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

9. Learned counsel for the appellant in the beginning contended that this is a case of acquittal, however, in alternative he has submitted that injuries were caused by using blunt side of the axe and not the sharp edge. The accused had pleaded that he was mentally ill and had to be kept in chains, the same part is not accepted by the court below. It is further submitted by learned counsel for the appellant that conviction is based on presumption and is

bad as the appellant had no intention to do away with the deceased. Learned counsel for the appellant has relied on the following authoritative judgments of the Apex Court:-

(i) Criminal Appeal No. 4345 of 2014 (Nafa Singh Vs. State of U.P.) decided on 10.02.2023;

(ii) Criminal Appeal No. 5657 of 2011 (Santosh Vs. State of U.P.) decided on 22.02.2021;

(iii) Criminal Appeal No. 1838 to 840 of 2019 2022 0 Supreme (SC) 564 decided on 12.07.2022.

(iv) Criminal Appeal No. 923 of 2011 arising out of S.L.P. (Crl.) No. 8847 of 2009 decided on 13.04.2011

to contend that this is case of clear acquittal/if at all offence is made out it is under Section 304 (1) of I.P.C.

10. Learned A.G.A. has submitted that the statement under Section 313 Cr.P.C is totally unreliable. It is further submitted that it was a premeditated murder as she was hurt by the accused-appellant and his brothers and second wife to take away the given land.

11. On hearing the arguments advanced by the learned counsel for the parties, two moot questions are to be addressed by us namely whether the death was homicidal death and whether the offence would be punishable under Section 302 or 304 Part I or Part II or Section 304 B of Indian Penal Code. Before sifting the evidence, it is relevant here to discuss the law pertaining to culpable homicide amounting to murder, culpable homicide not amounting to murder and the dowry

death. Section 299 of the Indian Penal Code, which reads as under:

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

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

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to	(2) with the intention of causing such

cause death; or	bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

13. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that their act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

14. This takes us to the alternative submission of learned counsel for the appellants that the quantum of sentence is

too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

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

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to antisocial behaviour has to be countered not by undue cruelty but by reculturation. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the [11] rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'interrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

16. 'Proper Sentence' was explained in **Deo Narain Mandal Vs. State of UP** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence,

manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

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

appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

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

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

20. The evidence on record will not permit us to accept the submission of learned counsel for the appellant that it is a

case of acquittal rather it was a homicidal death proved by the evidence.

21. In view of the above, we hold that the accused has committed culpable homicide not amounting to murder. The accused is punished to undergo rigorous imprisonment for 10 years and fine of Rs.5000/- which should be paid within four weeks of his release, if not paid default sentence of three months. If 10 years' incarceration is over, the Jail authority would release the accused if not wanted in any other offence.

22. This appeal is partly allowed. The judgment and order by the learned Sessions Judge shall stand modified to the aforesaid extent. Record and proceedings be sent back to the Court below forthwith.

(2023) 5 ILRA 1375
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SURENDRA SINGH-I, J.

Crl. Misc. Writ Petition No. 3701 of 2023

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

Counsel for the Petitioners:
 Sri Sanjay Kr. Srivastava

Counsel for the Respondents:
 G.A., Sri Mithilesh Kumar Shukla

Criminal Law - Indian Penal Code, 1860 -
Section 366 - Kidnapping, abducting or
inducing woman to compel her marriage -
Quashing of FIR - FIR was lodged by
husband of petitioner no. 1 - Informant's

wife was in love affair for a long duration with petitioner no. 2 - Earlier she was found in house of petitioner no. 2, brought back by her husband - St. argued that petitioner no. 2 cannot be granted relief as he was living with petitioner no. 1, who was a married woman with two children - Held, from affidavit filed by petitioner no. 1, it is clear that petitioner no. 2, did not force her to leave her matrimonial home, she left it due to harassment and torture inflicted on her by her husband and in-laws - Petitioner no. 1, was living at home of petitioner no. 2 on her free will on request of wife of petitioner no. 2, who was a close friend of petitioner no. 1 and petitioner no. 2, has not confined her to stay in his home - Ingredients of Section are not fulfilled, FIR quashed. (Para 9, 10, 12)

Writ Petitions Allowed. (E-13)

List of Cases cited:

1. Gabbu Vs St. of M.P., AIR 2006 SC 2461
2. Shahjahan Vs St., 2011 Cr.L.J. 573

(Delivered by Hon'ble Surendra Singh-I, J.)

1. Heard Sri Sanjay Kr. Srivastava, learned counsel for the petitioners, Sri Mithilesh Kumar Shukla, learned counsel for the informant and Sri G.P. Singh, learned A.G.A. for the State.

2. The present writ petition has been preferred with the prayer to quash the impugned first information report dated 17.02.2023 registered as Case Crime No. 77 of 2023 under Sections 366 I.P.C., Police Station- Rasulpur, District- Firozabad and for a direction to the respondents not to arrest or harass the petitioner no. 2, Suraj in pursuance of the impugned first information report.

3. According to prosecution case, informant Shyam Sundar's wife, Neetu, is

the resident of Tea-Huts No. 2296, Sonia Camp, G.T. Road, Jhilmil Industrial Area, near Dilshan Garden, Metro Station, Shahdara, Old Delhi. On 12.02.2023 at 1.30 p.m., informant's younger brother dropped Neetu along with her two sons, namely, Sangam, aged 8 years and Sushank, aged 6 years on bus at Asafabad Chauraha for Agra. Since then, the whereabouts of Neetu is not known. The informant's wife, Neetu was in love affair for a long duration with petitioner no. 2, Suraj, resident of Shahdara, old Delhi, who was posted as House Keeping Supervisor at Dilshad Garden, Metro Station. His wife often used to have conversation with Suraj on her mobile. The informant had earlier also found Neetu in the house of accused Suraj but he had brought Neetu back to his home. On the written statement of the informant, the first information report was lodged against petitioner no. 2, Suraj.

4. It has been submitted by learned counsel for the petitioners that the first information report has been lodged after a delay of about 5 days without any explanation which is clearly an afterthought and consultation with apparently false allegations. It has been next submitted that petitioner no. 2, Neetu has filed an affidavit supporting the petitioners case that her husband, Shyam Sundar and her in-laws used to harass and torture her. She came to her parental home but her parents could not give her any help. It is also submitted that under compelling circumstances, petitioner no. 1, Smt. Neetu has taken shelter with the petitioner no. 2, Suraj with her free consent. Petitioner no. 2, Suraj has not abducted petitioner no. 1, Smt. Neetu by forceful compulsion or inducement to leave her matrimonial home to marry her against her will or for illicit intercourse, thus, no offence u/s 366 I.P.C. is made out.

5. Petitioner no.1, Smt. Neetu has also deposed in her affidavit that on 10.12.2021, she was ousted from the house of her in-laws. Thereafter, she started living with her two children in a rented house at Partapur, District- Meerut. Later on, informant came there to the house of petitioner no. 1, Smt. Neetu and after seeking excuse, started living with her at Partapur in a rented house but due to dispute, informant came back to his native place, leaving petitioner no. 1, Smt. Neetu and her two children alone at Partapur, Meerut. Petitioner no. 1, Smt. Neetu has also deposed that Smt. Dolly, wife of petitioner no. 2 has close friendly relation with her since her school period and as such only with a view to provide her shelter, wife of petitioner no. 2 permitted petitioner no. 1, Smt. Neetu to live at the house of petitioner no. 2, Suraj since first week of January, 2023. The petitioner no. 2, Suraj has no concern with the alleged offence.

6. Per contra, learned A.G.A. representing the State has opposed the petition and submitted that petitioner no. 1, Smt. Neetu and petitioner no. 2, Suraj, both are married, having two children each. Petitioner no. 2, Suraj cannot be granted any indulgence as he is living with petitioner no. 1, Smt. Neetu who is a married woman with two children. However, learned A.G.A. could not deny the submissions advanced on behalf of the petitioners that petitioner no. 1, Smt. Neetu is major and she has left her matrimonial home on her own sweet will.

7. To ascertain whether prima facie, offence u/s 366 I.P.C. is made out, it is necessary to peruse Sections 362 and 366 I.P.C. which are quoted hereunder :-

362. Abduction.Whoever by force compels, or by any deceitful means

induces, any person to go from any place, is said to abduct that person.

Ingredients :- This section requires two things :-

(1) *forceful compulsion or inducement by deceitful means;*

(2) *the object of such compulsion or inducement must be the going of a person from any place.*

The expression "deceitful means" includes a misleading statement. It is, really speaking, a matter of intention. The intention of the accused is the basis and gravamen of the charge. If the consent of the person is freely and voluntarily given, there will be no abduction. Unlike kidnapping, abduction as defined u/s 362 I.P.C. is not an substantive offence under the Code but abduction is an auxiliary act and is made criminal and punishable only when it is done with one or other intention specified in Section 366 I.P.C.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or

knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.

Ingredients :- This section requires :-

(1) kidnapping or abducting of a woman;

(2) such kidnapping or abduction must be -

(i) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or

(ii) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse; or

(iii) by means or criminal intimidation or otherwise by inducing any woman to go from any place with intent that she may be, or knowing that she will be forced or seduced to illicit intercourse.

Section 366 I.P.C. only applies when the woman abducted has no intention of marriage or lawful intercourse when abducted. Mere abduction does not bring the accused under the ambit of this penal section.

In **Gabbu Vs. State of M.P., AIR 2006 SC 2461**, the Apex Court has held that so far as the charge u/s 366 I.P.C. is concerned, mere finding that a woman was abducted is not enough. It must further be proved that the abduction is for the purposes mentioned in Section 366 I.P.C.

In **Shahjahan Vs. State, 2011 Cr.L.J. 573**, the Apex Court has held :-

"In order to establish an offence u/s 366 I.P.C., it must first be established that the offence of kidnapping under Section 361 I.P.C. or abduction under Section 362 I.P.C. has been proved. It must then be shown that such kidnapping or abduction was with the contumacious intent referred to under Section 366 I.P.C."

8. The essential condition for the application of Section 366 I.P.C. is that there is kidnapping or abduction of a woman with the intention to compel her or knowing it to be likely that she will be compelled to marry any person against her will or will be forced or seduced to illicit intercourse.

9. From the affidavit filed by petitioner no. 1, Smt. Neetu, it is obvious that petitioner no. 2, Suraj did not force or induce her to leave her matrimonial home but she left it due to the harassment and torture inflicted on her by her husband, Shyam Sundar and her in-laws. From her affidavit, it is also clear that petitioner no. 1, Smt. Neetu is living at the home of petitioner no. 2, Suraj on her free will on the request of Smt. Dolly, wife of petitioner no. 2, who was a friend of petitioner no. 1, Smt. Neetu and petitioner no. 2, Suraj has not restrained or confined her to stay in his home.

10. In such view of the matter, we find that the essential ingredients of Section 362 I.P.C. or even Section 366 I.P.C. are not fulfilled against the petitioner no. 2, Suraj.

11. Under these facts and circumstances of the case, we are inclined to allow the writ petition.

12. Accordingly, the writ petition stands allowed. The First Information Report dated 17.02.2023 registered as Case Crime No. 77 of 2023 under Sections 366 I.P.C., Police Station-Rasulpur, District- Firozabad as well as all consequential proceedings are hereby quashed.

(2023) 5 ILRA 1379
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SURENDRA SINGH-I, J.

Crl. Misc. Writ Petition No. 4318 of 2023

Prachi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Neeraj Kumar Pandey

Counsel for the Respondents:
 G.A., Sri Shiv Sagar Singh

Criminal Law - Indian Penal Code, 1860 - Sections 366 & 368 - Quashing of FIR - Kidnapping, abducting or inducing woman to compel her marriage - Allegation against petitioner that he enticed and abducted the daughter of informant from her home with intention of marrying her against her wishes, confines her at some place - St. opposed the prayer - Held, petitioner no. 1, in her affidavit St.d that she was a major girl, fell in love with petitioner no. 2, accused - Her marriage with another person was arranged and fixed by her father - Therefore, she was not happy, had love affair for the last one year with accused and had gone to house of accused with her own will - Ingredients of above Sections are not fulfilled, FIR quashed. (Para 7, 14, 16)

Writ Petitions Allowed. (E-13)

List of Cases cited:

1. Birbal Chaudhary Vs St. of Bihar, AIR 2017 SC 4866
2. Gabbu Vs St. of M.P., AIR 2006 SC 2461
3. Shahjahan Vs St., 2011 Cr.L.J. 573

(Delivered by Hon'ble Surendra Singh-I, J.)

1. Heard Sri Neeraj Kumar Pandey, learned counsel for the petitioners, Sri Shiv Sagar Singh, learned counsel for the informant and Smt. Manju Thakur, learned A.G.A. for the State.

2. Learned A.G.A. pointed out that Section 368 I.P.C. has been added during the course of investigation.

3. Learned counsel for the petitioners submits that he may be permitted to correct the prayer clause.

4. Prayer is allowed.

5. He may do so during the course of the day.

6. The present writ petition has been preferred with the prayer to quash the impugned first information report dated 03.03.2023 registered as Case Crime No. 129 of 2023 under Sections 366, 368 I.P.C., Police Station- Tronica City, District- (Commissionerate) Ghaziabad, and for a direction to the respondents not to arrest the petitioner no. 2, Ashish Chauhan in pursuance of the impugned first information report.

7. According to prosecution case, on 01.03.2023 at 11.45 p.m., petitioner,

Ashish Chauhan, enticed and abducted the daughter of informant, Prachi aged 21 years from her home with the intention of marrying her against her wishes. Knowing that Prachi has been abducted, he wrongfully conceals and confines her at some place.

8. Submission of learned counsel for the petitioners is that the petitioner no. 1, Prachi as per the age given in the first information report itself, the alleged victim, Prachi is 21 years old and she had filed her affidavit in support of the present petition. Therefore, no offence u/s 366 I.P.C. has been made out as there is no inducement. Since no offence under Section 366 I.P.C. is made out hence there shall not be any offence u/s 368 I.P.C. as well. Petitioner no. 1, Prachi Tyagi had given an application dated 13.03.2023 (Annexure No. 4) to the Investigating Officer, P.S.-Tronica City, District- Ghaziabad to the effect that her father had settled her marriage with another person against her wishes. Therefore, she was unhappy. She had gone to the house of the petitioner no. 2, Ashish Chauhan on her own sweet will on 001.03.2023 and petitioner no. 2, Ashish Chauhan had not induced or enticed her from her house for marriage. The story given in the F.I.R. is fully false and fabricated.

9. The deponent of the present petition and petitioner no. 1, Prachi, is present before this Court who has been identified by learned counsel for the petitioners.

10. Per contra, learned counsel for the informant opposing the petition submits that the petitioner no. 2, Ashish Chauhan is a minor and there is no good ground to quash the impugned first information report.

11. Learned A.G.A. has opposed the prayer. However, she could not dispute the facts and has fairly submitted that as per instructions, according to C.B.S.E. certificate, the date of birth of petitioner no.1, Prachi is 01.01.2002 and therefore, she is major.

12. Before proceeding, it would be appropriate to take note of Sections 359, 362, 366 and 368 I.P.C. which are quoted hereunder :-

359. *Kidnapping.*?Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.

362. *Abduction.*?Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Ingredients :- This section requires two things :-

(1) forceful compulsion or inducement by deceitful means;

(2) the object of such compulsion or inducement must be the going of a person from any place.

The expression "deceitful means" includes a misleading statement. It is, really speaking, a matter of intention. The intention of the accused is the basis and gravamen of the charge. If the consent of the person is freely and voluntarily given, there will be no abduction. Unlike kidnapping, abduction as defined u/s 362 I.P.C. is not an substantive offence under the Code but abduction is an auxilliary act and is made criminal and punishable only when it is done with one or other intention specified in Section 368 I.P.C.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc. *?Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.*

Ingredients :- This section requires :-

(1) kidnapping or abducting of a woman;

(2) such kidnapping or abduction must be -

(i) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or

(ii) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse; or

(iii) by means or criminal intimidation or otherwise by inducing any woman to go from any place with intent

that she may be, or knowing that she will be forced or seduced to illicit intercourse.

Section 366 I.P.C. only applies when the woman abducted has no intention of marriage or lawful intercourse when abducted. Mere abduction does not bring the accused under the ambit of this penal section.

In **Gabbu Vs. State of M.P., AIR 2006 SC 2461**, the Apex Court has held that so far as the charge u/s 366 I.P.C. is concerned, mere finding that a woman was abducted is not enough. It must further be proved that the abduction is for the purposes mentioned in Section 366 I.P.C.

In **Shahjahan Vs. State, 2011 Cr.L.J. 573**, the Apex Court has held :-

"In order to establish an offence u/s 366 I.P.C., it must first be established that the offence of kidnapping under Section 361 I.P.C. or abduction under Section 362 I.P.C. has been proved. It must then be shown that such kidnapping or abduction was with the contumacious intent referred to under Section 366 I.P.C."

368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person. *?Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.*

Ingredients :- To constitute an offence u/s 368 I.P.C., it is necessary to establish the following ingredients :-

(1) the person in question has been kidnapped/abducted;

(2) the accused knew that the said person has been kidnapped/abducted;

(3) the accused having such knowledge wrongfully conceals or confines the person concerned;

This section does not apply to the principal offender but to those persons who assist him in concealing a kidnapped or abducted person. The kidnapper cannot be convicted under this section.

13. In **Birbal Chaudhary Vs. State of Bihar, AIR 2017 SC 4866**, the Apex Court has held :

"the other party who wrongfully conceals or confines a kidnapped person knowing that he has been kidnapped, suffers the same consequences at par with the person who had kidnapped or abducted the person with the same intention or knowledge or for the same purpose."

14. Petitioner no. 1, Prachi in her affidavit has stated that she is a major girl, seriously fell in love with petitioner no. 2, accused/Ashish Chauhan. The father of the petitioner no. 1 has arranged and fixed her marriage with another person on 01.03.2023. Therefore, the petitioner no. 1, Prachi, was not happy with the marriage with another person. She had gone to the house of petitioner no. 2, accused/Ashish Chauhan with her own sweet will on 01.03.2023. Petitioner no. 1, Prachi, had love affair with petitioner no. 2, accused/Ashish Chauhan for the last one year and she was living with him with her free will.

15. For an offence to be constituted u/s 366 I.P.C., a major woman should be enticed or taken away without her consent from her home but in the present case, the abductee had clearly stated that she was neither taken away nor enticed to leave her home by the petitioner no. 2, accused/Ashish Chauhan but she had left her home on her own free will as her father had arranged her marriage with another person whereas she had love affair with the petitioner no. 2 for the last one year and she wanted to marry him. Section 366 I.P.C. would come into play only where there is kidnapping or abduction of a woman for the purposes mentioned in Section 366 I.P.C. Likewise, Section 368 I.P.C. would come into play only where the kidnapped or abducted person is concealed or confined by the accused. Since petitioner no. 1, Prachi Tyagi was not abducted from her home, prima facie, offence u/s 368 I.P.C. has not been made out against the petitioner no. 2, accused/Ashish Chauhan.

16. In such view of the matter, we find that the essential ingredients of Section 366 I.P.C. or even Section 368 I.P.C. (added during the course of investigation) are not fulfilled as purely legal question is involved and there is no dispute about the fact that the victim is major and present before this Court.

17. Under these facts and circumstances of the case, we are inclined to allow the writ petition.

18. Accordingly, the writ petition stands allowed. The First Information Report dated 03.03.2023 registered as Case Crime No. 129 of 2023 under Sections 366, 368 I.P.C., Police Station- Tronica City, District- (Commissionerate) Ghaziabad as

well as all consequential proceedings are hereby quashed.

(2023) 5 ILRA 1383

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 13.04.2023

BEFORE

**THE HON'BLE ANJANI KUMAR MISHRA,
J.**

THE HON'BLE MS. NAND PRABHA SHUKLA, J.

CrI. Misc. Writ Petition No. 4451 of 2023

Vishal (Minor) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Balram Mishra

Counsel for the Respondents:

G.A.

Criminal Law - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 3(1) - Quashing of FIR - Age of petitioner was more than 16 years on the date of incident, but as the two base cases shown against the petitioner in gang chart do not come within the category of cases described under Rules 22 (2), 27 of U.P. Gangsters and Anti-Social Activities (Prevention) Rules, 2021 - As the said cases in the impugned gang chart are under Sections 379, 380 and 411 IPC, therefore, no action can be taken against him under the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Hence, direction to police authorities to delete the name of petitioner from gang chart. (Para 9, 10)

Writ Petitions Allowed. (E-13)

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard learned counsel for the petitioner and learned AGA for the State and perused the record.

2. By means of the instant writ petition, the petitioner has challenged the First Information Report dated 30.07.2022 giving rise to Case Crime No. 244 of 2022 under Section 3(1) of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station-Maholi, District-Sant Kabir Nagar.

3. The contention of learned counsel for the petitioner is that the petitioner was minor at the time of occurrence in regard to two base cases shown in the gang chart and has been falsely implicated under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. The details of criminal activities/base cases shown in the gang chart dated 24.07.2022 are as follows:

I. Case Crime No. 180 of 2022 under Section 379 IPC, Police Station-Maholi, District- Sant Kabir Nagar.

II. Case Crime No. 188 of 2022, under Sections 380, 411 IPC, Police Station-Maholi, District-Sant Kabir Nagar.

4. It has further been submitted that the petitioner has already been released on bail in Case Crime No. 180 of 2022 on 23.06.2022 and has been declared juvenile vide order dated 07.12.2022. The petitioner has also been released on bail in Case Crime No. 188 of 2022 on 23.06.2022. The counsel for the petitioner further argued that the petitioner was minor when the impugned FIR was registered, therefore, he cannot be booked under the said Act.

5. As per the High School Marksheet (Annexure ?3? to the writ petition), the date of birth of the petitioner is recorded as 09.10.2005 and on the date of incident his age was about 17 years and 21 days as per impugned FIR and was minor, therefore, cannot be prosecuted under the provisions of the U.P. Gangsters Act. It was further asserted that a ?minor? does not come within the purview of the word ?Person?. The word ?Person? does not include a child below 18 years of age, hence cannot be prosecuted.

6. Per contra, learned AGA for the State referred to the provisions of Section 11 of the Indian Penal Code defining the word ?Person? which reads as follows- The word ?Person? includes any company or association or body of persons whether incorporated or not.

7. However, after hearing both the parties, it is relevant to refer to Rule 27 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Rules, 2021 which reads as follows:-

?27. Act not applicable to minor generally:- *If the accused are minors and their age is less than 18 years, then they should not be included in the gang chart:- Provided that if the act of a juvenile falls under the category of offences mentioned in Rule 22 and his age is more than 16 years, then action can be taken against him under the relevant provisions of the Act, subject to the decision of the District Level Supervision Committee mentioned in Rule 64.?*

8. Rule 22 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Rules, 2021 which is also relevant reads as follows:-

?22. Criminal history not mandatory and sections of the Act can be imposed in the course of investigation:- *1. A single act/omission will also constitute an offence under the Act, the First Information Report may be registered on the basis of a single case i.e., it is not mandatory that any criminal history must be recorded and alleged before registering an offence under the Act.*

2. The Act may also come into force on a single prosecution in certain class of cases, such as-

if it appears that the gang has committed a single offence mentioned in Sections 302, 376D, 395, 396 or 397 of the Penal Code out of the offences mentioned in sub-clause (i) of clause (b) of Section 2 of the Act or sub-clauses (ii), (iii), (v), (vii), (x), (xii), (xiv), (xv), (xvii), (xviii), (xix), (xx) or (xxi) of clause (b) of Section 2 of the Act, which is presently under investigation, and the offence under this Act is being proved by collected evidence, then along with the criminal act under consideration, the gang-chart should also be approved by the concerned Commissioner of Police/District Magistrate involved in the investigation of the said offence and the provisions of the Act can be imposed while investigating both the offences together in accordance with the provisions of the Act. Further, the charge-sheet can be sent to the Special Court constituted under the Act.?

9. Thus, from the facts and circumstances as contended above and the proviso to Rule 27, it is obvious that the age of the petitioner was more than 16 years on the date of the incident, but as the base cases shown against the petitioner in the gang chart do not come within the category of cases described under Rule 22

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

1. Heard Sri B.R.Singh, learned counsel for the appellant and Mr A.A. Khan, learned counsel for respondents.

2. This appeal, at the behest of the claimant, challenges the judgment and order dated 18.11.1995 passed by M.A.C.T/4th-Additional District Judge, Mainpuri (hereinafter referred to as "Tribunal") in M.A.C.P. No. 60 of 1993 awarding a sum of Rs. 57,000/- as compensation with interest at the rate of 12%.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent-Insurance Company has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. Brief facts as culled out from the record are that on 15.09.1992, petitioner Dinesh Babu alongwith his brother Surya Prakash was going on a cycle on his left side of the road from his school Devnagari Inter College Kuraoli to his village Nanamau, as soon as at about 12:20 p.m he reached near Gailanath bridge on G.T.Road, a new chasis No. B.R. X-9252 came from Bhagaon side rashly and negligently ad without any alarm collided with the petitioner and his brother were seriously injured and their cycle was damaged. The petitioner and his younger brother Surya Prakash were driving cycle on correct side of the road.

5. The injured was 15 year old student. The tribunal has considered his income to be Nil, granted Rs. 15,000/-

towards loss of medical expenses, granted Rs. 2000/- towards attendant charges for past and future and Rs. 40,000/- towards pain, shock and sufferings and ultimately assessed the total compensation to be Rs. 57,000/-.

6. It is submitted by learned counsel for the appellant that no amount under the head loss of income has been granted by the Tribunal which is unjust and should be at least Rs.2,000/- per month. It is submitted that no amount is granted under the head of monthly loss to injured which is also unjust and should be at least 50%. It is submitted that no amount under the head of future loss of income has been granted. It is also submitted that the amount under the non-pecuniary heads and the interest awarded are also on the lower side and requires to be enhanced in view of the following authoritative pronouncements:

(i) Sanjay Kumar Vs. Ashok Kumar and another, (2014) 5 SCC 330;

(ii) Syed. Sadiq and others Vs. Divisional Manager, United India Insurance Company Limited, (2014) 2 SCC 735;

(iii) V. Mekala Vs. M. Malathi and another, (2014) 11 SCC 178; and

(iv) Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011.

(v) Hari Babu Vs. Amrit Lal and others, 2019 (2) T.A.C. 718 (All.).

(vi) Kajal Vs. Jagdish Chand reported in 2020 (0) AIJEL-SC 65725

7. Can additional interest be granted, the answer is no. The claimant is claiming

that his income was Rs. 25000/- p.a. There is 100% loss of injury. The tribunal has not considered what is the loss of earning capacity but 30 years have elapsed since 15 year old student become crippled.

8. As against this, it is submitted by Mr. A.A. Khan, learned counsel for the respondent that even in the year 1992 the notional income can be Rs. 18,000/-p.m. and not more, there is no 100% loss of income, the multiplier of 15 is just and proper and could be granted even if this Court feels that the claimant is entitled to the enhanced amount.

9. After hearing the counsel for the parties and perusing the judgment and order impugned, as he was a student, this Court feels that income with potential to earn can be considered to be Rs.1500/- per month. To which as the injured was 15 years at the time of accident, 50% of the income towards disability. Further, a lump sum of Rs. 50,000/- for medical expenses. As far as the amount under pain, shock and sufferings is concerned, Rs.50,000/- is granted.

10. Hence, the total compensation payable to the appellant is computed herein below:

- i. Income : Rs.1500/-
- ii. Percentage towards future prospects : 40% namely Rs.600/-
- iii. Total income : Rs. 1500 + 600 = Rs. 2100/-
- iv. Loss of earning capacity : 50% namely Rs. 1000/- (rounded up)

v. Annual loss : Rs. 1000 x 12 = Rs. 12000/-

vi. Multiplier applicable : 15

vii. Total loss : Rs. 12000 x 15 = Rs. 1,80,000/-

viii. Medical expenses : Rs. 50,000/-

ix. Amount under pain, shock and suffering : Rs.50,000/-

xiii. Total compensation : 2,80,000/-

11. As far as issue of rate of interest is concerned, it should be 7.5% from the date of filing of the claim petition till date.

12. No other grounds are urged orally when the matter was heard.

13. In view of the above, the appeal is partly allowed. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be deposited by the respondent-Insurance Company within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

14. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants

/claimants are neither illiterate or rustic villagers.

15. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another**) while disbursing the amount.

16. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

17. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India**

and others vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

18. Record be sent back to tribunal forthwith.

19. This Court is thankful to both the learned Advocates for ably assisting this Court.

(2023) 5 ILRA 1388
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2023
BEFORE

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

First Appeal From Order No. 1054 of 1995

Yogendra Nath Upadhyaya & Anr.
...Applicants

Versus
Sailesh Kr. Singh & Ors. ...Respondents

Counsel for the Applicants:
 Sri A.K. Pandey

Counsel for the Respondents:
 Sri Kameshwar Singh, Sri Amaresh Sinha,
 Sri Sushil Kumar Mehrotra

Civil Law - Motor Vehicle Act- Sections 166 & 140-Accident due to joint negligence of jeep and tractor drivers-deceased was 60 years-was agriculturist -earning Rs. 2000/- p.m.-tribunal considered the income to be Nil-Tribunal held claimant entitled to amount on only no fault liability basis-wrong-amount u/s 140 is under no fault liability and is independent of sec.166-case of composite negligence-deceased was not tort feisor -both drivers negligent-amount be apportioned between the two tort

feasors -income considered Rs. 15,000/- per annum-head of non-pecuniary damages-multiplier of 5-no addition in future prospects.

Appeal partly allowed. (E-9)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 105

2. First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors.)

3. Khenyei Vs New India Assurance Co. Ltd. & ors., 2015 LawSuit (SC) 469

4. Deepal Girishbhai Soni & ors. Vs United India Insurance Co. Ltd. (2004) 5 SCC 385

5. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

6. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 29

7. Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna & ors. Vs Hari Singh & anr.)

8. First Appeal From Order No.2871 of 2016 (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.) decided on 19.3.2021

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

1. Heard Sri A.K.Pandey, learned counsel for the appellants, Sri Sushil Kumar Mehrotra, learned counsel for respondent no. 2/New India Insurance Co. Ltd., and Sri Amresh Sinha, learned counsel for the respondentNo.4/United India Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and order dated 21.8.1995 passed by Motor Accident Claims Tribunal/5th-Additional

District Judge, Ballia (hereinafter referred to as 'Tribunal') in M.A.C. No. 2 of 1991.

3. Brief facts as culled out from the record are that on 14.10.1990 at about 3:00 p.m deceased Thakurji Upadhaya was returning from Ballia to his house in a jeep bearing no. B.H.N. 793, when the jeep reached near Hanuman Chatti at Ballia Sikandarpur marg, a Tractor bearing No.U.R.I. 732 hit the jeep from front. Accident occurred due to joint negligence of jeep and tractor drivers and as a result of which Thakurji Upadhaya died on the spot.

4. The deceased was 60 years of age at the time of accident. He was an agriculturist and was earning Rs.2,000/- p.m. He was survived by his two sons. The Tribunal has considered his income to be Nil, granted Rs.50,000/- as the total compensation. The Tribunal held both the drivers namely driver of the jeep in which the deceased was travelling and the driver of the tractor 50:50% negligent.

5. Learned counsel for the appellant has submitted that the deceased was an agriculturist and was earning Rs. 2000/- p.m, but the Tribunal has considered his income to be Nil and it should be considered to be Rs.15,000/- per annum. It is further submitted that the Tribunal neither granted any amount for future loss of income of the deceased nor any amount is awarded under non-pecuniary heads which should be as per the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 105.**

6. It is submitted by both the counsels for respondent nos.2 and 4 that the quantum of compensation and the interest awarded by the Tribunal is just and proper

and does not call for any interference by this Court.

7. Having heard the learned counsel for the parties, let us consider the negligence from the perspective of the law laid down.

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

9. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

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

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or

doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

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

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads

unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

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

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

new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (**per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840**).

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

emphasis added

11. The Apex Court in Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469 has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feorsors. In a case of accident caused by negligence of joint tort feorsors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always

joint and several. The extent of negligence of joint tort feors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in **T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]** has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to

his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory

negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in **Challa Bharathamma & Nanjappan (supra)** has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tortfeasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or

appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor

should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

emphasis added

12. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident.

13. There is a fallacious belief of the learned Tribunal in holding that if claim petition under Section 140 read with Section 166 M.V. Act is filed, the claimants are entitled to amount on only no fault liability basis and the Presiding Officer holds that the learned Advocate for the claimants opted for getting the amount only under Section 140 of the M.V. Act, this could not have been the mandate of the legislation. The finding to this effect is bad in the eye of law. The provisions of Section 140 of M.V. Act is read as follows:

"140. Liability to pay compensation in certain cases on the principle of no fault.--

(1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in

respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of 1[fifty thousand rupees] and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of 2[twenty-five thousand rupees].

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement. 3[(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force: Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163A.]"

It is now a cardinal principle enunciated by the Apex Court that amount

under Section 140 of M.V. Act is under no fault liability and is independent of Section 166 of M.V. Act. The difference if the claim petition is filed under Section 163A and 166 of M.V. Act, the claimants will have to choose as per the judgment of **Deepal Girishbhai Soni And Ors vs United India Insurance Co. Ltd. (2004) 5 SCC 385**, therefore this appeal will have to be allowed on this short ground. It was a case of composite negligence, the deceased was not tortfeasor and therefore deducting the amount is also again fallacious finding of facts.

14. The finding of fact that both the drivers were negligent is upheld by this Court, the amount would be apportioned between the two tortfeasors though normally this should not be done but in this case when there are two insurance companies who have been saddled with liability they both shall deposit compensation as per the negligence namely 50% each of total compensation.

15. This takes this Court to the issue of compensation. The income of the deceased in the year of accident and looking to his profession can be considered to be Rs.15,000/- per annum. As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/-. As far as multiplier is concerned it should be of 5. The sons though may be major are legal representatives and hence entitled to compensation, there can be no addition in future prospects.

16. Hence, the total compensation payable to the appellants is computed herein below:

i. Income: Rs.15,000/- p.a

ii. Income after deduction of personal expenses : Rs. 7500/-

iii. Multiplier applicable : 5

iv. Loss of dependency: Rs.7500 x 5 = Rs.37,500/-

v. Amount under non-pecuniary head : 30,000/-

vi. Total compensation : 67,500/-

17. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

18. No other grounds are urged orally when the matter was heard.

19. 1 In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from

today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited. The Insurance Company who will deposit the entire amount can have their right to recover the amount from owner and the Insurance Company of the other vehicle. As far as deceased is concerned, it is a case of composite negligence, hence, the amount cannot be deducted from the compensation awarded to the claimants who are the heirs of a non tort-feasor.

20. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291 and this High Court in** , total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016 (**Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.**) decided on 19.3.2021 while disbursing the amount.

21. This Court is thankful to the learned Advocates for ably assisting this Court.

(2023) 5 ILRA 1396
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Government Appeal No. 845 of 2018

State of U.P. ...Appellant
Versus
Panna Lal ...Opposite Party

Counsel for the Appellant:
 G.A., Sri Hari Pratap Singh

Counsel for the Opposite Party:

Criminal Law - Indian Penal Code, 1860 - Section 304 - The Code of Criminal Procedure, 1973 - Section 313 - Appeal against acquittal - Circumstantial Evidence - FIR was lodged on 05.01.2017, alleging that accused had killed his father, who was around 90 years of age - Accused pressurised his father to give money to him so that he could buy liquor - Charges framed, acquitted - St. argued that PW-2 had actually seen the crime being committed - Held, unless the view taken by Trial Court was a view which could not have been possibly taken on the basis of evidence available on record, it cannot be said that view taken by Trial Court was not a reasonably possible view - Perusal of St.ments of witnesses shows that findings of Trial Court were appropriate - Trial Court's view was definitely a possible view, not perverse - Hence, appeal dismissed. (Para 2, 7, 10)

Appeal Dismissed. (E-13)

List of Cases cited:

1. Sharad Birdhi Chand Vs St. of Mah., reported in 1984 (4) SCC 116

2. Murlidhar @ Gidda & Anr. Vs St. of Karn., reported in (2014) 5 SCC 730

(Delivered by Hon'ble Manish Kumar
Nigam, J.)

1. Heard Shri Haripratap Gupta and learned A.G.A. for the State and also perused the record.

2. A First Information Report was lodged on 05.01.2017 alleging that in the previous night the accused had killed Ramnath the father of the accused and the informant. The father of the accused Panna Lal Kushwaha, it has been stated the informant Vijay, was around 90 years of age and was being all the time pressurised by the accused Panna Lal to give money to him so that he could buy liquor, etc. It has also been stated in the First Information report that the brother of the first informant was a little mentally disbalanced. Upon the First Information Report being lodged, Case Crime No. 14 of 2017 under Section 304 IPC was registered. Investigation followed and thereafter charge-sheet was submitted. Thereafter the Court framed charges and trial commenced. After the trial when the case resulted in acquittal, the State filed the instant Government Appeal.

3. In the trial Court from the side of the prosecution PW-1 Vijay Kushwaha, PW-2 Keshav Khan, PW-3 Constable Ajay Kumar, PW-4 Dr. Parutosh Shukla, PW-5 Sub-Inspector Vijay Singh Yadav, PW-6 Sub-Inspector Nitesh Kumar were examined. Documentary evidence were there in the form of FIR, Chick Report, Spot Inspection, Panchayat Nama, Naksha

Photonash, Challan of the dead body and the Post Mortem Report.

4. The accused has given his statement under Section 313 Cr.P.C. and had denied the committing of the crime.

5. In his statement before the trial Court PW-1 who was the first informant had stated that the accused was staying with the deceased (father) and because PW-1 was all the time afraid of the fact that the accused Panna Lal would also indulge in Marpeet with him he used to stay away from the family. He has also stated that Panna Lal, the accused used to indulge in various types of intoxication and for that purpose he used to always demand money from his father and when that money was not given to him he used to indulge in Marpeet.

6. In the night of 04/05.01.2017 it was stated by him that Panna Lal had beaten the deceased Ramnath black and blue and when the first informant reached the house of the deceased in the morning he had found that the father was still breathing and he had also uttered that the Panna Lal had beaten him. The first informant had therefore rushed with his father to the hospital where he died on the way and consequently thereafter he had gone to lodge the First Information Report. PW-2 is another witness of fact. He has stated that he was having his lock and key shop in the neighborhood and in the night of 4/5.1.2017 he had crossed the house of the deceased Ramnath and had heard some verbal altercation taking place between the father and the son. The other prosecution witnesses were formal police witnesses. However, the learned A.G.A. since had laid stress on the statement of PW-4, who had proved the Post Mortem Report and had

brought to the notice of the trial Court, the 12 injuries which were found on the body of the deceased. The PW-5 again is the Sub-Inspector who has proved the First Information Report and he was also the Investigating Officer.

7. The court below after dealing with all the evidence which were led before it, concluded that the case was that of circumstantial evidence and after relying upon the case of **Sharad Birdhi Chand vs. State of Maharashtra, reported in 1984 (4) SCC 116** had found that as all the links to prove that the crime which had been committed by the accused were not being found the case had to result in an acquittal. It has also stated that substantially evidence were not such which would lead to the only conclusion that the crime had taken place on account of the fact that the accused had pre-planned the crime and thereafter had committed the same.

8. Learned A.G.A. has argued that if the evidence which was there before the trial Court was looked into and specially the statement of PW-2 Keshav Khan then it would be clear that Keshav Khan had actually seen the crime being committed.

9. Having heard learned A.G.A. and after having gone through the record, the Court is of the view that the view taken by the trial Court was a possible view.

10. On a careful perusal of the judgment on record, we find that it cannot be said that the view taken by the Trial Court was perverse or unreasonable. Simply because another view might have been taken on the evidence available would not give us any ground for interfering with the order of acquittal. Unless the view taken by the Trial Court was a view which could not have been possibly taken on the basis of the evidence available on record, it

cannot be said that the view taken by the Trial Court was not a reasonably possible view. In fact, the perusal of the statements of the witnesses definitely shows that the findings of the Trial Court were appropriate.

11. This Court which is sitting in appeal over a judgment of acquittal as per the judgment of the Supreme Court in **Murlidhar alias Gidda & Anr. vs. State of Karnataka** reported in 0 can only interfere in an appeal if the view taken by the Trial Court was not a view which was possible. Considering the inconsistencies, improvements and also the fact that essential ingredients to constitute the offence charged against the accused were not found to be proved beyond reasonable doubt, we are of the view that the Trial Court's view was definitely a possible view. Hence, the instant appeal is liable to be dismissed.

12. Under such circumstances, the Court is of the view that there is absolutely no error in the assessment of the Trial Court.

13. In view of the aforesaid, the appeal is dismissed at the admission stage itself and no leave to appeal is being granted.

(2023) 5 ILRA 1398

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.04.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ Tax No.4 of 2022

And

Writ Tax No.5 of 2022

**M/s Diamond Steel, Fatehpur ...Petitioner
Versus**

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

Counsel for the Petitioner:

Sri Aloke Kumar

Counsel for the Respondents:
C.S.C.

A. Tax Law – Assessment - U.P. Goods and Services Tax Act, 2017 - Sections 67 & 74 - For taking recourse to Section 74, it is essential that along with search and seizure report, certain specific averment is made w.r.t. the supply of goods and the non-payment of tax coupled with the fact that the same should be by reasons of fraud, willful misstatement or suppression of facts and an intent to evade the tax. The adjudicating authority clearly erred in assessing and quantifying the demand and levying the penalty by taking recourse to some guidelines issued by the Income Tax Authorities (sole basis for issuance of the show cause notice was the SIB report, which finds mention in the notice as well as the additional notice) which is impermissible while determining the tax liability u/s 74. The order of the appellate authority is even further bad in law as it discloses no reason, whatsoever for assessing the tax and quantifying the liability. While on the one hand, the appellate authority disapproved the manner in which the adjudicating authority had assessed and quantified the demand of tax and penalty, in the same breath, he proceeds to quantify the tax and imposed penalty without disclosing any reasons whatsoever. (Para 15)

B. Distinction between assessment u/Ss 73 and 74 is that Section 73 prescribes for normal determination of tax and Section 74 prescribes for determination of tax not paid for the reasons of fraud, willful misstatement or suppression of facts coupled with intent to evade payment of tax. It is clear in the present case that department has taken recourse to Section 74 for assessing the demand of tax and penalty leviable. (Para 12)

The manner in which the demand has been raised and quantified is not in consonance with the mandate of Section 74 and thus on the ground alone, impugned appellate orders as well as the adjudicating authority's orders are liable to be quashed. (Para 16)

Writ petition allowed. (E-4)

Present petition challenges order dated 03.06.2021, passed by the Deputy Commissioner, Commercial Tax – Sector-1, Fatehpur, as well as the order in appeal dated 13.07.2021 preferred against the order dated 03.06.2021.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Both the said writ petitions arise out of the similar proceedings against the

2. For the sake of brevity, the facts of Writ Tax No.4 of 2022 are being recorded.

3. By means of the said writ petition, the petitioner challenges the order dated 03.06.2021 passed by the respondent no.3 as well as the order in appeal dated 13.07.2021 preferred against the order dated 03.06.2021.

4. The facts in brief are that the petitioner is a partnership concern and is duly registered with the GST Department. The petitioner claims that all the inwards and outwards supply was duly reflected on the portal of the department and the petitioner uploaded the supply made by him in GSTR-1 and after claiming the Input Tax Credit as reflected in GSTR-2A, filed his return in the form of GSTR-3B claiming the benefit of Input Tax Credit. It is argued that the returns filed were accepted and were never questioned and no proceedings were initiated in the case of the petitioner.

5. It is argued that an inspection was carried out on the business premises of the petitioner on 31.10.2019 and a Panchanama was drawn wherein the stock present in the business premises was recorded and certain papers were seized in exercise of powers under Section 67 of the GST Act.

6. The contention of the Counsel for the petitioner is that the search and seizure memo was not in accordance with law, however, the said issue is not agitated before this Court and no relief to that extent has been sought. It is stated that search and seizure was carried out by the SIB Authorities. The petitioner objecting to the manner in which the search and seizure was carried out, moved an application along with an affidavit on 18.12.2019 and thereafter nothing transpired. On 08.01.2021, the respondent no.3 issued a notice under Section 74 of the UPGST Act for the period July, 2017 to March, 2018 (Annexure-7 to the writ petition). It is argued that in the said notice, the date for filing the reply was mentioned as 22.01.2021 and, the date and the time for personal hearing was also mentioned as 22.01.2021 but the venue of personal hearing was not disclosed as is clear from the perusal of the notice (Annexure-7). Alongwith the said show cause notice, the petitioner was also supplied with the summary of show cause notice dated 08.01.2021 in the form of GST DRC-01 (Annexure-8).

7. It is argued that in the show cause notice, in the column indicating the brief fact of the case "Adverse material found in SIB" was mentioned and in the column of grounds for issuance of the show cause notice, it was again mentioned that "Adverse material found in SIB". The petitioner further argues that yet another notice was issued calling upon the petitioner to submit reply by 24.12.2020. In the said notice also, the report of the SIB was mentioned. It is argued that in all the notices, there is a reference to the SIB report, which was the foundation for issuance of the notice under Section 74, however, the said report was never supplied

to the petitioner. Despite that, the petitioner submitted his reply on 08.01.2021. It is specifically alleged that neither at the time of issuance of show cause notice nor on the date of hearing any evidence whatsoever was adduced against the petitioner, even the SIB reply was never produced, however, an order came to be passed on 03.06.2021 under Section 74 of the UPGST Act wherein the demand of tax and penalty was quantified against the petitioner at Rs.14,84,099.82/-. He draws my attention to the order passed under Section 74, wherein on the basis of the SIB report and the documents referred therein as well as some ex-parte submission by the department wherein it had claimed that 20% profit should be deemed to be appropriate, as against which, the Assessing Authority was of the view that even under the Income Tax Act, 1961, 8% profit would be an appropriate estimate and on the said basis quantified the demand and penalty against the petitioner. The petitioner preferred an appeal against the said order on various grounds. The appellate authority decided the appeal and partly allowed the same. While allowing the appeal held that on the basis of the provisions of the Income Tax Act, the manner of assessment done by the adjudicating authority cannot be justified, however, without disclosing any basis, whatsoever, quantified the tax and penalty at Rs.9,30,969.60/-. The said order is under challenge before this Court as the Appellate Tribunal has not yet been constituted.

8. The contention of the Counsel for the petitioner Sri Aloke Kumar is that for invoking the powers under Section 74, it is essential that all the documents proposed to be relied upon should be provided, which has not been done in the present case. He further argues that in terms of the mandate

of Section 74, it is essential that the demand of tax be quantified after considering the supply of goods, the time and value of supply and after recording that the petitioner did not pay the tax, which he was required to pay. He further argues that from the perusal of the order of the adjudicating authority as well as the appellate authority, it is clear that while adjudicating the issues, the department has assessed the demand and penalty on the basis of the best judgment assessment which is possible only when recourse is taken to Section 62 and the said best judgment assessment procedure is neither prescribed nor contemplated under Section 74.

9. The Counsel for the petitioner further argues that the recourse to the guidelines issued to the Income Tax Authorities cannot be invoked for completing the assessment as has been done by the adjudicating authority. He further argues that the appellate authority has not recorded any reasons whatsoever for quantifying the tax and penalty, although the same was substantially reduced from what was assessed by the adjudicating authorities.

10. Learned Standing Counsel, on the other hand, tries to justify the demand on the ground that on the basis of search and seizure carried out, huge quantity of the stock, which was not quantified property, was found in the business premises and on the said basis, the department has rightly assessed the duty and penalty against the petitioner.

11. Considering the said submissions at the bar, it is essential to note the scheme of the UPGST Act.

12. In terms of the provisions of the GST Act, the tax is leviable on the supply of goods as specified under Section 7 and

the said tax is to be paid at the time of supply of goods, which is clarified under Chapter IV of the UPGST Act. The value on which the tax is to be levied flows from Section 15 of the Act, which mandates the manner in which the value of the taxable supply is to be done. Chapter IX of the said Act prescribes for filing of the returns by the assessee and Chapter X mandates the payment of tax, interest, penalty and other amounts on the basis of the returns filed as prescribed under Chapter IX of the said Act. Chapter XIV of the Act confers the power on the authorized officers with regard to the inspection, search, seizure and arrest and Chapter XV prescribes for demands and recovery in respect of the tax not paid or short paid or erroneously refunded or input tax credit wrongly availed. The distinction between assessment under Sections 73 and 74 is that Section 73 prescribes for normal determination of tax and Section 74 prescribes for determination of tax not paid for the reasons of fraud, willful misstatement or suppression of facts coupled with intent to evade payment of tax. It is clear in the present case that department has taken recourse to Section 74 for assessing the demand of tax and penalty leviable.

13. The sole basis for issuance of the show cause notice under Section 74 was the SIB report, which finds mention in the notice as well as the additional notice served upon the petitioner. No material in the form of the SIB report was ever supplied to the petitioner as is contended by the petitioner specifically in the writ petition in paragraph 31. Although in the counter affidavit, it has been stated that the SIB report was never demanded by the petitioner, however, on the request of the assessee, the same was given at the time of assessment proceedings and he had submitted a return reply

against the said report. In the impugned order, there is no mention of SIB report being supplied to the petitioner or his counsel or consideration of the alleged reply while passing the impugned order.

14. Be that as it may, the fact remains that while passing the assessment order, the adjudicating authority assessed the demand of tax and levied penalty on the basis of some guidelines issued by the Income Tax Authorities and taking the mean average of 8%, which is wholly impermissible while adjudicating Section 74, the said manner of adjudication adopted by the respondents department can at best be termed as best judgment assessment which can be resorted to only under Section 62 and that too only in respect of the persons who have not filed the returns. In respect of the persons who have filed returns, Section 61(3) is very clear under which the department is duly empowered to take action under Sections 73 or 74, in case the returns furnished contain discrepancies and the assessee fails to take corrective measures in respect of the said discrepancies.

15. For taking recourse to Section 74, it is essential that along with search and seizure report, certain specific averment is made with regard to the supply of goods and the non-payment of tax coupled with the fact that the same should be by reasons of fraud, willful misstatement or suppression of facts and an intent to evade the tax. The adjudicating authority clearly erred in assessing and quantifying the demand and levying the penalty by taking recourse to some guidelines issued by the Income Tax Authorities which is impermissible while determining the tax liability under Section 74. The order of the appellate authority is even further bad in law as it discloses no reason, whatsoever for assessing the tax and quantifying the liability. While on the one hand, the appellate authority

disapproved the manner in which the adjudicating authority had assessed and quantified the demand of tax and penalty, in the same breath, he proceeds to quantify the tax and imposed penalty without disclosing any reasons whatsoever.

16. On the perusal of the adjudicating authority's order as well as the appellate order, the manner in which the demand has been raised and quantified is not in consonance with the mandate of Section 74 and thus on the ground alone, impugned appellate orders as well as the adjudicating authority's orders are liable to be quashed.

17. Accordingly, the appellate order dated 13.07.2021 and the order dated 03.06.2021 challenged in Writ Tax No.4 of 2022 and the appellate order dated 13.07.2022 and the order dated 09.06.2021 challenged in Writ Tax No.5 of 2022 are quashed.

18. Both the writ petition stand ***allowed***.

19. Any amount deposited by the petitioner shall be refunded to the petitioner on his moving an appropriate application in accordance with law.

(2023) 5 ILRA 1402
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ Tax No.1569 of 2022

And

Writ Tax No.1570 of 2022

M/s Lari Almira House, Gorakhpur

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Aloke Kumar

Counsel for the Respondents:

C.S.C.

A. Tax Law – Assessment of non-payment of tax - U.P. Goods and Services Tax Act, 2017 – Sections 74 & 104(4) - It is mandatory for the department to give the opportunity of hearing as per the Section 75(4) of the Act. It is equally well settled that any document proposed to be relied upon should be provided to the assessee prior to conclusion of the proceedings. (Para 17)

In the present case, the order dated 24.01.2022, clearly falls short of the principle of natural of justice as admittedly the SIB report, which is the foundation was never supplied to the petitioner, no hearing was granted to the petitioner u/s 75(4) of the Act and there is prima facie no material other than the SIB report to corroborate the discrepancies as allegedly found by the SIB at the time of scrutiny of returns and inspection. (Para 14, 18)

B. Mere report of inspection and discrepancy in the scrutiny of returns is not enough to assess and levy the tax, the said discrepancies, even if noticed by the department should be corroborated with materials in the form of either the evidence or in any other form as the department may deem fit. (Para 16)

Irrespective of the outcome of the scrutiny of return u/s 61 of the Act or the inspection carried out u/ s 67 of the Act, the burden of assessing the short payment of tax or wrong availment of input tax credit still lies on the department which is to be discharged by the department. (Para 15)

Section 74 from its plain reading confers the power to assess the non-payment of tax on the supply or wrong availment of input tax credit by the reasons of fraud, wilful misstatement or suppression of facts coupled with an intent to evade tax. For that it is essential that the

relevant evidence is carried out by the department in respect of the taxable supplies made by the assessee and non-payment of tax which is required to be done at the time of supply as specified u/s 13 of the Act. It is also incumbent on the department to compute the value of taxable supply on the goods on which it is alleged that the tax has either not been paid or short paid or short levied. In addition to the said, the burden is on the department to establish that the said non-payment was on account of fraud, wilful misstatement or suppression of facts. Without any corroborative material, merely on the basis of discrepancies found in the scrutiny of returns or discrepancies found during the inspection is not enough to assess the tax. (Para 16)

Writ petitions allowed. Matter remanded. (E-4)

Precedent followed:

M.P. Steel Corporation Vs Commissioner of Central Excise, 2015 (7) SCC 58 (Para 5)

Present petitions challenge the order dated 24.01.2022, passed u/s 74 of the U.P. G.S.T. Act as well as the order dated 30.09.2022, passed by the first appellate authority whereby the appeal was dismissed as beyond limitation.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Both the writ petitions are common in terms of the content and relate to the same assessee although for different years, as such, the same are being decided by means of this common order. For the sake of brevity, the facts of Writ Tax No.1570 of 2022 are being referred to.

2. Both the writ petitions have been filed challenging the order dated 24.01.2022 passed in exercise of the power under Section 74 of the U.P. G.S.T. Act against the petitioner as well as the order dated 30.09.2022 passed by the first appellate

authority whereby the appeal was dismissed as beyond limitation.

3. The contention of the counsel for the petitioner is that the appellate authority has erred in dismissing the delay condonation application, however he argues that in the event, this Court finds that the appellate court had rightly dismissed the application for extension of period of limitation, this Court should hear the matter in respect of challenge to the order dated 24.01.2022 on the grounds which are available for challenge of a quasi judicial order in exercise of the power under Article 226 of the Constitution of India, more so as the doctrine of merger would not apply as the appeal has been dismissed on the ground of limitation and not on merits.

4. On perusal of the appellate order (Annexure no.13), it is clear that the same has been dismissed as being beyond limitation prescribed under Section 104 (4) of the U.P. G.S.T.Act.

5. Considering the law which is clearly well settled by the Supreme Court in the case of **M.P. Steel Corporation vs. Commissioner of Central Excise 2015(7) SCC 58, I** do not find any error in the appellate order dated 30.09.2022, whereby the appeal was dismissed on the ground of limitation. However, this Court is to consider the validity of the order dated 24.01.2022 on the limited grounds which are available for judicial review under Article 226 of the Constitution of India as the order dated 24.01.2022 has not merged in the order dated 30.09.2022.

6. The facts, in brief, are that the petitioner claims to be an assessee and holds a valid registration under the U.P.

G.S.T. Act. It is claimed that the petitioner had uploaded the relevant documents of sale and inward supply and had claimed input tax credit in accordance with law, however, for the financial year 2017-18, an inspection was carried out by the Deputy Commissioner (SIB), Commercial Tax, Gorakhpur on 20.04.2018 and a Panchanama was prepared in pursuance to the inspection so carried out. The inspection report is on record as Annexure no.2 and 3.

7. It is argued that in terms of the said search and seizure, summons were issued to the petitioner under section 70 of the Act on 28.04.2018, the petitioner appeared in pursuance to the said summons and also filed a reply. Subsequently, after about three years on 02.09.2021, the petitioner was served with a show cause notice under section 74 of the U.P.G.S.T. Act on the basis of the SIB survey report. The said show cause notice is on record as Annexure no.8. Along with the said show cause notice, no relied upon documents were mentioned and the petitioner was not even supplied with a copy of the SIB report. The petitioner asked for adjournment and was waiting for the supply of the SIB report, however, an ex-parte order came to be passed on 24.01.2022 solely based upon the said SIB report (Annexure no.9).

8. The contention of the counsel for the petitioner is that the entire proceedings initiated against the petitioner on 02.09.2022 were based upon the SIB report and without supplying a copy of the SIB report, the petitioner was not in a position to file a reply to the show cause notice. He further argues that the order dated 24.01.2022 is an ex-parte order solely based upon the SIB report and without there being any effort of the department to

corroborate the same by means of any evidence whatsoever. He further argues that even if for the sake of argument, it is accepted that in the survey carried out by the SIB, there was some discrepancy in the recording of the materials, it is still incumbent upon the department to establish that the Tax was not paid on the supplies effected by corroborating the same by means of some evidence either in the form of evidences by the purchaser of the said goods or otherwise.

9. He draws my attention to argue that the G.S.T. is payable on supply of goods in terms of Section 7 of the U.P. G.S.T. Act and the time of payment of the tax is governed by Section 12 and 13 of the U.P. G.S.T. Act and the valuation of the supply of goods is to be done in terms of Section 15 of the U.P.G.S.T. Act, which admittedly has not been done as is clear from the perusal of the order dated 24.01.2022. He argues that it is well settled that any document based upon which the order intended is to be passed should be supplied to the assessee and any non-compliance thereof would render the order bad in law and also in violation of principle of natural justice. He lastly argues that improper returns only give the right to the department to initiate the proceedings under section 74 of the Act, in the light of section 61(3) of the U.P. G.S.T. Act. He also argues that in any event, no right of hearing was accorded to the petitioner which is a mandatory requirement under section 75(4) of the U.P.G.S.T. Act. Specific allegation with regard to non-supply of the SIB report has been made in paragraph 19, 36 and 38 of the Writ Petition.

10. Standing counsel, on the other hand, justifies the order dated 24.01.2022

by arguing that the SIB had found certain discrepancies in the search and seizure carried out at the premises of the petitioner and a copy of the search, seizure and panchnama are available with the petitioner. He further argues that in pursuance to the search and seizure carried out by the SIB, summons were also issued to the petitioner and the petitioner filed a reply to the said summons and thereafter the SIB had forwarded its report.

11. In reply to the contention of the counsel for the petitioner that the SIB report was not provided, it is stated in paragraph 28 of the counter affidavit that the petitioner never demanded the copy of the report and in any case, all important points mentioned in the report were mention in the show cause notice itself. It is further pleaded in paragraph 43 of the counter affidavit that the report was sent by the SIB on the basis of adverse facts found during the investigation by the SIB Unit and all important points in the SIB report were mentioned in the show cause notice.

12. With regard to the other contentions of the counsel for the petitioner, it has been especially stated in paragraph 42 of the counter affidavit that as the stocks found by the SIB at the time of survey were verified by the petitioner and due to variation of the stocks from the books of account by the trader, the stock has been treated as "condemn purchase'. It is further pleaded in paragraph 44 of the counter affidavit that the assessment of duty was done, on the basis of unverified records and stock by the SIB Unit, which has prepared the report on the basis of the verification and not on the basis of eye estimation and thus, on the said foundation, the demand has been created as per the Rules.

13. It is also pleaded that the petitioner was provided with several reasonable opportunities for hearing but no explanation was submitted, as such, an ex-parte order was passed.

14. In the light of the pleadings as referred above, what emerges is that an ex-parte order came to be passed against the petitioner on 24.01.2022, the foundation for passing the said order is the SIB report alone. No opportunity of hearing appears to have been granted to the petitioner nor is the same mentioned in the order dated 24.01.2022.

15. In terms of the scheme of the Act, the power of search and seizure is conferred by virtue of Section 67 of the Act and the power of scrutiny of returns filed is conferred upon the proper officer in terms of Section 61 of the Act. Both the said sections 61 and 67, are step towards the initiation of the proceedings either under Section 73 or Section 74 of the Act, as the case may be. They in itself do not form any basis for concluding the evasion of tax, which has to be established by following the procedure as prescribed under section 73 and under section 74 of the Act as the case may be. Section 74 from its plain reading confers the power to assess the non-payment of tax on the supply or wrong availment of input tax credit by the reasons of fraud, wilful misstatement or suppression of facts coupled with an intent to evade tax. Irrespective of the outcome of the scrutiny of return under section 61 of the Act or the inspection carried out under section 67 of the Act, the burden of assessing the short payment of tax or wrong availment of input tax credit still lies on the department which is to be discharged by the department.

16. To calculate and assess the non-payment of tax, it is essential that the relevant

evidence is carried out by the department in respect of the taxable supplies made by the assessee and non-payment of tax which is required to be done at the time of supply as specified under section 13 of the Act. It is also incumbent on the department to compute the value of taxable supply on the goods on which it is alleged that the tax has either not been paid or short paid or short levied. In addition to the said, the burden is on the department to establish that the said non-payment was on account of fraud, wilful misstatement or suppression of facts. Mere report of inspection and discrepancy in the scrutiny of returns is not enough to assess and levy the tax, the said discrepancies, even if noticed by the department should be corroborated with materials in the form of either the evidence or in any other form as the department may deem fit. Without any corroborative material, merely on the basis of discrepancies found in the scrutiny of returns or discrepancies found during the inspection is not enough to assess the tax.

17. It is also incumbent upon the department to give the opportunity of hearing as per the Section 75(4) of the Act which is mandatory to be followed by the department. It is equally well settled that any document proposed to be relied upon should be provided to the assessee prior to conclusion of the proceedings.

18. In the present case, the order dated 24.01.2022, clearly falls short of the principle of natural of justice as admittedly the SIB report, which is the foundation was never supplied to the petitioner, no hearing was granted to the petitioner under section 75(4) of the Act and there is prima facie no material other than the SIB report to corroborate the discrepancies as allegedly found by the SIB at the time of scrutiny of returns and inspection.

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19. Thus, on all the three grounds, as noted above, the impugned order dated 24.01.2022 is unsustainable and is quashed. The matter is remanded to the adjudicating authority to pass a fresh order after supplying the copy of the SIB report and giving an opportunity of hearing to the petitioner and also an opportunity of filing a reply.

20. Both the writ petitions stand allowed in terms of the said order.

(2023) 5 ILRA 1407
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

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

Special Appeal No. 136 of 2023

**District Basic Education Office, Gorakhpur
& Ors. ...Appellants**

Versus

**Committee of Management Karwal Devi
Kanya Laghu Madhyamik Vidhyalaya
Karwal Majhgawan, Gorakhpur & Anr.
...Respondents**

Counsel for the Appellants:
Sri Nagendra Kumar Pandey

Counsel for the Respondents:
Sri Indra Raj Singh

**A. Civil Law - Service Matter - Amendment
in Rules - Effect - Selection process for the
post of Headmistress of a recognized and
aided Junior High School, administered by
a private Management - U.P. Recognized
Basic Schools (Junior High Schools)
(Recruitment and Conditions of Service of
Teachers) Rules, 1978 - amendment to the
Rules of 1978 by the 7th Amendment
Rules w.e.f. 04.12.2019 - 7th Amendment**

**Rules, enforced w.e.f. 04.12.2019,
withdrew the power of selection from the
Managements of non-government aided
Junior High Schools, vesting it in a
Selection Board. There is nothing to show
that these have retrospective operation.
Selection process commenced under the
existing Rules remains unaffected by any
change or amendment to the Rules, unless
the amended Rules, expressly or by
necessary implication, have retrospective
effect.**

**B. In the instant case, post of
Headmistress of the Institution fell
vacant. BSA granted the permission on
08.03.2019, authorizing the Institution to
advertise the post of Headmistress and
complete the process of selection. Post of
Headmistress advertised on 09.03.2019.
Interviews were held on 10.06.2019.
Selection procedure was completed by the
Committee of Management and papers
forwarded to the BSA on 12.06.2019 for
approval. Held : Process of selection was
commenced under the unamended Rules
of 1978, after due permission of the
competent authority, much prior to the
issue of the Government Order dated
31.10.2019 and the amendment to the
Rules of 1978 by the 7th Amendment
Rules w.e.f. 04.12.2019, the process of
appointment in such a case would
continue to be preserved under the then
existing Rules and that the 7th
Amendment Rules, that came into
existence later on, would not affect its
validity. The process of selection was
completed before the 7th Amendment
Rules were notified. The process of
selection would, therefore, be governed
by the Rules of 1978, unaffected by the
7th Amendment Rules. (Para 19, 21)**

Dismissed. (E-5)

List of Cases cited:

1. Committee of Management, Adarsh Janta
Madhyamik Vidyalaya & anr. Vs St. of U.P. &
ors., Writ-A No.10509 of 2019, dated
04.03.2020

2. Santosh Kumar Singh Vs St. of U.P. & ors.,
2015 (5) AWC 4719

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

1. This is an appeal by the State of U.P. and its officials in the Department of Basic Education, impugning the validity of the judgment and order dated 23.03.2022 passed by the learned Single Judge allowing Writ-A No.21411 of 2019.

2. The facts giving rise to this appeal are that there is a Junior High School, going by the name Karwal Devi Kanya Laghu Madhyamik Vidyalaya, Karwal, Majhawan, Gorakhpur, which is a recognized and aided Junior High School, administered by a private Management. The aforesaid Junior High School shall hereinafter be called 'the Institution'. The services of teachers of the Institution are governed by the provisions of the Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (for short, 'the Rules of 1978'). Salaries to teachers and other employees of the Institution are borne on State grant and are paid in accordance with the provisions of the Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 (for short, 'the Act of 1978'). The parties are ad idem that the post of Headmistress of the Institution fell vacant and the Management of the Institution sought permission of the District Basic Education Officer, Gorakhpur (for short, 'the BSA') on 22.12.2018 to make recruitment on the post. The BSA granted the requisite permission on 05.01.2019, authorizing the Institution to advertise the post of Headmistress and complete the process of selection. An advertisement dated 08.01.2019 was, accordingly,

published in two daily newspapers, to wit, 'Aaj' and 'Swatantra Bharat', advertising the post of Headmistress of the Institution. In the said advertisement, there was no mention of the minimum qualifications for the post rendering it bad on that account. The Management of the Institution sought permission of the BSA to cancel the said advertisement and issue a fresh one in its place, rectifying the error.

3. The BSA vide order dated 08.03.2019 permitted a fresh advertisement to be issued. Accordingly, the Institution advertised the post of Headmistress afresh on 09.03.2019, getting it published in the dailies, 'Aaj' and 'Swatantra Bharat'. The advertisement invited applications from eligible and qualified candidates for the post of Headmistress of the Institution until 25.03.2019 indicating that the applications were to be submitted by registered post. The date of interview was scheduled on 29.03.2019. The Manager of the Institution addressed a letter dated 18.03.2019 to the BSA, requesting for the provision of a nominee to participate in the Selection Committee convened to select the Headmistress.

4. In response to the letter dated 18.03.2019, the BSA sent a memo dated 26.03.2019 to the Institution saying that it was not possible to provide a nominee as the Model Code of Conduct was in operation on account of the then forthcoming elections to the Legislative Assembly. The Institution, accordingly, postponed the date of interview from 29.03.2019 to 29.05.2019. All the candidates, who had applied, were informed of the changed date. Later on, on 16.05.2019, a memo was addressed to the BSA requesting for the provision of a nominee as the Model Code of Conduct

was then soon scheduled to be over. A reminder was sent on 25.05.2019 with a further request to re-schedule the interview to 10.06.2019. The BSA on occasion provided a nominee to sit on the Selection Committee and issued an order dated 01.06.2019, directing Arun Pratap Singh, Block Education Officer, Gagaha, Gorakhpur to act as the BSA's nominee in the Selection Committee convened to select the Headmistress of the Institution. The Institution constituted a Three Members Selection Committee, comprising the Manager of the Institution, the Vice President of the Committee of Management of the Institution and Arun Pratap Singh, the BSA's nominee.

5. The interviews were held on the re-scheduled date i.e. 10.06.2019. The Selection Committee met and conducted the interviews of eligible and qualified candidates. The members individually awarded marks to each candidate in accordance with the assessed merit. An attendance register of candidates signed by all members of the Selection Committee was also drawn up. At the conclusion of selection, the relative merit of all candidates, who appeared, was drawn up. One Smt. Kajal Singh was found to be the most suitable amongst the candidates on account of the highest merit assessed for her. She was followed by Smt. Alka Singh and Smt. Indrakala Singh, who were placed at serial Nos. 2 and 3 in that order. The Manager of the Institution issued a letter dated 12.06.2019, forwarding the names of the candidates in accordance with their merit assessed by the members of the Selection Committee to the BSA. The Manager sought the BSA's approval to Smt. Kajal Singh's selection.

6. The BSA, however, passed an order dated 04.07.2019, declining to grant

approval to the selection of Smt. Kajal Singh. The Management, who are the writ petitioner-respondents to this appeal, aggrieved by the order dated 11.07.2019 passed by the BSA, moved this Court by instituting Writ-A No.11919 of 2019. It appears that in the said petition, this Court required the BSA to file his personal affidavit vide order dated 13.08.2019. In compliance, the BSA filed his personal affidavit stating that there is no order dated 07.06.2019 in writing, but an oral instruction was issued through Video Conferencing by the Additional Chief Secretary (Basic Education) imposing a ban on grant of approval to the appointment of Assistant Teachers and Headmasters/Headmistresses in recognized and aided junior high schools. In view of the aforesaid stand, this Court vide order dated 26.08.2019 disposed of Writ-A No.11919 of 2019 with a direction to the BSA to decide the writ-petitioners' claim for grant of approval to the Headmistress's selection, relating to the Institution.

7. The writ-petitioner Management served a certified copy of the judgment and order dated 26.08.2019 passed by this Court in Writ-A No.11919 of 2019 upon the BSA along with representation dated 07.09.2019/ 09.09.2019, seeking approval to the selection of the Headmistress. Since no orders were passed with regard to the approval of the selected Headmistress, the writ-petitioners, considering it to be a case of deemed approval under Rule 10(5)(iii) of the Rules of 1978 [as it stood prior to the enforcement of the Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) (Seventh Amendment) Rules, 2019] (for short, 'the 7th Amendment Rules'), proceeded to issue a letter of appointment to Smt. Kajal Singh

dated 10.10.2019. Smt. Kajal Singh, in compliance with the letter of appointment issued by the writ-petitioners Management, joined the Institution as the Headmistress on 24.10.2019. An information with regard to the said action was forwarded by the Manager of the Institution to the BSA vide memo dated 30.10.2019. At this stage, the BSA proceeded to pass an order dated 06.11.2019 rejecting the Institution's claim for grant of approval to the appointment of the Headmistress.

8. The Institution, accordingly, preferred Writ-A No.21411 of 2019, challenging the order dated 06.11.2019 passed by the BSA, as also the Government Order dated 31.10.2019, on the strength of which the BSA passed the former order. A mandamus was also prayed directing the BSA to consider grant of approval to the Headmistress's appointment. The writ petition came up for hearing after exchange of affidavits before the learned Single Judge on 23.03.2022, who allowed the writ petition and quashed the order dated 06.11.2019 passed by the BSA. A mandamus was issued to the BSA to grant approval to the appointment of Smt. Kajal Singh as the Headmistress of the Institution within a period of two weeks. It was also ordered that Smt. Kajal Singh would be entitled to her salary and other service benefits from 10.10.2019 i.e. after one month of the date of submission of papers for approval by the Management of the Institution to the BSA.

9. Aggrieved by the judgment of the learned Single Judge, the State of U.P. and two of its Officers in the Department of Basic Education, who are respondents to the writ petition, have preferred this appeal under Chapter VIII Rule 5 of the Rules of the Court.

10. Heard the learned Standing Counsel appearing on behalf of the appellants and Mr. Indra Raj Singh, learned Counsel appearing on behalf of the respondents.

11. The learned Single Judge while allowing the writ petition was of opinion that the Government Order dated 31.10.2019 came into force with effect from that date, but the selection procedure was completed by the Committee of Management and papers forwarded to the BSA on 12.06.2019. The learned Judge relied upon a judgment of this Court in **Writ-A No.10509 of 2019, Committee of Management, Adarsh Janta Madhyamik Vidyalaya and another v. State of U.P. and others, decided on 04.03.2020**, holding that the process of selection being initiated much prior to the issue of the Government Order dated 31.10.2019 and the amendment to the Rules of 1978 by the 7th Amendment Rules w.e.f. 04.12.2019, the process of appointment in such a case would continue to be preserved under the then existing Rules. It was opined by this Court in **Committee of Management, Adarsh Janta Madhyamik Vidyalaya (supra)** that the process of selection that was commenced under the unamended Rules of 1978, after due permission of the competent Authority, would continue to be governed by that process and the subsequently issued Government Order or the 7th Amendment Rules, that came into existence later on, would not affect its validity.

12. In support of his Lordship's reasoning, the learned Single Judge in **Committee of Management, Adarsh Janta Madhyamik Vidyalaya** relied upon the decision of a Full Bench of this Court in **Santosh Kumar Singh v. State of U.P.**

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and others, 2015 (5) AWC 4719. It would be apposite to extract what the learned Single Judge took note of in **Committee of Management, Adarsh Janta Madhyamik Vidyalaya** regarding the Full Bench decision of this Court in **Santosh Kumar Singh (supra)**:

"A Full Bench of this Court in Special Appeal (Defective) No. 215 of 2015 (Santosh Kumar Singh Vs. State of U.P. & others) decided on 22.7.2015 **has considered the question of continuing selection process where the process of appointment was initiated by issuing advertiesement before rescision of the removal of Difficulties Order by Section 33-E of the U.P. Act No. 13 of 1999 and held, as under:-**

"We consequently answer the reference in the following terms:

(a) Despite the rescission of the Removal of Difficulties Orders by Section 33-E of U P Act No 13 of 1999 with effect from 25 January 1999, the power of the Committee of Management to make appointments against short term vacancies, where the process of appointment had been initiated prior to 25 January 1999 by the publication of an advertisement, would continue to be preserved;

(b) On the enforcement of the provisions of Section 33-E, the power of a Committee of Management to make adhoc appointments against short term vacancies would not stand abrogated in a case where the process of selection had been initiated prior to 25 January 1999;

(c) Under Section 16-E of the Intermediate Education Act, 1921, the

Committee of Management is empowered to make an appointment against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or in the case of death, termination or otherwise, of an incumbent occurring during an educational session. An appointment made under sub-section (11) of Section 16-E as provided in the proviso thereto shall, in any case, not continue beyond the end of educational session during which the appointment was made; and

(d) The judgment of the Division Bench in Subhash Chandra Tripathi (supra) is affirmed as laying down a correct interpretation of the judgment in A A Calton (supra).

The reference to the Full Bench is answered in the aforesaid terms. The special appeal shall now be placed before the appropriate Bench for disposal in the light of this judgment."

(emphasis supplied)

13. Before us, it has been argued on the basis of the averments made in Paragraph No.6 of the counter affidavit that on 07.06.2019, the Additional Chief Secretary (Basic Education), Government of U.P., Lucknow, through Video Conferencing, had directed all Authorities to stop selections for filling up posts of Headmasters and Assistant Teachers in non-government aided junior high schools. Apparently, this was an oral direction issued by the Additional Chief Secretary. It is pointed out that this direction was issued in anticipation of amendments then under contemplation to the Rules of 1978. Accordingly, the State Government vide orders dated 26.09.2019 and 31.10.2019

imposed a ban on selection and appointment of Headmasters and Assistant Teachers in non-government aided junior high schools. Copies of those orders have been annexed as Annexure No. CA-1 to the counter affidavit, to which our attention was drawn by the learned Counsel for the appellants.

14. We have perused both the Government Orders dated 26.09.2019 and 31.10.2019. The learned Single Judge has not looked into the validity of the Government Order dated 31.10.2019, because in his Lordship's opinion, and, we think rightly so, the said Government Order would not affect the right of the Institution in this case to make appointment to the post of Headmistress. Here, the selection process commenced much before the date of the oral fiat of the Additional Chief Secretary (Basic Education), directing stoppage of all selection processes relating to posts of Assistant Teachers and Headmasters of non-government aided junior high schools. The said direction was issued on 07.06.2019.

15. We would proceed to examine the matter on the basis that such a direction could be issued by the Additional Chief Secretary, and see if it affects the Institution's right to make appointments. In our opinion, it does not. The reason is that the process of selection, that was initiated with the approval of the BSA, granted on 05.01.2019, would have to be completed in accordance with the Rules of 1978, as in force at the time when the selection process was initiated. Advertisement pursuant to the order of the BSA, permitting the Institution to fill up the post of Headmistress, was first published on 08.01.2019. It was then cancelled on the request of the Management of the

Institution by the BSA on 08.03.2019 with permission to issue a fresh advertisement to overcome a technical flaw in the advertisement. The revised advertisement was published on 09.03.2019. The interviews were initially scheduled for 29th March, 2019, but ultimately held on 10.06.2019 with the BSA sending his nominee to sit on the Selection Committee. The papers regarding proceedings of the Selection Committee were submitted to the BSA on 12.06.2019. Thus, out of the entire recruitment process, only two events happened after the Additional Chief Secretary's oral orders dated 07.06.2019 made through Video Conferencing to stop appointments, to wit, interviews that were held by the Selection Committee on 10.06.2019 and the submission of proceedings of the Selection Committee to the BSA on 12.06.2019. Apart from the aforesaid two events, the entire recruitment process was initiated much before the Additional Chief Secretary's oral 'halt' order.

16. The oral orders were followed by Government Orders dated 26.09.2019 and 31.10.2019, imposing a ban by the State Government on selection and appointment of Headmasters/ Assistant Teachers in non-government aided junior high schools. Later on, the State Government, in exercise of their powers under Section 19(1) of the Uttar Pradesh Basic Education Act, 1972 (for short, 'the Act of 1972'), issued a notification dated 04.12.2019, notifying the 7th Amendment Rules, amending the Rules of 1978. The 7th Amendment Rules, enforced w.e.f. 04.12.2019, withdrew the power of selection from the Managements of non-government aided junior high schools, vesting it in a Selection Board, constituted under the last mentioned Rules. Thus seen, the oral order of the Additional

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Chief Secretary, asking the Authorities of the Basic Education Department to stop the ongoing selection and appointment of Assistant Teachers and Headmasters in private aided junior high schools as also the two Government Orders dated 26.09.2019 and 31.10.2019 were efforts made in anticipation of enforcement of the then proposed 7th Amendment Rules. The oral orders and the Government Orders sought to achieve this by halting all ongoing selection and appointment of Headmasters and Assistant Teachers in private aided junior high schools, till such time that the 7th Amendment Rules were notified. Accordingly, we also propose to examine whether apart from the oral order dated 07.06.2019, the two Government Orders dated 26.09.2019 and 31.10.2019 could lawfully stop an ongoing selection process initiated prior to any of those measures, oral or written.

17. As already observed with regard to the oral orders of the Additional Chief Secretary assuming that these had binding effect on the Institution's right to select and appoint, would not affect the selection and appointment in this case, because the process had already commenced before the oral orders were issued by the Additional Chief Secretary. Likewise, is the case with the two Government Orders dated 26.09.2019 and 31.10.2019, both of which were issued much after the selection process relating to the post of Headmistress of the Institution was initiated. Rather, the entire process had been completed much before the two Government Orders came to be issued.

18. The principle, that a change in the rules of selection could be applied prospectively, but not affect the selection process already commenced under the

unamended or the old Rules, was extensively examined by the Full Bench in **Santosh Kumar Singh** (*supra*). In **Santosh Kumar Singh**, it was held by their Lordships of the Full Bench:

"9. The decision in A.A. Calton (*supra*) is, therefore, an authority for the proposition that once a process of selection has been initiated, a subsequent amendment of the law by which the power to make an appointment has specifically been taken away from a statutory authority - in that case from the Director - would have no application to a pending selection process which must be governed by the law as it stood when the selection process was initiated. Undoubtedly, the Legislature does have the power to make a law with retrospective effect but unless the law is made expressly retrospective or retrospective by necessary implication, the position of law as it stood when the selection process was initiated, would govern the selection.

10. In certain other contexts, the Supreme Court has held, for instance, that a selection process has to be governed by the Rules and Government Orders in existence on the date on which the process is initiated. In N.T. Bevin Katti v. Karnataka Public Service Commission, (1990) 3 SCC 157, the Supreme Court held as follows:

"...Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government orders and any amendment of the rules or the Government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended Rules or

the amended Government orders, issued in exercise of its statutory power either by express provision or by necessary intendment indicate the amended Rules shall be applicable to the pending selections. See *P. Mahendran v. State of Karnataka*, (1990) 1 SCC 411 : JT (1989) 4 SC 459."

11. In *State of Bihar v. Mithilesh Kumar*, (2010) 13 SCC 467, the Supreme Court held that a change in the norms of recruitment could be applied prospectively and could not affect those who have been selected for being recommended for appointment after following the norms which were in place at the time when the selection process was commenced. The submission to the contrary was based on the decision in *Shankarsan Dash v. Union of India*, AIR 1991 SC 1612, to the effect that mere inclusion in a select panel did not confer indefeasible right to appointment. The Supreme Court explained the position in law as follows:

"The decisions which have been cited on behalf of the respondent have clearly explained the law with regard to the applicability of the rules which are amended and/or altered during the selection process. They all say in one voice that the norms or rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect...While a person may not acquire an indefeasible right to appointment merely on the basis of selection, in the instant case the fact situation is different since the claim of the respondent to be appointed had been negated by a change in policy after the selection process had begun."

12. In a subsequent decision in *Government of Andhra Pradesh v. Sri Sevadas Vidyamandir High School*, (2011) 9 SCC 613, the Supreme Court held that a ban on recruitment to grant-in-aid posts had been issued after the school in question had been permitted by the State to fill up vacant posts. The Supreme Court held that in these circumstances, the State could not contend that the process of rationalization which was introduced subsequently, would also apply to private aided schools, where the process of recruitment had already been commenced pursuant to the approval granted earlier.

13. The judgment in *A.A. Cotton* (supra) has been recently followed in a decision of the Supreme Court in *Kulwant Singh v. Daya Ram*, (2015) 3 SCC 177, in the context of the principle that vacancies which had occurred prior to an amendment of rules would be governed by the un-amended rules and not by the amended rules where the amended rules are not made retrospective either expressly or by implication.

14. The judgment of the Division Bench in *Subhash Chandra Tripathi's case* was based on the law laid down by the Supreme Court in *A.A. Cotton* (supra). In the referring judgment, the Division Bench has doubted the correctness of that view based on a judgment of the Supreme Court in *Shankarsan Dash* (supra). In the view of the Division Bench, the Supreme Court has held that even a selection does not confer a right of appointment. Hence, the view which has been taken by the Division Bench is that a mere initiation of the process of selection will not result in the retention of the power of appointment by the authority concerned even when the power of appointment had been withdrawn

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under a statutory provision, in this case Section 33-E. The decision in Shankarsan Dash (supra) of a Constitution Bench of the Supreme Court dealt with the issue as to whether a candidate whose name appears in the merit list on the basis of a competitive examination acquires an indefeasible right of appointment as a Government servant merely because a vacancy exists. In that context, the Supreme Court held as follows:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha*, (1974) 1 SCR 165 : (AIR 1973 SC 2216), *Miss Neelim Shangla v. State of Haryana*, (1986) 4 SCC 268 : AIR 1987 SC 169, or *Jitendra Kumar v. State of Punjab*, (1985) 1 SCR 899 : AIR 1984 SC 1850."

15. These observations of the Supreme Court would indicate that the

issue in *Shankarsan Dash* (supra) was completely distinct. A candidate who is on a select list does not have an indefeasible right to appointment merely because a vacancy exists. That is not the issue in the present case. The issue in the present case is whether a process of selection which was initiated prior to the insertion of Section 33-E which rescinded the Removal of Difficulties Orders must be governed by the law as it then stood at the time when the process was initiated by the issuance of an advertisement. Plainly, the issue is not about the right of a particular candidate to appointment but whether the selection process should be governed by the law as it stood when the selection process was initiated. On this aspect, the consistent position of law has been laid down in the judgment of the Supreme Court in *A.A. Cotton* (supra)."

19. The answers by the Full Bench in **Santosh Kumar Singh** have been referred to much earlier in this judgment and the remarks of their Lordships, above referred, make it pellucid that the selection process commenced under the existing rules remains unaffected by any change or amendment to the Rules, unless the amended Rules, expressly or by necessary implication, have retrospective effect.

20. Interestingly, in this case, the oral orders of the Additional Chief Secretary under reference or the two Government Orders issued in this case are not any kind of an amendment to the existing Rules, that is to say, the Rules of 1978. These were just interim measures to hold back the selection processes pending the enforcement of the amended Rules. If the amended Rules, that is to say, the 7th Amendment Rules, that came to be enforced w.e.f. 04.12.2019, do not affect a

selection process already commenced, measures to facilitate taken in the interregnum prior to introduction of the amended Rules would not apply likewise to a selection process already commenced. This is precisely the case with the selection of the Headmistress of the Institution.

21. A perusal of the 7th Amendment Rules shows that these Rules by virtue of sub-Rule (2) of Rule 1 are ordained to come into effect from the date of their publication in the Gazette. There is nothing to show in the amended Rules, either expressly or by necessary implication, that these have retrospective operation. The principle adumbrated by the Full Bench in **Santosh Kumar Singh**, therefore, would apply to save the process of selection for the post of Headmistress of the Institution, that was initiated much before the 7th Amendment Rules were enforced. In fact, the process of selection was completed before the 7th Amendment Rules were notified. The process of selection would, therefore, be governed by the Rules of 1978, unaffected by the 7th Amendment Rules.

22. As already remarked, if the 7th Amendment Rules do not affect the selection process for the post of Headmistress of the Institution commenced much earlier, the measures taken by the State Government in interregnum to facilitate the application of the new regime under the 7th Amendment Rules, would not affect the validity of the selection process either. After all, the ban on selection, assuming that it could be orally imposed by the Additional Chief Secretary, pending enforcement of the 7th Amendment Rules, would not affect the validity of the selection process, because the ban was only an interim measure in aid of the 7th

Amendment Rules. If it be assumed further that the ban would nevertheless stall the ongoing selection process, already near completion, when it was orally issued by the Additional Chief Secretary, the recruitment process, upon the 7th Amendment Rules coming into force, would have to be carried to its logical conclusion as the 7th Amendment Rules would not affect it. The two Government Orders dated 26.09.2019 and 31.10.2019 are also in the nature of measures issued in aid of the then contemplated 7th Amendment Rules. The ban imposed under those orders would have like effect as the oral orders of the Additional Chief Secretary issued earlier imposing the ban. The selection process relating to the post of Headmistress would remain unaffected.

23. No other point was pressed.

24. In view of what has been said above, we do not find any good ground to interfere with the judgment and order impugned.

25. The appeal fails and is dismissed.

26. Costs easy.

(2023) 5 ILRA 1416
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.04.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 25213 of 2019

Prem Chandra	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents
Counsel for the Petitioner:	

Sri Akhilesh Kumar Mishra, Sri Pawan Kishor Mishra, Sri Raj Kumar Singh, Sri Vijay Kumar

Counsel for the Respondents:
C.S.C.

A. Service Law – Minimum pay scale - Principle of 'equal pay for equal work', which has emerged by interpretation of different provision of the Constitution and expounded through a large number of judgments of Supreme Court, continues to be the law declared by Supreme Court. The same is binding upon all. The same is extended to temporary employees including work charge, daily wage, casual, adhoc, contractual etc. **Thus, it held that they are entitled to draw wages on minimum of pay scale (at the lowest grade, in the regular pay scale), extended to regular employees holding the same post.** (Para 13)

In the present case, petitioner, who is continuously working since 2013 except for artificial breaks, is also entitled for payment of minimum of pay scale that is being given to regular employees providing same work in respondent department. (Para 14)

B. Merely by engaging daily wage employees through a service provider agency, State Government cannot shy-away from its responsibility of providing minimum of pay scale which it is bound to pay in accordance with law. (Para 17)

Respondent-State submits that petitioner is engaged through a service provider agency, therefore, he is not entitled for minimum of pay scale also does not have any force as, Supreme Court has held that the said benefit is available to all temporary employees whatever their nomenclature may be. (Para 16)

Writ petition allowed. (E-4)

Precedent followed:

St. of Pun. & ors. Vs Jagjit Singh & ors., (2017)
1 SCC 148 (Para 12)

Present petition challenges order dated 15.07.2019, passed by Director, Horticulture and Food Processing, Lucknow, whereby his representation for minimum pay scale is rejected.

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard learned counsel for petitioner and learned Standing Counsel for State-respondents.

2. The petitioner has approached this Court challenging order dated 15.7.2019 passed by respondent no.2-Director, Horticulture and Food Processing, Lucknow whereby his representation for minimum of pay scale is rejected.

3. Facts of the case, as claimed by petitioner, are that petitioner was engaged as a daily wagger on Class-IV post (Mali) in the year 2013 in the office of Scientist, State Tissue Culture Lab, Sector-G, Aliganj, Lucknow, where he was being paid daily wages only. He claims that other similarly situated daily wage employees, who have completed more than five years of service, are being paid minimum of pay scale while the same is denied to him.

4. Learned counsel for petitioner submits that impugned order is passed on false and incorrect facts. Submissions made by petitioner are either not considered in the impugned order or are rejected by concocting incorrect facts.

5. On the other hand, learned Standing Counsel strongly opposing the petition, submits that since petitioner is working as a daily wagger through a service provider agency, hence, he is not entitled for minimum of pay scale. He further

submits that impugned order is passed in accordance with law.

6. It is not in dispute that aforesaid Lab is run by department of Horticulture and Food Processing and is part of the same. It is the officers and employees of Horticulture and Food Processing department of State of U.P., who are working and running the said Lab. While rejecting the representation, it is noted that petitioner in the year 2013 had worked for 2 months, in 2014 again for 2 months, in 2016 for 5 months, in 2017 for 4 months, in 2018 for 2 months and since September, 2018, he has been working through a service provider agency.

7. In counter affidavit dated 5.12.2019 also said facts are reiterated. However, a detailed supplementary counter affidavit was filed on 8.2.2023 and along with the same working chart of petitioner from September, 2013 onwards is enclosed as Annexure-SCA-9. The said chart shows that since the year 2013 till date, working of petitioner only on muster-roll is considered while rejecting his representation. His entire working admittedly through a service provider is not considered. The same shows that petitioner started working since September, 2013 and worked for all four months of the year 2013 and thereafter in 2014, he worked for 8 months, in 2015 for 7 months, in 2016 for 11 months, in 2017 for 10 months, in 2018 for 7 months, in 2019 for 12 months and in 2020, he was continuously working till the time chart was prepared.

8. Thus, from the aforesaid chart, it is clear that impugned order is passed by referring to wrong and incorrect facts. The Director, Horticulture and Food Processing is a senior officer. It is not expected that he

would refer to incorrect and incomplete facts while considering the case of a person under the orders of this Court. He is cautioned not to conduct proceedings in such manner in future.

9. The aforesaid facts clearly show that petitioner is now working for last around ten years with respondent department.

10. The petitioner claims that persons, who are working as daily wager for more than five years, are paid minimum of pay scale under the orders of this Court. For the said purpose, learned counsel for petitioner relies upon a communication dated 4.11.2004 made by Joint Director/Incharge Officer, Rajkiya Utak Sambardhan Proyogshala, Aliganj, Lucknow to Director, Horticulture and Food Processing, Lucknow. In the said communication, Joint Director/Incharge Officer has specifically stated that such daily wage employees in the department, who have completed five years or more service, are getting minimum of pay scale of Rs.3050-4590 under the orders of High Court. Sri Pankaj Srivastava, Daily Wager is getting minimum of aforesaid pay scale. Thus, he has recommended that other similarly situated Class-IV employees should also be granted minimum of said pay scale. The said document is filed as Annexure-4 to the writ petition. The said letter dated 4.11.2004 is admitted in Para-16 of the counter affidavit, but the same is explained by saying that on the aforesaid letter dated 4.11.2004, no decision has been taken at State level.

11. The same cannot be a ground for refusing benefit of minimum of pay scale to petitioner, which is already being extended by respondent department to other similarly

situated persons. In fact, said submission of petitioner though is noted in impugned order, but is nowhere considered and decided.

12. The law with regard to payment of minimum of pay scale is settled by the Supreme Court in **State of Punjab and others vs. Jagjit Singh and others (2017) 1 SCC 148**. Paragraphs 56 to 61 of the said judgment read as follows:

"56. We shall now deal with the claim of temporary employees before this Court.

57. There is no room for any doubt that the principle of "equal pay for equal work" has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court, and constitutes law declared by this Court. The same is binding on all the courts in India under Article 141 of the Constitution of India. The parameters of the principle have been summarised by us in para 42 hereinabove. The principle of "equal pay for equal work" has also been extended to temporary employees (differently described as work-charge, daily wage, casual, ad hoc, contractual, and the like). The legal position, relating to temporary employees has been summarised by us, in para 44 hereinabove. The above legal position which has been repeatedly declared, is being reiterated by us yet again.

58. In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work cannot be paid less than another who performs the same duties and

responsibilities. Certainly not, in a welfare State. Such an action besides being demeaning, strikes at the very foundation of human dignity. Anyone, who is compelled to work at a lesser wage does not do so voluntarily. He does so to provide food and shelter to his family, at the cost of his self-respect and dignity, at the cost of his self-worth, and at the cost of his integrity. For he knows that his dependants would suffer immensely, if he does not accept the lesser wage. Any act of paying less wages as compared to others similarly situate constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation.

59. We would also like to extract herein Article 7 of the International Covenant on Economic, Social and Cultural Rights, 1966. The same is reproduced below:

"7. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) *Safe and healthy working conditions;*

(c) *Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*

(d) *Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."*

(emphasis supplied)

India is a signatory to the above Covenant having ratified the same on 10-4-1979. There is no escape from the above obligation in view of different provisions of the Constitution referred to above, and in view of the law declared by this Court under Article 141 of the Constitution of India, the principle of "equal pay for equal work" constitutes a clear and unambiguous right and is vested in every employee—whether engaged on regular or temporary basis.

60. *Having traversed the legal parameters with reference to the application of the principle of "equal pay for equal work", in relation to temporary employees (daily-wage employees, ad hoc appointees, employees appointed on casual basis, contractual employees and the like), the sole factor that requires our determination is, whether the employees concerned (before this Court), were rendering similar duties and responsibilities as were being discharged by regular employees holding the same/corresponding posts. This exercise would require the application of the parameters of the principle of "equal pay for equal work" summarised by us in para*

42 above. However, insofar as the instant aspect of the matter is concerned, it is not difficult for us to record the factual position. We say so, because it was fairly acknowledged by the learned counsel representing the State of Punjab, that all the temporary employees in the present bunch of appeals were appointed against posts which were also available in the regular cadre/establishment. It was also accepted that during the course of their employment, the temporary employees concerned were being randomly deputed to discharge duties and responsibilities which at some point in time were assigned to regular employees. Likewise, regular employees holding substantive posts were also posted to discharge the same work which was assigned to temporary employees from time to time. There is, therefore, no room for any doubt, that the duties and responsibilities discharged by the temporary employees in the present set of appeals were the same as were being discharged by regular employees. It is not the case of the appellants, that the respondent employees did not possess the qualifications prescribed for appointment on regular basis. Furthermore, it is not the case of the State that any of the temporary employees would not be entitled to pay parity on any of the principles summarised by us in para 42 hereinabove. There can be no doubt, that the principle of "equal pay for equal work" would be applicable to all the temporary employees concerned, so as to vest in them the right to claim wages on a par with the minimum of the pay scale of regularly engaged government employees holding the same post.

61. *In view of the position expressed by us in the foregoing paragraph, we have no hesitation in holding that all the temporary employees*

concerned, in the present bunch of cases would be entitled to draw wages at the minimum of the pay scale (at the lowest grade, in the regular pay scale), extended to regular employees holding the same post."

13. The Supreme Court after considering all the earlier law settled on the issue has again reiterated that principle of 'equal pay for equal work', which has emerged by interpretation of different provision of the Constitution and expounded through a large number of judgments of Supreme Court, continues to be the law declared by Supreme Court. The same is binding upon all. The same is extended to temporary employees including work charge, daily wage, casual, adhoc, contractual etc. Thus, it held that they are entitled to draw wages on minimum of pay scale (at the lowest grade, in the regular pay scale), extended to regular employees holding the same post.

14. In the aforesaid circumstances, petitioner, who is continuously working since 2013 except for artificial breaks, is also entitled for payment of minimum of pay scale, that is being given to regular employees providing same work in respondent department.

15. The respondents again try to hide behind the argument that they have not engaged any Class-IV employee in the Laboratory. The Laboratory itself is part of Horticulture and Food Processing department. It is not in dispute that regular Class-IV employees are working in Horticulture department. It is also not in dispute that in absence of petitioner, other Class-IV employees of the department would be bound to perform duties that are being performed by petitioner. Therefore, petitioner is entitled to minimum of pay scale that any Class-IV regularly appointed employee would be entitled

to, in case petitioner is not available for performing his duties.

16. Submission of respondent-State that petitioner is engaged through a service provider agency, therefore, he is not entitled for minimum of pay scale also does not have any force as in Para-60 of the aforesaid judgment, Supreme Court has held that the said benefit is available to all temporary employees whatever their nomenclature may be.

17. Merely by engaging daily wage employees through a service provider agency, State Government cannot shy-away from its responsibility of providing minimum of pay scale which it is bound to pay in accordance with law.

18. Hence, impugned order dated 15.7.2019 cannot stand and is set aside. Respondents are directed to pay minimum of pay scale to petitioner as is being paid to similarly situated employees performing the same work in respondent department forthwith without any delay.

19. Accordingly, writ petition stands **allowed**.

(2023) 5 ILRA 1421

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 08.05.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 3192 of 2017

State of U.P. & Ors.

...Petitioners

Versus

The Labour Court Gorakhpur & Anr.

...Respondents

Counsel for the Petitioners:

Kritika Singh, C.S.C., Sri Dhananjay Singh, S.C.

Counsel for the Respondents:

Sri Gopal Narain Srivastava, S.C., Sri Sudhanshu Narain

Labour Laws – Constitution of India, 1950 - Article 14, 15, 226 – U.P. Industrial Dispute Act, 1947 – Sections 6-N, 6-P & 6-Q, 11(a) - Evidence Act, 1872 – Sections 114 & 114(g) : - Writ Petition – challenging the impugned Award – Termination of Services - Industrial dispute - Labour Court, declares the order of termination of services as improper and illegal with directions to reinSt. the workman along with 50% of back-wages and further, he is entitled for full salary from the date of publication of Award – court finds that, petitioner/employer by not producing oral or documentary evidence to rebut the contention of the workman and also failed either to plead or to prove in any manner that the workman was gainfully employed so as to deny him back-wages - would be subject to adverse inference which has rightly been drawn by the Labour court – held, on this score, no interference is required in the impugned Award - and - it could be a case of full back-wages, but the Court is not inclined to enhance the same since writ petition has not been filed by the workman – directions issued to for execution of Award within four months accordingly – writ petition dismissed.

Writ Petition Dismissed. (E-11)

List of Cases cited:

1. Assistant Engineer, Rajasthan Development Corporation & anr. Vs Gitam Singh - (2013) 5 SCC 136,
2. Deepali Gundu Surwase Vs Kranti Junior Adhyapak & ors.: 2013 (139) FLR 541 (SC),
3. Allahabad Bank & ors. Vs Avtar Bhushan Bhartiya - SLP (Civil) No.32518, decided on 22.04.2022,

4. Krishan Singh Vs Executive Engineer, Haryana St. Agricultural Marketing Board, Rohtak (Haryana) - (2010) 3 SCC 637,

5. Devinder Singh Vs Municipal Council, Sanaur: (2011) 6 SCC 584,

6. St. of U.P. Vs Charan Singh: 2015 LawSuit (SC) 302,

7. Jasmer Singh Vs St. of Har. & anr.: (2015) 4 SCC 458,

8. R.M. Yellatti Vs Assistant Executive Engineer: (2006) 1 SCC 106,

9. Harjinder Singh Vs Punjab St. Warehousing Corporation: (2010) 3 SCC 192,

10. St. of U.P. Vs Amar Nath Yadav: 2014 Law Suit (SC) 32,

11. Director of Horticulture & anr. Vs H.A. Kumar: 2013 (138) FLR 1089 (SC),

12. Gauri Shanker Vs St. of Raj.: 2015 Law Suit (SC) 357,

13. Deep Chandra Vs St. of U.P.: (2001) 10 SCC 606,

14. Rajya Krishi Utpadan Mandi Parishad Vs Prescribed Authority, Industrial Tribunal (V), U.P., - 2002 (2) UPLBEC 1475,

15. St. of U. P. Vs Labour Court, Haldwani - 1998 Law Suit (All) 788,

16. Maharashtra SRTC Vs Casteribe Rajya Parivahan Karmchari Sanghatana - (2009) 8 SCC 556,

17. Hari Nandan Prasad Vs F.C.I. (2014) 7 SCC 190,

18. Haryana Roadways Vs Rudhan Singh (2005) 5 SCC 591,

19. Bhuvnesh Kumar Dwivedi Vs Hindalco Industries Ltd. (2014) 11 SCC 85,

20. M/s Hindustan Tin Works Pvt. Ltd. Vs The Employees of M/s Hindustan Tin Works Pvt. Ltd & ors.: AIR 1979 SC 75,

21. Bhuvanesh Kumar Dwivedi Vs M/s Hindalco Industries Ltd: 2014 (142) FLR 20,

22. Mackinnon Mackenzie & Company Ltd. Vs Mackinnon Employees' Union: 2015 (145) FLR 184,

23. Civil Appeal No. 6890/2022 Jeetubha Khansangji Jadeja Vs Kutchh District Panchayat, judgment dated 23.09.2022 (Arising out of Special Leave Petition (Civil) No. 8393/2022).

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. This writ petition has been filed by State of U.P. through Principal Secretary, Irrigation, Lucknow and officials of the said Department challenging the impugned award dated 08.01.2016 passed by the Labour Court, Gorakhpur, which was notified on the notice board on 07.06.2016, in Adjudication Case No.170 of 1992 whereby the Labour Court has held termination of services of the respondent no.2 with effect from 01.01.1991 as improper and illegal with a further direction for reinstatement of the said respondent maintaining continuity in his past services along with back-wages at the rate of 50%. A further direction has been issued that the respondent no.2 shall be entitled for full salary from the date of publication of the award.

2. The facts of the case are that the respondent no.2 (hereinafter referred to as the workman) came up with a case that he was regularly working in the department of Irrigation since October, 1988 as Camp Dhawak and was performing duties relating to distribution of post. It was further contended that all of a sudden, his services were orally terminated on 01.01.1991 and

his salary with effect from March, 1990 to December, 1990 was also not paid regarding which the workman had earlier filed a case before the Controlling Authority, Deoria under the Payment of Wages Act which was pending. It was further contended that the nature of the work performed by the workman was permanent and the juniors like Indrasan, Keshav and Shrawan, etc were retained in service; that the provisions of Sections 6-N, 6-P and 6-Q of the U.P. Industrial Disputes Act, 1947 and Rule 42 of the Rules were not complied with; that the workman had worked for a period of more than 240 days; and that he was wholly unemployed after the termination of his services despite best efforts.

3. The workman pleaded that the matter was registered as an Adjudication Case No.170 of 1992 pursuant to reference made by the Deputy Labour Commissioner, Gorakhpur where the question referred was as to whether termination of service of the workman by the Department with effect from 01.01.1991 was proper and/or legal ? If not, as to what benefit/ relief/ compensation the workman was entitled to receive ?

4. The Department also made its defence stating that the services of the workman were not terminated and that there was no question for payment of salary to him with effect from March, 1990 to December, 1990 as he had not worked during the said period. The Court finds that Annexure No.2 to the writ petition is a copy of the written statement filed by the Department in which nothing special has been averred except the aforesaid, however, in the impugned award, the Labour Court has discussed the defence taken by the Department also to the effect that the

workman was working as a daily-wager as per the requirements and he used to be paid wages as per the work performed by him. Therefore, it appears that there is some additional written statement filed by the Department which has not been brought on record in support of the pleadings, however the Court will consider this defence also as the same has been dealt with by the Labour Court in the award impugned.

5. Parties led evidence in support of their respective cases. Oral testimony of the workman has been filed as Annexure No.CA-1 to the counter affidavit in which the workman stated that he used to get monthly salary and that his services were orally terminated with effect from 01.01.1991; that for getting payment of salary with effect from March, 1990 to December, 1990, he had filed P.W. Case No.46 of 1991 which was decided in his favour on 17.02.1995 against which order, the employer filed a Misc. Case No.3 of 2000, which was also dismissed. It was further stated on oath that though the services of the workman had been illegally terminated, juniors to him, namely, Indrasan, Keshav and Shrawan were retained in service; that since the date of termination the workman was thoroughly unemployed and could not get job despite search; that despite order passed by the Labour Court on his application 17-D, the documents were not produced by the Department. The workman also proved documents filed by him which included muster roll. The workman was cross examined and specifically denied the suggestion made by the Department that it was wrong to say that he was working on daily-wage basis. The workman also stuck to his stand regarding retainment of persons junior to him in the services and also to the fact that the Department had not produced

the muster roll, except the muster roll of 1990 which the workman had got and filed as paper no.6 on record.

6. The Labour Court, after considering the pleadings of the parties and having perused the record, came to the conclusion that the working of more than 240 days period stood proved in view of the order passed by the Competent Authority in P.W. Case No.46 of 1991. The Labour Court also drew adverse inference against the Department for not filing attendance register/ muster roll for the period with effect from October, 1988 till January, 1991, despite application 17-D filed by the workman in this regard which was allowed. The Labour Court also observed that the Department just completed its formality by producing muster roll of only July, 1990 stating that in July, 1990 the workman had worked only for a period of 26 days.

7. As regards the contention of the employer that the workman was working in the capacity of daily-wager, the Labour Court, after discussing various authorities, recorded a finding that even then the Department should have ensured compliance of provisions of the Act and the workman would be entitled for reinstatement in his service as it was established that he had worked for more than 240 days in a calendar year. Accordingly, the award for reinstatement of the workman by maintaining continuity in past services along with payment of 50% back-wages was passed.

8. I have heard Sri Dhananjay Singh, learned Standing Counsel for the State - petitioners and Sri Sudhanshu Narain, learned counsel for the respondents and perused the record.

9. The contention of the learned Standing Counsel is to the effect that the award of the Labour Court is not sustainable as the respondent no.2 was merely a daily-wager employee and, therefore, his reinstatement could not be ordered. It is further argued that the respondent no.2 himself voluntarily left the job and wrongly instituted the case. It is further argued that even if the case of the workman is accepted, he worked for a very short period of two years and therefore keeping in view of the said tenure of alleged service, direction for reinstatement in service by maintaining past continuity and payment of 50% back-wages is illegal. Reliance has also been placed on the judgment of the Supreme Court in the case of **Assistant Engineer, Rajasthan Development Corporation and another Vs. Gitam Singh: (2013) 5 SCC 136.**

10. **Per contra**, learned counsel for the respondent-workman argued that since the workman was working in the regular capacity and was getting monthly salary and had established his case not only before the Labour Court but also before the Competent Authority under Payment of Wages Act where he succeeded against the Department, oral termination of his services with effect from 01.01.1991 without following the provisions of the Act of 1947 is illegal and since the juniors to the workman were retained in service and there is sufficient evidence to demonstrate that the workman was not gainfully employed after termination of his services, the award of Labour Court is just and proper and does not call for any interference.

11. In support of his submission, learned counsel for the respondent-

workman has relied upon following authorities:-

(i) Deepali Gundu Surwase Vs. Kranti Junior Adhyapak and others: 2013 (139) FLR 541 (SC);

(ii) Allahabad Bank and others Vs. Avtar Bhushan Bhartiya in Special Leave Petition (Civil) No.32554 of 2018, decided on 22.04.2022:

(iii) Krishan Singh Vs. Executive Engineer, Haryana State Agricultural Marketing Board, Rohtak (Haryana): (2010) 3 SCC 637;

(iv) Devinder Singh Vs. Municipal Council, Sanaur: (2011) 6 SCC 584;

(v) State of U.P. Vs. Charan Singh: 2015 LawSuit (SC) 302;

(vi) Jasmer Singh Vs. State of Haryana and another: (2015) 4 SCC 458;

(vii) R.M. Yellatti Vs. Assistant Executive Engineer: (2006) 1 SCC 106;

(viii) Harjinder Singh Vs. Punjab State Warehousing Corporation: (2010) 3 SCC 192;

(ix) State of U.P. Vs. Amar Nath Yadav: 2014 Law Suit (SC) 32;

(x) Director of Horticulture and another Vs. H.A. Kumar: 2013 (138) FLR 1089 (SC);

(xi) Gauri Shanker Vs. State of Rajasthan: 2015 Law Suit (SC) 357;

(xii) *Deep Chandra Vs. State of U.P.:* (2001) 10 SCC 606;

(xiii) *Rajya Krishi Utpadan Mandi Parishad Vs. Prescribed Authority, Industrial Tribunal (V), U.P., Meerut:* 2002 (2) UPLBEC 1475; and

(xiv) *State of Uttar Pradesh Vs. Labour Court, Haldwani:* 1998 Law Suit (All) 788.

12. Relying upon the aforesaid authorities, the contention of the learned counsel for the respondent-workman is that although the workman was working in a regular capacity, even if he is treated as a daily-wager, the Industrial Law does not make any distinction between the workmen/employees and the source of employment, method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/paid and the mode of payment are not at all relevant for deciding as to whether a person is a workman or not. Further submission is that since oral termination has been found to be illegal coupled with the fact that the Labour Court has recorded pure finding of fact that the workman had worked for more than 240 days and that the Department had failed to lead any documentary or oral evidence against the contention of the workman, the award is perfectly in accordance with law.

13. I have considered the arguments advanced and perused the record.

14. In ***Deepali Gundu Surwase (supra)***, the Supreme Court after discussing the entire law relating to reinstatement and back-wages, in paragraph 33 of the judgment, has held as follows:-

33. The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv) *The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.*

v) *The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.*

vi) *In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).*

vii) *The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."*

15. In so far as the issue regarding entitlement of a daily-wager for reinstatement or back-wages, the Supreme Court in **Krishan Singh (supra)** passed an

award in favour of a person who was said to be engaged as a daily-wager and directed his reinstatement as a daily-wager with 50% back-wages.

16. Similar view was taken by the Supreme Court in the case of **Jasmer Singh (supra)** where it was held that non compliance with the statutory provisions in case of termination of services even a daily-wager worker would justify award of reinstatement with back-wages.

17. In **R.M. Yellatty (supra)**, regarding mischief of the Department in connection with termination of services of an alleged daily-wager, the Supreme Court directed reinstatement of a workman as a daily-wager in the nominal muster roll and it was held that daily waged earners are not regular employees. They are not given letters of appointments. They are not given letters of termination. They are not given any written document which they could produce as proof of receipt of wages. Their muster rolls are maintained in loose sheets. Even in cases, where registers are maintained by the Government departments, the officers/clerks making entries do not put their signatures. Even where signatures of clerks appear, the entries are not countersigned or certified by the appointing authorities.

18. The Supreme Court in **Maharashtra SRTC Versus Casteribe Rajya Parivahan Karmchari Sanghatana (2009) 8 SCC 556** held that the case of **State of Karanataka Vs. Umadevi** does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under

Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established.

19. The Supreme Court in **Hari Nandan Prasad Versus Food Corporation of India (2014) 7 SCC 190**, upon considering the aforementioned judgments as to whether the principles enshrined in Umadevi case are applicable observed as follows:-

"34. A close scrutiny of the two cases, thus, would reveal that the law laid down in those cases is not contradictory to each other. In U.P. Power Corporation, this Court has recognized the powers of the Labour Court and at the same time emphasized that the Labour Court is to keep in mind that there should not be any direction of regularization if this offends the provisions of Article 14 of the Constitution, on which judgment in Umadevi is primarily founded. On the other hand, in Bhonde case, the Court has recognized the principle that having regard to statutory powers conferred upon the Labour Court/Industrial Court to grant certain reliefs to the workmen, which includes the relief of giving the status of permanency to the contract employees, such statutory power does not get denuded by the judgment in Umadevi's case. It is clear from the reading of this judgment that such a power is to be exercised when the employer has indulged in unfair labour practice by not filling up the permanent post even when available and continuing to workers on temporary/daily wage basis and

taking the same work from them and making them some purpose which were performed by the regular workers but paying them much less wages. It is only when a particular practice is found to be unfair labour practice as enumerated in Schedule IV of MRTP and PULP Act and it necessitates giving direction under Section 30 of the said Act, that the Court would give such a direction."

20. The Supreme Court in **Hari Nandan Prasad case (supra)** observed that keeping in mind that industrial disputes are settled by industrial adjudicator on principles of fair play and justice concluded that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage worker/adhoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wagger etc. may amount to backdoor entry into the service which is an anathema to Art. 14 of the Constitution. Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. However, wherever it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left over workers itself would amount to invidious

discrimination qua them in such cases and would be violative of Art. 14 of the Constitution. Thus, the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision.

21. A three-Judge Bench of the Supreme Court in **Haryana Roadways Versus Rudhan Singh (2005) 5 SCC 591**, considered the question whether back wages should be awarded to the workman in each and every case of illegal retrenchment and it was held that there is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which

our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.

22. The Supreme Court in ***Bhuvnesh Kumar Dwivedi Versus Hindalco Industries Ltd. (2014) 11 SCC 85***, on the facts of that case, the Court held that the workman was subjected to victimization, therefore, the award passed by the Labour Court reinstating with backwages was justified. The judgment and order of the High Court granting compensation was reversed.

23. Learned counsel for the workman Sri Sudhanshu Narain, has placed reliance upon a decision of the Supreme Court in ***Devinder Singh Vs. Municipal Council, Sanaur (2011) 6 SCC 584***, where the argument that had prevailed with the High Court to set aside the award of the Labour Court directing reinstatement of the workman, was that the employment of the workman with the respondent Municipal Council from 01.08.1994 to 19.09.1996 was engagement on contractual basis and that it was an appointment made contrary to the recruitment rules. The High Court had taken view that it would be violative of Articles 14 and 15 of the Constitution, and, that it would not be in public interest to sustain the award of reinstatement after a long lapse of time. It was also held that Section 2(s) contains an exhaustive definition of the term "workman". The definition takes within its ambit any person including an apprentice employed in any industry to do any manual, unskilled,

skilled, technical, operational, clerical or supervisory work for hire or reward and it is immaterial that the terms of employment are not reduced into writing. The definition also includes a person, who has been dismissed, discharged or retrenched in connection with an industrial dispute or as a consequence of such dispute or whose dismissal, discharge or retrenchment has led to that dispute.

It was further held that the source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act. It is apposite to observe that the definition of workman also does not make any distinction between full-time and part-time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on a regular basis or a person employed for doing whole-time job is a workman and the one employed on temporary, part-time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman.

24. The Apex Court in the case of ***M/s Hindustan Tin Works Pvt. Ltd. Vs. The Employees of M/s Hindustan Tin Works Pvt. Ltd and others: AIR 1979 SC 75***, has held that it is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of

mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to the work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived workman of his earnings. Thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigating activity of the employer.

25. Further, the Supreme Court, in the case of **Deepali Gundu Surwase (supra)**, elaborately discussed the very idea of

restoring an employee to the position which he held before dismissal or removal or termination of his services and, in paragraph 17, the Supreme Court held that the very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages.

26. The Supreme Court further held that if the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same

emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

27. In the same report, with regard to award of back-wages, it was held that payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety.

28. Reference of another decision of the Supreme Court in the case of **Bhuvanesh Kumar Dwivedi Vs. M/s Hindalco Industries Ltd: 2014 (142) FLR 20** is also worth mention in which, while referring to the judgment in the case of **Deepali Gundu Surwase (supra)** the Apex Court has held that it would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in *Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra)*....”

29. After discussing on the issue of reinstatement vis-a-vis back-wages, the Apex Court in the case of **Mackinnon Mackenzie & Company Ltd. Vs. Mackinnon Employees’ Union: 2015 (145) FLR 184**, has reiterated the ratio laid down in *Deepali Gundu (supra)*.

30. The aforesaid views have been reiterated by the Supreme Court very recently in its judgment dated 23.09.2022 passed in **Civil Appeal No.6890 of 2022 (Arising out of Special Leave Petition (Civil) No.8393 of 2022) Jeetubha Khansangji Jadeja Vs. Kutchh District Panchayat**.

31. In the present case, I find that the workman successfully pleaded and fully proved his case by oral and documentary evidence that oral termination of his services with effect from 01.01.1991 was contrary to the provisions of the Act, 1947 and that the workmen junior to him were retained in service. I also find that the employer by not producing oral and documentary evidence to rebut the contention of the workman would be subjected to adverse inference which has rightly been drawn by the Labour Court, more particularly in view of Section 114, Illustration (g) of the Indian Evidence Act, 1872.

32. In the present case, the workman has not only pleaded but also stated on oath in his oral testimony and maintained the stand even in cross examination that he was not gainfully employed after termination of his services. To the contrary, the petitioner/employer completely failed either to plead or to prove in any manner that the workman was gainfully employed so as to deny him back-wages. Therefore, the ratio laid down in the aforesaid

authorities on this score fully supports the case of workman for award of back-wages which the Labour Court has assessed to the extent of 50% although it could be a case where the workman was entitled for full back-wages. However, the Court is not inclined to enhance the back-wages as the writ petition has not been filed by the workman but by the employer.

33. There is no need to multiply the authorities on the aforesaid issues or to refer/quote more and more paragraphs of the said authorities as it would only make the judgment bulky and when the Court is satisfied that the Labour Court has not erred in making the award in the aforesaid terms, I find that no interference is required in the impugned award and the writ petition is devoid of merit.

34. Accordingly, the writ petition fails and is **dismissed** as such. **The impugned award is upheld.**

35. Before concluding this judgment, the Court finds that in the present case an interim order was passed on 23.01.2017 whereby the petitioner was directed to deposit a sum of Rs.2,00,000/- with the Labour Court, Gorakhpur and the operation of the impugned award was kept in abeyance. Though, it was also provided under the said interim order that out of the aforesaid amount, 25% of the same would be released in favour of the workman, I find that although the amount was deposited, the said 25% of the same could not be released despite a subsequent order dated 03.10.2017 and the reason for not release was that the Labour Court concerned was vacant, as noticed in the order dated 30.04.2019. Thereafter, a modification application was filed and it was contended on behalf of the workman

that direction may be issued to the Presiding Officer, Industrial Tribunal, Gorakhpur to act as the Presiding Officer, Labour Court, however the said contention was found to be misconceived and, accordingly, the modification application was rejected by order dated 11.07.2019. Thereafter, there is no order by which it could be inferred that the condition of release of 25% amount was fulfilled or that the workman has received the sum.

36. Therefore, while dismissing the writ petition, it is observed that the award of the Labour Court shall be executed as it is and the execution proceedings shall be completed within a period of four months from the date a certified copy of this judgment is produced before the court concerned. The amount of 25% as directed under the interim order dated 23.01.2017, if not released in favour of the respondent-workman, shall be adjusted in the back-wages to be awarded to him.

37. With the aforesaid observations, the writ petition is **dismissed**.

(2023) 5 ILRA 1433
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-C No. 6626 of 2023

Sarthak Choubey	...	Petitioners
	Versus	
U.O.I. & Ors.	...	Respondents

Counsel for the Petitioners:
 Sri Arjun Prasad Yadav

Counsel for the Respondents:

A.S.G.I., Sri Hem Pratap Singh

Admission -University-Petitioner is aggrieved by denial of admission to B.A. (Hons.) Economic course-in paid seats by respondent- university- he applied in both paid seats and regular seats- the fact that Petitioner got admitted to the B.A. (hons.) Sociology does not mean that he had waived his right to be admitted in B.A. (hons.) Economics course- Petitioner satisfies the pre-requisites for being allotted course of higher preference-paid fees after the initial allotment within prescribed deadline-vacancy was created- by virtue of merit the vacancy was liable to be filled up by him-refusal by the University is illegal-Petitioner entitled to the B.A. (Hons.) Economics in the category of paid seats.

W.P. allowed. (E-9)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The petitioner is aggrieved by denial of admission to the B.A. (Hons.) Economics Course in the category of paid seats by the respondent-University. The undisputed facts are these:

2. The petitioner applied for admission to B.A. (Hons.) Economics Course under the category of paid seats as well as regular seats at D.A.V. Post Graduate College, affiliated to Banaras Hindu University, Varanasi. The petitioner had secured 279.46/400 marks in CUET-2022 Examination. The last candidate who was admitted to B.A. (Hons.) Economics Course under the paid seats category had obtained lesser marks than the petitioner. The case of the petitioner for admission to the B.A. (Hons.) Economics Course in the category of paid seats was never considered by the University despite his application and eligibility for admission. This fact has been pleaded by the petitioner but not refuted by the University in its counter affidavit. Further, Shri Hem Pratap Singh,

learned counsel for the respondent-University has fairly admitted that the University has not considered the petitioner for admission to B.A. (Hons.) Economics Course in the category of paid seats.

3. After these facts were established, Sri Hem Pratap Singh, learned counsel for the respondent-University placed the relevant Ordinances of the University which are extracted hereunder for ease of reference:

"(i) There is a provision of 'Paid Seats' (supernumerary) in some courses, up to a maximum of 15% of total seats. Admission on Paid Seats will be done only after the regular fee seats are full.

(ii)....

(iii) In case of UG Counseling, Paid Seats options will be exercised by the candidates during preference entry. Allotment of Paid Seats would be done amongst those candidates, in order of merits."

4. There is also a provision for Upgradation and Locking of Admission in the said ordinances which is reproduced below:

"UPGRADATION AND
LOCKING RULE:

Rearrangement in 2nd and/or subsequent Admission List(s): The candidates have to enter their preference of course (where choice is available) in the preference entry form. The module has been developed in a manner to ensure that if the seats fall vacant on expiry of deadline of fee payment (after declaration of any

Round of results due to candidates holding higher merit do not take admission etc.), there are chances that the candidate who was initially allotted a course of his/her lower order of preference may get upgraded to a more preferred course as per his/her preference order. Accordingly, based on the preference given by the candidate at the time of counselling, there could be change in course allocation after its initial allotment. **Rearrangement process will enable only upward mobility of a candidate in the order of preference filled up by him/her, vacancy being created and his/her merit order provided payment of admission fee has already been done for the initial allotment within the prescribed deadline.**

(emphasis applied)

"Locking of Course Allotment: At times, if the candidate does not want any change in the Course allotted initially to him/her (say after 1st or subsequent round of result) thereby meaning that he/she wants to be excluded from the aforesaid rearrangement process in the subsequent round. If he/she is satisfied with the course allocation after any round of declaration of admission list, in such cases candidate will immediately email only through the Registered email ID of candidate to the Convener of the concerned Admission Committee to lock his/her course allotment. For this purpose each Admission Committee will create a dedicated email ID. If a candidate asks for lock option in the manner aforesaid, he/she will be excluded from the aforesaid rearrangement exercise in the succeeding rounds.

NOTE:

I....

II....

III. It is advised to every candidate to be very clear and careful while filling up their preferences of the subject in Preference Entry Form as after locking the course allotment, the so allotted combination with Honours subject by the computerized Online Admission Module shall not be changed under any circumstances during the whole course period."

5. Petitioner was granted admission in the B.A. (Hons) Sociology course. He deposited the admission-fee and has been pursuing the aforesaid ever since. The fact that the petitioner got admitted to the B.A. (Hons) Sociology course does not mean that he had waived his right to be admitted to B.A. (Hons) Economics course, nor does it estop him from pressing his right to be considered as a candidate for B.A. (Hons) Economics course in the category of paid seats.

6. The contention on behalf of the University that once a student pays his fees and takes admission in another course, his preferred option cannot be exercised in view of "Locking Rule" is misconceived. Reference of the underlined part of the rule shows that the petitioner was entitled to an upward mobility in the order of preference filled by him. The rule contemplates rearrangement in admissions.

7. The petitioner satisfies the pre-requisites for being allotted course of higher preference. He had paid the fees after his initial allotment within the prescribed deadline. Further, the vacancy was created in the course and by virtue of the petitioner's merit the vacancy was liable to be filled up by him.

8. Locking of rule is a completely different concept and has no bearing in the

instant case. The course allotment is locked only when a candidate makes a request to the University that he does not want any change in the course allotted to him initially and wants to be excluded from the rearrangement process. Admittedly, the candidate had not opted for locking of his admission in B.A. (Hons.) Sociology and hence could not have been excluded from the upward arrangement process.

9. The refusal of the University to admit the petitioner in the B.A. (Hons.) Economics Course in the category of paid seats was arbitrary and illegal.

10. In the wake of the preceding discussion this Court finds that the petitioner was entitled to the B.A. (Hons.) Economics Course in the category of paid seats.

11. A writ in the nature of mandamus is issued commanding the respondent University to forthwith process his candidature for admission to the B.A. (Hons) Economics course.

12. In view of the fact that the petitioner's admission to the said course was delayed by the fault of the University, the University shall take all measures including extra classes, holding of special exams and necessary support so that the petitioner does not lose an academic year.

13. The writ petition is allowed.

(2023) 5 ILRA 1436

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 17.05.2023

BEFORE

THE HON'BLE RAJAN ROY, J.

THE HON'BLE MANISH KUMAR, J.

Writ-C No. 8724 of 2013

Satish Kewlani ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ved Prakash, Sri Dinesh Kumar Mishra

Counsel for the Respondents:

C.S.C.

Civil Law – Constitution of India, 1950 - Article – 226, 252(2), – Urban Land Ceiling and Regulations Act, 1976 - Sections 8(3), 10(1), 10(3), 10(4), 10(5), 10(6) & 35 - Urban Land(Ceiling and Regulations) Repeal Act, 1999 – Sections 3, 4 & 5(2) - Writ Petition – seeking the mandamus commanding to opposite parties not to disturb in the peaceful possession – earlier, in the year 1990 – against Original Tenure holder of the said Gata in question a Notice u/s 8(3) was issued by the respondent authorities – which was never responded - resulted, said Gata was declared surplus land – notification u/s 10(3) & 10(5) was published – in year 1996 said land was transferred to LDA u/s 10(6) of the Act, 1976 – after death of original tenure holder, his daughter being successor executed a sale-deed in year 2000 in favour of petitioner – the old Act, 1976 was replaced by new Act, 1999 – court finds that, possession of tenure holder is still continue and actual physical possession of the land was never taken by the St., than all proceedings under the repealed Act, 1976 and orders therein are stood abated when the Act, 1999 was came into force – hence, petitioner is entitled to the benefit of section 3 & 4 of the Act, 1999 – consequently, writ petition is allowed – direction issued, for deletion of endorsement regarding surplus land in revenue record and restore the name of the petitioner, accordingly.

Para – (13, 18, 22, 23, 24)

Writ Petition Allowed. (E-11)

List of Cases cited:

1. St. of U.P. Vs Hari Ram, (2013) 4 SCC 280,
2. Yasin Vs St. of U.P. & ors., (2014) 4 ADJ 305 (DB),
3. Babu & ors. Vs St. of U.P. thru. Secy., Urban Land Ceiling, Lucknow & ors. (Misc. Bench No. 1960 of 2019)
4. St. of U.P. & ors. Vs Babu & ors. (S.L.P. No. 4160/2022 decided Dt. 14.03.2022),
5. St. of U.P. & anr. Vs Adarsh Seva Sahkari Samiti Ltd., (2016) 12 SCC 493,

(Delivered by Hon'ble Rajan Roy, J.
&
Hon'ble Manish Kumar, J.)

1. Heard.

2. The present writ petition has been preferred with the following main prayers:-

"i) Issue a writ, order or direction in the nature of Mandamus thereby commanding the opposite parties not to disturb the peaceful possession of the petitioner over Gata No. 72, Khata No. 178, area 1606.13 sq. mtrs. situated at village Chandan, Pargana, Tehsil and District Lucknow.

ii) Issue a writ, order or direction in the nature of mandamus directing the opposite parties to restore the entries in the name of the petitioner over Gata No. 72, Khata No. 178, area 1606.13 sq. mtrs. situated at Village Chandan, Pargana, Tehsil and District Lucknow, as it was prior to 4.2.2008."

3. Brief facts of the case are that Gata No. 72 (1606.13 sq. mtrs.) situated at village Chandan, Pargana, Tehsil and District Lucknow was recorded in the name of Sukkha, the original tenure holder who

was its Bhumidhar with transferable rights. A notice under Section 8(3) of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as 'Act, 1976') was issued in respect of aforesaid land and as per the opposite parties Sukkha did not respond, therefore, the said land measuring 1606.13 sq. mtrs. was declared surplus. On 09.09.1978, a notification under Section 10(1) of the Act, 1976 was issued. Thereafter on 12.05.1990, notification under Section 10(3) of the Act, 1976 was published. Sukkha was directed to handover possession of the said land on 24.01.1991, as claimed by the opposite parties, in view of Section 10(5) of the Act, 1976. Thereafter, the said land, as per opposite parties, was transferred to Lucknow Development Authority in view of Government Order dated 11.12.1996 and Section 10(6) of the Act, 1976, though the exact date of this transfer has not been mentioned. In fact in the counter affidavit of the State though it is mentioned that Sukkha was asked to handover possession of the land, but it is nowhere mentioned that he did handover or surrender his possession to the State authorities voluntarily or that it was forcibly taken. No proof of such handover or taking over of possession has been annexed by the opposite parties in the counter affidavit. Only a copy of notice under Section 10(5) of the Act, 1976 has been annexed which by itself does not prove handing over or taking over of actual possession. On 11.03.1999, the Urban Land (Ceiling and Regulation) Repeal Ordinance, 1999 was issued which was adopted by the State Legislature of U.P. under Article 252(2) of the Constitution of India on 18.03.1999. This Ordinance was replaced by the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (Act No. 5 of 1999) (hereinafter referred to as the 'Repeal Act, 1999') by

which the Act, 1976 was repealed. As per Section 5(2) of this Act, 1999, notwithstanding repeal of the Ordinance of 1999, anything done or action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of the Act, therefore, the adoption dated 18.03.1999 by State of U.P. holds good for the Act, 1999 also.

4. Before referring to the provision of Repeal Act, 1999, it is relevant to mention that at some point of time Sukkha died and his daughter succeeded him with regard to his land and after coming into force of the Repeal Act, 1999, she executed a sale-deed in favour of the petitioner on 18.09.2000 as per the supplementary affidavit of the petitioner dated 11.02.2020, copy of which was served on the State, contents of which have not been denied by it. Copy of sale-deed is also annexed with it. Based on the said sale deed, petitioner was recorded in the revenue records as its Bhumidhar with transferable rights. Copy of khatauni pertaining to Gata No. 72 is annexed as Annexure no. 1 to the petition. By then, the State was not even recorded in respect of the said land and it was so recorded only on 04.02.2008. Sections 3 & 4 of the Repeal Act, 1999 read as under:-

"3. Saving.- (1) *The repeal of the principal Act shall not affect -*

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorised by the State Government in this behalf or by the competent authority.

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken

thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where -

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4. Abatement of legal proceedings -- All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate:

Provided that this section shall not apply to the proceedings relating to sections 11, 12, 13 & 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

5. These provisions of the Repeal Act, 1999 were considered by Hon'ble the

Supreme Court in the case of State of U.P. vs Hari Ram [(2013) 4 SCC 280] and it was inter alia held that vesting under Sub Section (3) of Section 10 meant vesting of title absolutely and not possession, though nothing stands in the way of a person voluntarily surrendering or delivering possession. It further held that it was mandatory for the State to issue a notice under Section 10 (5) of the Act, 1976 directing the petitioner/land holder to deliver possession to the State, failing which it was mandatory for the State to take forceful possession under Section 10(6) of the Act, 1976. It went on to hold as under:-

"42. The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any of those situations, the land owner or holder can claim the benefit of Section 4 of the Repeal Act. The State Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the respondent is entitled to get the benefit of Section 4 of the Repeal Act."

6. Thus, vesting of land under Section 10(3) of the Act, 1976 does not mean actual physical possession and such vesting also does not by itself render the possession of tenure holder illegal. Thus the crux of the issue is whether in the case at hand, actual/de facto possession was taken or

voluntarily given prior to coming into force of Repeal Act, 1999 or not. If not, then the benefit of the Repeal Act will be available to the petitioner. If it has been taken, then it will not be available.

7. Now the mode/procedure for taking possession was discussed by this Court in the case of **Yasin vs. State of U.P. and Ors. [(2014) 4 ADJ 305 (DB)]**. Paragraphs 15 & 16 of the said judgment reads as under:-

"15. In the light of the aforesaid, the Court has to see as to whether actual physical possession had been taken by the State or not either under Sections 10(5) or 10(6) of the Act. The procedure for taking possession has been provided under the Directions of 1983, which has been issued by the State Government while exercising its power under Section 35 of the Act. Paragraph 3 of the Directions is extracted hereunder:

'3. Procedure for taking possession of vacant land in excess of Ceiling Limit .--(1) The Competent Authority will maintain a register in Form No. ULC -1 for each case regarding which notification under sub-section (3) of Section 10 of the Act is published in the gazette.

(2) An order in Form No. ULC-II will be sent to each landholder as prescribed under sub-section (5) of Section 10 of the Act and the date of issue and service of the order will be entered in Column 8 of Form No. ULC-1.

(3) On possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6) of Section 10 of the Act, entries will be made in a register in Form ULC-III and also in Column 9 of the Form No.

ULC-I. The Competent Authority shall, in token of verification of the entries, put his signature in Column II of Form No. ULC/1 and Column 10 of Form No. ULC-III.'

16. From the aforesaid, it is clear that Competent Authority is required to maintain a register under U.L.C.-I, which is required to indicate the date of notice issued under Section 10(5) of the Act and the date of service of notice as well as the date of taking the possession and the signature of the Competent Authority. Form no. U.L.C.-II is with regard to issuance of notice under Section 10(5). The format indicates that in addition to the notice that had to be sent to the tenure holder an intimation is also required to be sent to the Collector with a request to take possession under sub-section (6) of Section 10 of the Act. Form no. U.L.C.-III is a register for the land of which possession has been taken under Sections 10(5) or 10(6) of the Act. The Competent Authority is also required to place his signature endorsing the date of taking possession."

8. The directions of 1983 referred in the above quoted judgment have been issued under Section 35 of the Act, 1976.

9. The Division Bench in the case of **Yasin** (supra) after considering various decisions of Hon'ble Supreme Court on the mode of possession also observed that normal mode of taking possession is drafting a panchnama in the presence of panchas and taking possession and giving delivery of possession to the beneficiaries, if any.

10. There is no such pleading in the counter affidavit nor any documents annexed to demonstrate the taking over of possession in terms of the aforesaid

procedure prescribed. As already stated, in fact, even bereft of the aforesaid procedure, there is no such averment in the counter affidavit of the State that de facto/actual possession was taken over by it of the land in question. It is also not the case that the actual possession was voluntarily delivered by the tenure holder.

11. From perusal of the प्रपत्र संख्या न० भू० अ० सी० -दो issued under Section 10 (5) of the Act, it shows the name of Sukkha the original tenure holder but nothing has been found from the record that at any point of time, either the original tenure holder or the petitioner has ever given physical possession voluntarily as per Section 10 (5) of the Act. The counter affidavit also does not say that actual physical possession was handed over to Lucknow Development Authority and it has made any construction on it. There is no documentary proof at all in the light of Division Bench judgments of this Court in the cases of **Yasin** (supra) **and Babu and Ors. vs. State of U.P. thru. Secy., Urban Land Ceiling, Lucknow & Ors. (Misc. Bench No. 1960 of 2019)** to show voluntary surrender of possession by original tenure holder or forcible de facto possession by the State.

12. The Competent Authority is required to maintain a register under U.L.C.-I, which is required to indicate the date of notice issued under Section 10(5) of the Act, 1976 and the date of service of notice as well as the date of taking the possession and the signature of the Competent Authority. Form No. U.L.C.-II is with regard to issuance of notice under Section 10 (5). The format indicates that in addition to the notice that had to be sent to the tenure holder, an intimation is also required to be sent to the Collector with a request to take possession under sub-

Section (6) of Section 10 of the Act. Form No. U.L.C. -III is a register for the land of which possession has been taken under Section 10 (5) or 10 (6) of the Act, 1976. The Competent Authority is also required to place his signature endorsing the date of taking consideration. In this case, no such record is available which could help the opposite parties. No memo of possession is annexed to the counter affidavit. Even the date of taking the possession has not been mentioned in the counter affidavit.

13. The petitioner has specifically pleaded in para 6 of the writ petition that possession of the land was never taken. It reads as under:-

"6. That the notification under Section 10(1) of the Act No. 33 of 1976 was made vide notification No.8540/3228 dated 9.9.1978 but the possession was not taken."

14. The aforesaid para has been replied in para 24 of the counter affidavit, which is being quoted hereinbelow:-

"24. That the contents of para 6 of the writ petition need no comment."

15. Further in para 11 of the writ petition, he has mentioned that he continues to be in actual and physical possession of the land. It reads as under:-

"11. That the petitioner respectfully submits that after the execution of the sale deed executed by opposite party No. 4 in favour of the petitioner his name was mutated in the revenue records and he is continuing in actual and physical possession of the land in question."

16. This has been replied by the State in para 26, as under:-

" That the contents of para 11 of the writ petition as stated are denied in view of the submissions made hereinabove."

17. On a perusal of the other paragraphs of the counter affidavit, we do not find any pleading and proof referred in its support about actual physical possession having been delivered or taken to/by State authorities. In fact, para 24 of the counter affidavit accepts the case of the petitioner. The possession and transfer, which have been referred in the counter affidavit of the State, are only on paper. The original records in this regard which were produced before us also do not contain any proof of such actual possession having been taken or delivered voluntarily.

18. Possession of the tenure holder or petitioner cannot be termed as illegal merely because of vesting of the land in the State in view of the decision of Hon'ble Supreme Court in the case of **Hari Ram** (supra), as has already been held in the case of **Babu & Ors.** (supra). In view of the above, the land owner or holder can claim benefit of Sections 3 & 4 of the Repeal Act, 1999.

19. As regards, the contention of Sri Khare that the petition has been filed belatedly, this is also irrelevant as the petitioner is still in possession of the land and its possession was never actually taken by the State. Moreover, the petition was filed after petitioner come to know about the entry made on 04.02.2008 in the records, illegally. This aspect has also been considered by a Division Bench judgment of this Court in the case of **Babu and Ors.** (supra). The relevant extract of the said judgment is quoted hereinbelow:

"16. As regards the contentions of Sri Sarin that the challenge was delayed, we are of the opinion that as the actual physical possession still continues with the petitioners and it was not taken by the State, there is no question of delay in seeking the relief as aforesaid. The decision relied by Sri Sarin, which are reported in 2015 (5) SCC 321 *State of Assam Versus Bhaskar Jyoti Sharma and others*, 2017 (7) ADJ 362 *Dhani Ram Versus State of U.P. and others* and 2015 (7) ADJ 630 *Shiv Ram Singh Vs. State of U.P. and others* do not apply to the facts of the case. In the case of *Bhaskar Jyoti* (supra) the fact was that the actual physical possession had been taken over from the erstwhile land owner on 07.12.1991, therefore in this context the plea raised about taking over the possession illegally was held to be highly belated. Here the facts are very different. The possession still continues with the petitioners and there is nothing to show that it was taken by the State. As regards the case of *Shiv Ram Singh* (supra) here also the allegation was of dispossession from land without due notice under Section 10(5) and as it was a belated plea, therefore, the same was not acceptable. In the case of *Dhani Ram* (supra) a notification under Section 4 of the Act, 1976 was challenged belatedly, which is not the case here. Therefore, none of these decisions supports the case of the opposite parties."

20. Against the judgment dated 30.07.2021 in the case of ***Babu & Others*** (supra), an S.L.P. bearing No. 4160/2022 was preferred by the ***State of U.P. & Ors.*** vs. *Babu and Ors.*, which was dismissed by Hon'ble the Supreme Court vide its order dated 14.03.2022.

21. As there is nothing on record to establish voluntary surrender of land by

Sukkha under Section 10(5) or forcible actual/de facto possession by the State of U.P. under Section 10(6) therefore, the Repeal Act, 1999 is clearly attracted and the petitioner is entitled to the benefit of Sections 3 and 4 of the Repeal Act, 1999.

22. Once we have arrived at the conclusion that actual physical possession was never taken by the State then in view of the Repeal Act, 1999, all proceedings under the repealed Act, 1976 and orders passed therein stood abated as on 18.03.1999/22.03.1999 when the Act, 1999 came into force. The Act, 1976 itself ceased to be operative from the said date, therefore, it cannot be said that the sale of the land by daughter of Sukkha in favour of petitioner on 18.09.2000 is hit by any provisions of the Act, 1976, such as, Section 10(4).

23. The contention of Sri Khare in this regard based on the decision of Hon'ble Supreme Court in the case of ***State of U.P. and another Vs. Adarsh Seva Sahkari Samiti Ltd.***; (2016) 12 SCC 493 that petitioner being a subsequent purchaser is not entitled to any relief is misconceived. In the case of ***Adarsh Seva Sahkari Samiti Ltd.*** (supra), the sale-deed of the land which was the subject matter of ceiling proceedings was sold/purchased in the year 1991-92 when the Act, 1976 was in operation and the land had vested in the State and the sale was prohibited by Section 10(4) of the said Act, but, in this case, the Act, 1976 ceased to be operative on 18.03.1999/22.03.1999 when it stood repealed and sale of the land by the tenure holder took place on 18.09.2000 in favour of petitioner, therefore, it was not hit by Section 10(4) as it was no longer in existence. Nothing in law prohibited the recorded tenure holder from selling the said

land to petitioner on the said date. The decision in ***Adarsh Seva Sahkari Samiti Ltd.*** (supra) is not applicable to the facts of this case.

24. In view of the above discussion, the petition is ***allowed***. We direct the concerned revenue authorities to delete the endorsement contained in the remarks column of the Khatauni, regarding land being surplus under the Ceiling Act, copy of which is annexed as Annexure 1 and restore the name of the petitioner in respect of the land in question in the revenue record, so far as his share therein is concerned. This is without prejudice to the rights of any third person who may have a claim against the petitioner.

25. The original records which were produced and were retained by the Court, are returned herewith to the counsel for the State.

(2023) 5 ILRA 1443
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-C No. 9252 of 2023

**Shree Arya Mahila Hitakarini
Mahaparishad, Varanasi & Anr.**

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Dr. Pradeep Kumar Mishra, Sri Shivendu Ojha, Sri Radhakant Ojha (Sr. Adv.)

Counsel for the Respondents:

C.S.C., Ms. Vishakha Pande, Sri Ashok Kumar Singh, Sri Rakesh Pande (Sr. Adv.)

**Civil Law – Constitution of India, 1950 -
Article - 226 - Societies Registration Act,
1860 – Bye Laws of Society – 29 & 35 : -**

Writ Petition – impugned order – two elections were counted by the rival parties to the society – writ petition – Special Appeal – remanded back the matter before the Prescribed Authority – who has upheld the election set up by the respondent no. 4 and invalidated the election claim of the petitioners - court finds that, prescribed authority in the impugned order considered the interplay of bye laws of the society - namely bye laws no. 29 and 35 to determine the legality of the meeting called for election - court finds that, Bye law no. 35 is especial provision made for a specific purpose, while Bye Law no. 29 is a general provision created for all others purposes – Good authorities in law settled the cannon of interpretation that the special law prevails over the general law – hence, an election meeting shall be governed and regulated only by Bye Laws no. 35 - and the next issue regarding venue of the meeting was in the teeth of the holding of the learned Division Bench – further, there is no issue about the electoral college – consequently, impugned order is liable to be set aside and matter is remitted to the Assistant Registrar, Firms, Societies and Chits to conduct the election in a fair and transparent manner – writ petition is allowed – directions issued accordingly.

Writ Petition Allowed. (E-11)

List of Cases cited:

1. Writ – C No. 20203/2022 (Shree Arya Mahila Hitakarini Mahaparishad & anr. Vs St. of UP & ors.) decided on Dated 20.10.2022,

2. Special Appeal No. 692/20222 (Dr. Shashi Kant Dixit Vs St. of UP & ors.) decided on Dated 16.12.2022.

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Sri Radhakant Ojha, learned Senior Counsel assisted by Dr. Pradeep Kumar Mishra, learned counsel for the petitioners and Sri Rakesh Pande, learned Senior Counsel assisted by Ms. Vishakha Pande, and Sri Ashok Kumar Singh, learned counsel for the respondent no. 4.

2. By the impugned order dated 27.02.2023 passed by the Prescribed Authority/Joint Magistrate/Upziladhari, Sadar, Varanasi, under the Societies Registration Act, 1860, the election set up by the respondent no. 4 has been upheld while the election claim of the petitioners has been invalidated.

3. Brief facts are these. Election to society was called on 18.02.2022 by the Chief Secretary/General Secretary of the Samrakshak Sabha by notice dated 23.01.2022. The said notice fixed Arya Mahila PG College, Varanasi as the election venue. On 04.02.2022 meeting called by the Joint Secretary of the All India Council resolved to change the venue of the election to Bharat Dharam Mahamandal Building, Jagatganj, Banaras.

4. Two elections were conducted by the rival parties at their respective venues. The competing election claims were presented before the Assistant Registrar, Firms, Societies and Chits, Varanasi. The Assistant Registrar vide order dated 28.06.2022 recognized the election set up by the respondent no. 4 and invalidated the claim of the petitioner. Aggrieved the petitioners invoked the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India and instituted a writ petition which was registered as Writ C No. 20203 of 2022 (Shree Arya Mahila Hitakarini Mahaparishad and Another vs. State of U.P. and Others). The learned

single Judge by judgment rendered on 20.10.2022 ruled as follows:

"Therefore, under such facts and circumstances as well as law laid down by this Court, the writ petition is allowed and impugned order dated 28.6.2022 passed by the Assistant Registrar-respondent no.2 is hereby quashed. Respondent no.2 is directed to refer the matter to Prescribed Authority within two weeks alongwith election proposals of both the rival groups. Prescribed Authority is further directed to take final decision in the matter maximum within six weeks thereafter after affording opportunity of hearing to petitioner, respondent no.3 and all other concerned, if any."

5. The order passed by the learned single Judge was carried in appeal by respondent no. 4 which came to be registered as Special Appeal No. 692 of 2022 (Dr. Shashi Kant Dixit vs. State of U.P. and 3 Others). The learned Division Bench affirmed the judgment of the learned Single Judge and dismissed the appeal by judgment dated 16.12.2022. However, various observations were made by the learned Division Bench which influence the controversy till date. The learned Division Bench in Special Appeal No. 692 of 2022 (supra) dealing with the argument relating to invalidity of the notice and change of the election venue observed thus:

"Dealing with the first argument that there is an inherent defect in the notice for convening the meeting on 29.01.2022, it would be apt to bear in mind that the election programme was notified by the appellant fixing 18.02.2022. It is not in dispute that convening a meeting is a step towards holding the elections. Clause 30 of the Rules of the Association provides for a

three weeks notice for convening the meeting. Parties are in agreement that the election date so fixed by the appellant for holding the election remained unaltered. However, it is the venue which got changed. Now a question would arise whether holding a meeting on 04.02.2022 to change the venue would amount to materially and substantially altering the election program. The answer to the same finds place in Rule 35 of the Rules of the Association wherein, it is provided that in case election is held at Varanasi, then it should be at the Headquarters at Varanasi. Headquarters is specified in Clause 2 of the MOA, which is, at Bharat Dharam Mahamandal Building, Jagatganj, Benaras. Admittedly, the venue of the elections so notified by the appellant was at Arya Kanya P.G. College, Chetganj, Varanasi which was not a place specified in MOA for conducting elections. It is also not in dispute that allegations were levelled regarding the possibility of manipulation. Thus, in the opinion of the Court, mere change in the election venue would not partake the character of materially altering the election programme as to require issuance and publication of fresh election programme by giving three weeks notice."

6. Other observations were also in the judgment. However, most relevant observation on which the fate of the case before this Court turns has been extracted above.

7. Sri Radhakant Ojha, learned Senior Counsel assisted by Dr. Pradeep Kumar Mishra, learned counsel for the petitioners submits that the findings quoted above finally decided the issue of venue of the elections. The impugned order is in the teeth of the holding of the learned Division Bench.

8. Per contra, Sri Rakesh Pande, learned Senior Counsel assisted by Ms. Vishakha Pande, learned counsel for the respondent no. 4 contends as under:

9. The findings of the learned Division Bench in Special Appeal No. 692 of 2022 (supra) were made only in the context whether a triable case arose which merited reference to the prescribed authority. The said observations do not bind the authorities. Upon remand the prescribed authority was liable to exercise its independent judgment uninfluenced by observations made in the judgment of the learned Division Bench.

10. Heard learned counsel for the parties.

11. Two issues define the controversy. Firstly the legality of the meetings and resolutions dated 23.01.2022 and 04.02.2022 respectively called by the rival parties. Secondly the validity of the elections held by the parties respectively at separate venues.

12. The prescribed authority in the impugned order considered the interplay of relevant bye laws of the society namely Bye law No. 29 and Bye law no. 35 to determine the legality of the meeting called on 04.02.2022.

13. The provisions are extracted hereunder for ease of reference.

"Bye Law no. 29- The meeting of the Samrakshak Sabha shall be held at least once in every five years or whenever considered necessary by the Chief Secretary, joint Chief Secretary or on the request of at least seven members of the Samrakshak Sabha in writing to the Chief Secretary to call the meeting.

Bye Law no. 35- The member of the All India Council other than the disciple of Bhagwan Maharashi Swami Gyananandji Maharaj, the representative of Sri Bharat Dharm Mahamandal, and Shree mahamaya Trust shall be elected every five years by the All India Samrakshak Sabha at its meeting specially called for the purpose either at Varanasi, the head quarter or at any other place in India considered suitable by the General president, Chief Secretary or General Secretary."

14. The bye laws delineate two categories of meetings. The first class of meetings are of a general nature which can be called within the prescribed time period and on other occasions by the authorities depicted in the Bye law No. 29. The other set of meetings which were contemplated in Bye Law No. 35 exclusively pertain to elections. An election as per Bye law No. 35 can be called only by the General President, Chief Secretary or General Secretary. The venues for the meeting were also provided in the said bye law.

15. The Bye law No 35 clearly is a special provision made for a specific purpose, while Bye law No. 29 is a general provision created for all other purposes.

16. Good authorities in law settle the cannon of interpretation that the special law prevails over the general law. Hence, an election meeting shall be governed and regulated only by Bye law No. 35.

17. The meeting called by respondent no. 4 on 23.01.2022 related to holding of the election. The office bearer calling for the said election was competent to do so as per the scheme of the bye laws. To the contrary, the Joint Chief Secretary was not authorised by the bye laws to call an election meeting on 04.02.2022. No

exception can be taken in the findings in the impugned order insofar as it invalidates the meeting dated 04.02.2022 and consequent election for like reasons.

18. The learned Division Bench by using the word "prima facie" did not decide the issue but clearly left it open for the parties to canvass the same before the prescribed authority;

"In our opinion, once the Joint Chief Secretary was authorised to issue notice/agenda and convene the meeting, then, *prima facie*, there appears to be no inherent defect in the notice/agenda."

19. The next critical issue relates to the venue of the election. The election called by the respondent no. 4 on 23.01.2022 was held at Arya Mahila P.G. College, Varanasi. The venue of the meeting was in the teeth of the holding of the learned Division Bench. The learned Division Bench conclusively adjudicated the issue of election venue as seen in the findings extracted earlier.

20. It is contended on behalf of the private respondent that the venue of the election as a matter of precedent has for the past many decades been Arya Mahila P.G. College, Varanasi. However, this submission is contested by Sri Radhakant Ojha, learned Senior Counsel. In any case it is not for this Court to decide the venue in view of the holding of the learned Division Bench.

21. While the arguments of Shri Rakesh Pande, learned Senior Counsel appear persuasive but not enough for a Single Judge to transgress the holdings of a learned Division Bench. The matter has to be settled on merits by a Division Bench of superior strength.

22. The impugned order insofar as it upholds the election dated 23.01.2022 held at Arya Mahila P.G. College, Varanasi is liable to be reversed and is reversed. The election claim set up by the respondent no. 4 on the footing of election held at Arya Mahila P.G. College, Varanasi is liable to set aside and is set aside.

23. The findings of the prescribed authority invalidating the meeting set up by the petitioner on 04.02.2022 and the elections held on 18.02.2022 at the Mahamandal Buildings, Lahurabir, Varanasi are not liable to interfered with.

24. There is no dispute about the electoral college.

25. The matter is remitted to the Assistant Registrar, Firms, Societies and Chits, Varanasi to conduct the election in a fair and transparent manner as per law within a period of six weeks from the date of receipt of a certified copy of this order.

26. The impugned order insofar as it upholds the election claim set up by the respondent no. 4 is liable to be set aside and is set aside.

27. The District Magistrate, Varanasi is directed to ensure that adequate security arrangements be made at the election venue.

28. The writ petition is allowed.

(2023) 5 ILRA 1447
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-C No. 9866 of 2023

Committee of Managemant of Shiksha Prasar Samiti, Kanpur & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Sharad Chandra, Sri Sankalp Narain

Counsel for the Respondents:
 C.S.C., Sri Sanjeev Kumar Yadav

(A) Civil Law – Constitution of India, 1950 - Article - 226 - Societies Registration Act, 1860 – Sections 4(1), 5(a)(g), 16-A & 25(1) - Indian Penal Code – Section – 302
 - Writ Petition – petitioner claims as an elected Secretary of the Society challenging the impugned order passed by the Registrar U/s 4(1) declining to register the list of office bearers on the footing that a reference is pending U/s 25(1) - Question of Disqualification – Court finds that, both the petitioner and the contesting respondents are convicts of offence of murder - 'Moral Turpitude' – the term moral turpitude cannot be defined by an iron cast rule or an inflexible formula to fit all cases – The line of enquiry would examine the gravity of the offence, the role of offender, nature of culpability in the crime, and the scheme of the enactment before the criminal offence becomes an act of moral turpitude which attracts a disqualification – held, the offence of murder for which the petitioner has been convicted is comprised in the ambit of moral turpitude U/s 16-A of the Act, - hence, persons with such criminal antecedents cannot be permitted to run the affairs of an educational institution and blight the education prospects of the country's youth – both petitioner and respondent neither has right to contest the elections of the society nor can have any say in running of the educational institution – writ petition is dismissed. (Para – 9, 13, 15, 16)

(B) Civil Law – Constitution of India, 1950 - Article - 226 - Societies Registration Act, 1860 – Sections 4(1), 5(a)(g), 16-A & 25(1) - Indian Penal Code – Section – 302
 - Writ Petition – Question of Disqualification – Moral Turpitude - both the petitioner and the

contesting respondents are convicts of offence of murder – they failed to disclose their antecedents before the court in the first instance – such practices can be discouraged only by deterrence – hence, cost of Rupees one Lakh each are imposed and same shall be recovered from them as arrears of land revenue – the Chief Judicial Magistrate shall submit a report disclosing the recovery before the Registrar General within two months – directions issued accordingly.

(Para – 17)

(C) Civil Law – Constitution of India, 1950 - Article - 226 - Societies Registration Act, 1860 – Sections 4(1), 5(a)(g), 16-A & 25(1) - Indian Penal Code, 1860 – Section 302 - Writ Petition – Question of Disqualification – Moral Turpitude - both the petitioner and the contesting respondents are convicts of offence of murder – the provisions in question of Society Registration Act, has been created to curb mischief of like nature - it has to be applied to purge educational institutions of criminal elements and lief the curse of criminal influence on formative minds – Law cannot countenance a situation wherein convicted criminal run educational institutions as a matter of right and conceal facts with a sense of impunity – hence, various directions issued to execute them to the Additional Chief Secretary, Institutional Finance, Govt. of UP - to dissuade unscrupulous litigants from abusing the process of the court – All the Assistant / Deputy Registrar, Firms, Societies and Chits in all districts of the St. shall ensure that every proceeding u/s 4(1) and 25(1) shall be preceded by a declaration from each member/applicant disclosing their criminal antecedents – which shall be on affidavit and placed in the record – and shall also call for similar declarations on affidavits from all office bearers of Societies currently running in the St. – directions issued to the concern authorities who shall draw up a compliance report and submit the same, accordingly.

(Para – 15, 18, 19)

Writ Petition Dismissed with directions.
(E-11)

List of Cases cited:

1. Baleshwar Singh Vs District Magistrate and Collector, Banaras & ors. (AIR 1959 All 71),

2. Mahak Singh Vs St. of U.P. & ors., 1999 (2) UPLBEC 1336,

3. The St. Bank of India Vs P. Soupramaniane, 2019 (18) SCC 135,

(Delivered by Hon'ble Ajay Bhanot, J.)

1. By the impugned order dated 12.12.2022 the Deputy Registrar, Firms, Societies and Chits has declined to register the list of office bearers under Section 4(1) of the Societies Registration Act, 1860 on the footing that a reference is pending before the prescribed authority under Section 25(1) of the Societies Registration Act.

2. The petitioner claims that he is the Secretary of the society registered under the name and style of "Shiksha Prasar Bankatu Bujurg Etawah." which runs an educational institution. The petitioner states that he was lawfully elected on 24.07.2022.

3. Shri Sanjeev Kumar Yadav, learned counsel for the newly impleaded respondent submits that the petitioner cannot be elected as office bearer, inasmuch as, he has been convicted for murder in Sessions Trial No. 419 of 1993 (State Vs. Prema Devi and others).

4. Rejoining the issue, Shri Sankalp Narain, learned counsel for the petitioners does not dispute the aforesaid fact. He, however, contends that the newly impleaded respondent himself is a convict under Section 302 I.P.C. in Sessions Trial No. 120 of 1991 (State Vs. Ajeet Singh and others).

5. The undisputed facts of this case are that the petitioner claims to be the

manager of the committee of management. The petitioner was convicted by a judgement rendered by the learned trial court on 11.05.2017 in Sessions Trial No. 419 of 1993 (State Vs. Prema Devi and others) for an offence under Section 302 I.P.C. The learned trial court has found that the petitioner was a principal offender who had done the deceased to death. The offence was actuated by an old rivalry between the adversaries. Further, the conviction of the petitioner for murder still stands, and has not been upset by any appellate court.

6. The newly impleaded respondent was convicted by the learned trial court on 30.10.2001 in Sessions Trial No. 120 of 1991 (State Vs. Ajeet Singh and others). The learned trial court found that the newly impleaded respondent was one of the principal offenders who committed the murder of the deceased. The deceased was murdered on account of an old enmity between the parties.

7. Both the petitioner and the respondent are linked to the offence of murder in the respective cases by credible evidence.

8. The right of the petitioner to be appointed as Secretary of the society has to be construed in light of Section 16A of the Societies Registration Act, 1860. The provision states as under:

"16A. Disqualification for holding office in society.-- A person who is undischarged insolvent or who has been convicted of any offence in connection with the formation, promotion, management or conduct of the affairs of a society, or of a body corporate, or of an offence involving moral turpitude shall be disqualified for

chosen as and for being a member of the governing body or the President, Secretary or any other office-bearer of a society."

9. The question of disqualification of the petitioner contemplated under Section 16A of the Societies Registration Act will turn upon the fact whether the offence for which he has been convicted involves "moral turpitude". The phrase "moral turpitude" is of a wide ambit and has not been defined by the legislature. Recourse can be had to various dictionaries and authorities which define the aforesaid term:

(i). "Moral Turpitude" as defined in **Black's Law Dictionary** (6th Edn.) is as follows:

"Moral Turpitude.--The act of baseness, vileness, or the depravity in the private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man." [Black's Law Dictionary (6th Edn.) p. 1008.]

"implies something immoral in itself regardless of it being punishable by law"; "restricted to the gravest offences, consisting of felonies, infamous crimes, and those that are malum in se and disclose a depraved mind." [Id, p. 1517.]

(ii). According to **Bouvier's Law Dictionary**, "Moral Turpitude" is:

"An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

(iii). **Burton Legal Thesaurus** defines "Moral Turpitude" as:

"Bad faith, bad repute, corruption, defilement, delinquency, discredit, dishonour, shame, guilt, knavery, misdoing, perversion, shame, vice, wrong."

10. This Court in **Baleshwar Singh Vs. District Magistrate and Collector, Banaras and others**¹ while exploring the scope of term "moral turpitude" held as under:

"26. The expression 'moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellowmen or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man."

11. The question whether the conviction for the offence of murder would fall in the breadth of "moral turpitude" and cause disqualification of Pradhan of the Gram Panchayat was in issue before the this Court in **Mahak Singh Vs. State of U.P. and others**². This Court in **Mahak Singh (supra)**

upon examining the facts of the case held:

"12..... The expression 'moral turpitude', as said above, is not a term of rigid connotation to be defined in any strait-jacket formulae, but regard being had to socio-ethical ethos, and morals of people, at a given time and their cultural heritage, It would not be difficult for the Courts to conclude that the offence committed by the petitioner in exterminating his own step mother in an horrendous manner involves moral wickedness. The petitioner cannot escape from the finding that the offence of murder' of Smt. Raj Kumari committed by him and for which he was ultimately convicted was an act of moral turpitude. His conviction under Section 302/34, I.P.C. involving moral turpitude was sufficient enough to earn disqualification within the meaning of provision of Section 5A (g) of the Act."

12. The scope of term "moral turpitude" and its applicability to the services of an employee arose for consideration before the Supreme Court in **The State Bank of India Vs. P. Soupramaniane**³, which stated the position of law thus:

"12. There is no doubt that there is an obligation on the management of the Bank to discontinue the services of an employee who has been convicted by a criminal court for an offence involving moral turpitude. [Sushil Kumar Singhal v. Punjab National Bank, (2010) 8 SCC 573 : (2010) 2 SCC (L&S) 674] Though every offence is a crime against the society, discontinuance from service according to the Banking Regulation Act can be only for committing an offence involving moral

turpitude. Acts which disclose depravity and wickedness of character can be categorised as offences involving moral turpitude. Whether an offence involves moral turpitude or not depends upon the facts [Allahabad Bank v. Deepak Kumar Bhola, (1997) 4 SCC 1 : 1997 SCC (L&S) 897] and the circumstances [Pawan Kumar v. State of Haryana, (1996) 4 SCC 17, para 12 : 1996 SCC (Cri) 583] of the case."

13. From the preceding narrative, it is evident that every conviction in a criminal offence may not amount to "moral turpitude". The term moral turpitude cannot be defined by an iron cast rule or an inflexible formula to fit all cases. To determine whether an offence comes within the purview of the term "moral turpitude" a fact based enquiry has to be made. The line of enquiry would examine the gravity of the offence, the role of the offender, nature of culpability in the crime, and the scheme of the enactment before the criminal offence becomes an act of moral turpitude and attracts a disqualification.

14. In this case the learned trial court has found that commission of the heinous offence of murder by the petitioner has been established beyond reasonable doubt.

15. The petitioner claims managership of an educational institution. Education nurtures the future of India, and forms the backbone of our national strength and character. Persons with such criminal antecedents cannot be permitted to run the affairs of an educational institution and blight the education prospects of the country's youth. In this wake, the offence of murder for which the petitioner has been convicted is comprised in the ambit of "moral turpitude" under Section 16A of the Societies Registration Act, 1860. The

provision has been created to curb mischiefs of like nature; it has to be applied to purge educational institutions of criminal elements, and lift the curse of criminal influence on formative minds.

16. For the like reasons, the newly impleaded respondent neither has the right to contest the elections of the society nor can he have any say in the running of the educational institution.

17. The matter cannot end here. Both the petitioner and the newly impleaded respondent are convicts. They failed to disclose their antecedents before the Court in the first instance. These facts came to light when the respective adversaries pointed out their convictions. Such practices can be discouraged only by deterrence. Costs of Rs. 1,00,000/- (Rupee One lakh) each are imposed upon the petitioner and the newly impleaded respondent respectively. Costs shall be recovered from them by the District Magistrate, Etawah, as arrears of land revenue within six weeks. The District Magistrate, Etawah, shall submit a compliance report before the Chief Judicial Magistrate. The Chief Judicial Magistrate shall submit a report disclosing the recovery before the Registrar General of this Court within a period of two months.

18. Law cannot countenance a situation wherein convicted criminals run educational institutions as a matter of right, and conceal facts with a sense of impunity. Prohibitive costs have been imposed by the Court to dissuade unscrupulous litigants from abusing the process of the Court.

19. The Additional Chief Secretary, Institutional Finance, Government of U.P., Lucknow, is directed to execute the following directions:

I. All Assistant/Deputy Registrars, Firms, Societies and Chits in all districts of the State of Uttar Pradesh, shall ensure that every proceeding under Section 4(1) and Section 25(1) of the Societies Registration Act, 1860, shall be preceded by a declaration from each member/applicant disclosing their criminal antecedents.

II. No order shall be passed in any proceeding under Section 4(1) of the Societies Registration Act, 1860, in respect of societies which are running educational institutions till such declarations of criminal antecedents are submitted by each member on affidavit and placed in the record.

III. Assistant/Deputy Registrars, Firms, Societies and Chits in all districts of the State of Uttar Pradesh, shall also call for similar declarations on affidavits from all office bearers of societies currently running educational institutions in the State of Uttar Pradesh and proceed as per law.

IV. Additional Chief Secretary, Institutional Finance, Government of U.P., Lucknow, shall circulate this judgement to all Assistant/Deputy Registrars, Firms, Societies and Chits in all districts of the State of Uttar Pradesh for ensuring compliance of these directions.

V. Considering the importance of the matter, Additional Chief Secretary, Institutional Finance, Government of U.P., Lucknow, shall draw up a compliance report and submit the same before the Chief Secretary, Government of U.P., Lucknow within six months so that the State is alerted to the menace of criminal elements usurping educational institutions and can take appropriate legal measures to check the same.

VI. Failure of any Assistant/Deputy Registrars, Firms, Societies and Chits to comply with this order will not only expose the official to proceedings for violation of orders of this Court but will also amount to a grave misconduct for which departmental proceedings will be initiated against the concerned official as per law.

20. Learned Chief Standing Counsel shall communicate this order to Additional Chief Secretary, Institutional Finance, Government of U.P., Lucknow for necessary compliance.

21. The writ petition is dismissed.

22. The Court would like to appreciate the assistance rendered by Shri Sankalp Narain, learned counsel and Shri Sanjeev Kumar Singh, learned counsel who in the true fashion of high ethical standards of the profession assisted the process of law as officers of the Court with exemplary integrity and scholarship.

(2023) 5 ILRA 1452
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 10228 of 2023

Uttar Pradesh State Road Transport Corp.,
Agra **...Petitioner**

Versus
Sri Bhuri Singh & Anr. ...Respondents

Counsel for the Petitioner:
 Sri Sunil Kumar Misra

Counsel for the Respondents:

C.S.C., Sri Jamal Ahmad Khan

Labour Laws – Constitution of India, 1950 - Article – 20(2) & 226 – Industrial Dispute Act, 1947 – Section 4(A) - Evidence Act, 1872 – Sections 114 & 114(g) :

- Writ Petition – challenging the impugned Award – Workman posted as Driver in UPSRTC bus – charged with - stealing of diesel from the vehicle – denied allegations - removed from Services and his salary for the suspension period was forfeited - Industrial dispute – Labour court returned finding that there was no material to implicate workman with the charge of stealing diesel and hence order of removal from service to be illegal and arbitrary accordingly set aside the order with full back wages – writ petition - UPSRTC takes plea that they may be permitted to re-conduct inquiry - Court observed that, - UPSRTC was under mandate to conduct disciplinary proceedings against employee in accordance with law and for that purpose a charge was required to be framed and all evidence and material which were available to prove charge are disclosed to delinquent employee and are also considered by Inquiry Officer - In case there is material available which has not been taken into consideration by prosecuting authority, they cannot be permitted to re-inquire into matter and be given a chance to take into account available material which was not considered in previous inquiry - In case same is permitted it will run counter to settled legal principle of *atrophise acquit/atrophise convict* – held, permitting the employer to proceed afresh with the same inquiry would be hit by the principle of 'double jeopardy' – hence, no fresh proceeding can be directed - writ petition dismissed. (Para – 14, 16, 17, 18)

Writ Petition Dismissed. (E-11)

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Sunil Kumar Misra, learned counsel for the petitioner as well as Sri Jamal Ahmad Khan, learned counsel appearing for respondent no. 1 - workman.

2. By means of present writ petition the petitioner - Uttar Pradesh State Road Transport Corporation (hereinafter referred to as "the UPSRTC"), has assailed the order of the Labour Court, Agra passed in Claim No. 79 of 2021, there by allowing the claim of respondent no. 1 - workman, against the order of removal from service dated 28.04.2015.

3. Brief conspectus of present case necessary for adjudication of the case are that respondent no. 1 on 05.07.2009, was posed as Driver at Regional Workshop, Agra and assigned duty at Store Truck No. UTF-7775. Sri V.K. Shukla, Traffic Superintendent fort Depot, submitted report by letter no. 995, dated 17.07.2009, disclosing that he alongwith his assistants Vishambhar Dayal, Assistant Traffic Inspector, Shivkaran, Office Assistant on Staff Car UP-32-6842 were coming from Saunkh to Mathura and at village Nagala Bhuria found that diesel was being siphoned off from the diesel tank of Store Truck No. UTF-7775 and filled in steel Tanks and other plastic cans which was total 16 liters by respondent no. 1.

4. Complaint was forwarded to Regional Manager, UPSRTC Agra and disciplinary proceedings were initiated against respondent no. 1 in pursuance to which he was suspended on 31.07.2009 and charge sheet was also issued to him on the same day. Assistant Regional Manager, Mahanagar Depot, was appointed as Inquiry Officer. An oral inquiry was initiated where complainant appeared before the Committee and stated that on the date of occurrence he had found respondent no. 1 stealing diesel from the said vehicle. Respondent no. 1 has cross examined the complainant and Inquiry Officer concluded the inquiry and submitted his report to the

Disciplinary Authority who issued show cause notice dated 08.04.2015, to which respondent no. 1 submitted his response and final punishment order was passed on 28.04.2015 where respondent no. 1 was removed from service and his salary for the suspension period was forfeited.

5. Assailing the order of removal from service, respondent no. 1 raised an industrial dispute under the U.P. Industrial Dispute Act, where proceedings were initiated where validity of punishment order was considered by the Deputy Labour Commissioner, Agra under Section 4A of the Industrial Dispute Act. The petitioner filed written statement opposing the claim of respondent no. 1 on 14.03.2022. The Presiding Officer, Labour Court, Agra had set aside the punishment order dated 28.04.2015 and re-instated the petitioner with full back wages.

6. The Labour Court had examined the entire material on record as well as statements made by the witnesses during the said proceedings. The Tribunal was persuaded by the fact that according to complaint there were four employees at the time of incident who were standing around the vehicle in question and amongst four people one of them was mechanic, fitter and helper. Respondent no. 1 in his response has submitted that they detected some blockade in the pipe line and therefore in order to remove the defect the diesel tank was required to be emptied and then the defect/air block was to be removed and for which purpose the mechanic, fitter and helper were present at the spot, and denied that they were trying to steal diesel.

7. The Labour Court has allowed the claim of respondent no. 1 and returned a finding that they were not stealing diesel

but were removing air block in the diesel pipe line for which mechanic and fitter were present at the spot and were involved in repair of the vehicle in question when they were noticed by the Traffic Superintendent. Admittedly no further investigation or material was produced by the petitioner which could challenge the stand taken by the workman. It has not been denied that the diesel tank was in good order and there was no need for removal of air block. In respect of workman, evidence was given by respondent no. 1 himself which is on record, stating that they were repairing the diesel tank which had developed an air block and there was no material adduced by the petitioner to repel the evidence given by the workman.

8. The Labour Court has duly considered the evidence and returned a finding that charge against respondent no. 1 - workman has not been proved and consequently, set aside the order of removal from service with full back wages.

9. Learned counsel for the petitioner has vehemently submitted that the Tribunal should have given another opportunity to the employer -petitioner to proceed against workman. Considering the fact that it has been recorded by the Tribunal that there were three other persons present on the spot but the petitioner chose not to examine any of the three other persons during disciplinary proceedings conducted by them.

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

11. This Court is of the considered view that before the Labour Court order of removal from service was under

examination. While considering the order of removal, the inquiry conducted by the employer against the workman was duly considered and found that there was insufficient material adduced by the employer to inflict penalty of removal from service upon the workman. It could not be proved that respondent no. 1 tried to steal diesel from the tank of the vehicle in question. The defense taken by the respondent that he was attempting to remove the defect of the truck which developed air block and for which purpose mechanic and fitter were present on the spot, was duly accepted as being reasonable, and no challenge to the said plea was raised by the petitioner so as to disbelieve the workman. No reason or reply has been submitted by the petitioner to record a different finding than the one which has been recorded by the Labour Court.

12. This Court does not find any merit in the arguments raised by the petitioner. It is submitted that the Labour Court has returned finding that there was no material to implicate respondent no. 1 with the charge of stealing diesel and hence has held the order of removal from service to be illegal and arbitrary and has accordingly set aside the said order.

13. The counsel for the petitioner has submitted that in light of the finding recorded by the Labour court that there were other witnesses present on the spot who were never examined by the petitioner who was prosecuting the respondent workman, and in light of the said finding the matter may be remitted to re-enquiry, so that they can take a record fresh evidence which was available but not recorded during the proceedings against respondent no. 1.

14. I have considered the submissions of the petitioner. It is only at the behest of employer that inquiry proceedings were conducted against respondent no. 1/employee where there were serious allegations levelled against him. The employer is mandated to proceed against delinquent employee in accordance with law and to give him full opportunity to defend himself before recording any finding holding him guilty of charges levelled against him of misconduct. It is duty of employer who is prosecuting the employee to bring forthwith all the material in support of charges levelled against him and to inform the delinquent employee about the said material so that he has full opportunity of defend himself adequately.

15. In the present case, in the proceedings the employee was found guilty of misconduct and accordingly has been awarded punishment/penalty of removal from service. The Labour Court after examining entire material on record and findings adduced by the prosecution in support of charges came to a conclusion that charges against the employee are not proved.

16. This Court has also examined the findings recorded by the Labour Court and found the same to be reasonable and there is no infirmity in the findings returned by the Labour Court. Prayer of the employer that he may be permitted to re-conduct inquiry so that they can record further evidence which were not adduced in the previous inquiry. Such prayer is misconceived and is accordingly rejected for the following reasons:

Firstly a person cannot get the benefit of his own fault. The petitioner was duty bound to present all the available

material in support of the charges levelled against delinquent employee and when inquiry has concluded and Labour Court has found that charges are not proved, then the employee is exonerated of the said charges. Permitting the employer to proceed afresh with the same inquiry would be hit by the principle of '*double jeopardy*' as it is well settled principle that once a person has been acquitted or is exonerated of the charges, no fresh proceedings, trial or inquiry can be commenced in relation to the said charges. The said principle finds its roots under Article 20(2) of the Constitution of India and it is the principle of *atrophoise acquit/atrophoise convict* as a person has right not to be tried again for the same offence for which he has been either acquitted or convicted and same principle applies even to disciplinary proceedings.

17. It is only where inquiry proceedings are conducted in violation of principles of natural justice, the employer is permitted to proceed against employee from the stage where there has been infirmity in the proceedings noticed by superior authority only to ensure that due opportunity is given to the delinquent employee and that he is not punished unheard. The petitioner who is employer of respondent no. 1, was under mandate to conduct disciplinary proceedings against the employee in accordance with law and for that purpose a charge was required to be framed and all the evidence and material which were available to prove the charge are disclosed to the delinquent employee and are also considered by the Inquiry Officer. In case there is material available which has not been taken into consideration by the prosecuting authority, they cannot be permitted to re-

inquire into the matter and be given a chance to take into account the available material which was not considered in the previous inquiry. In case same is permitted it will run counter to settled legal principle of *atrophoise acquit/atrophoise convict*, as has been discussed above.

18. If there was some material available with the employer and the same was not deliberately or otherwise adduced in the disciplinary proceedings/domestic inquiry then action can be taken against persons responsible for such act/omission but no fresh proceedings can be directed to be instituted to make good the deficient material/evidence, in support of charges.

19. The other ground raised by learned counsel for the petitioner is with regard to back wages. It has been submitted by counsel for the petitioner that Tribunal has wrongly granted full back wages to respondent no. 1 - workman. This Court has examined the judgment passed by the Tribunal and also submissions made in the writ petition. There is no reason for us to interfere in the findings recorded by the Tribunal as there is no material before this Court to show that respondent no. 1 was gainfully employed during period he was placed under suspension or there is any other circumstance which may compel this Court to interfere in the findings recorded by the Labour Court in this regard.

20. In the light of above discussion, this Court does not find any illegality or infirmity in the judgment of Labour Court. Accordingly, the writ petition being devoid of merits is **dismissed**.

by the District Magistrate, Bijnor/respondent No.2. A further prayer has also been made to direct the respondents to permit the petitioner to discharge the duties of Gram Pradhan of Gram Panchayat Baldiya Block Haldaur District Bijnor.

3. Facts in brief as contained in the writ petition are that the petitioner was elected as Pradhan of the Gram Panchayat Baldiya Block Haldaur District Bijnor in the election held on 19.04.2021. Certain complaints were made against the petitioner regarding work and conduct of the Panchayat and in this regard a notice dated 11.04.2022 was issued to the petitioner by the District Magistrate Bijnor/respondent No.2 making allegations that payment in number heads were made from One Active Code and the petitioner was granted fifteen (15) days time to submit his reply. Though as per notice dated 11.04.2022, fifteen days time was going to be expired on 26.04.2022 but in the meanwhile due to acute angle glaucoma severe health condition, the petitioner was going in serious medical treatment and supervision in a hospital in Bijnor from 15.04.2022 to 15.05.2022. After the aforesaid treatment, the petitioner came at his house and take a complete two weeks bed rest and medication. On 31.05.2022 after recovery from his ailment when the petitioner visited to Block Development Office Haldaur, for submission of his reply, he got information that the order impugned has already been passed by the respondent No.2.

4. It is argued by learned counsel for the petitioner that the order impugned has been passed without providing opportunity of hearing as well as submission of reply, therefore, the order impugned is liable to be

set aside. It is argued that second proviso of Section 95(1)(g) provides that no action shall be taken against the Pradhan or Member of the Gram Panchayat under sub Section (1)(g) of Section 95 of U.P. Gram Panchayat Raj Act, 1947 except after providing reasonable opportunity of showing cause to the body or person concerned, in this view of the matter it is argued that since no opportunity has been given to show cause, the order is liable to be set aside. It is argued that the impugned order is passed without application of mind and in casual manner. The Paragraph Nos.8, 10, 11 are reproduced below:-

8. That as per the notice dated 11.04.2022, the petitioner was required to submit his reply within Fifteen days from the date of issuance of the letter which was expiring on 26.04.2022, but meanwhile it is relevant to mention here that due to acute angle glaucoma severe health condition, petitioner was going in serious medical treatment and supervision in a hospital in Bijnor from dated 15.04.2022 to 15.05.2022, however after hospital treatment petitioner came at his house and take a complete two weeks bed rest and medication, so that he can get speedy recovery from ailment; A true/photocopy of medical certificate issued by the Nayan Netra Hospital through concern Doctor dated 16.05.2022 is being filed herewith and marked as ANNEXURE NOS. 2 to this writ petition.

10. That on 31.05.2022, after recovery from his ailment when the petitioner was in position to visit Block Development office, he immediately visited Block Development Office, Haldaur for regarding his reply of the notice dated 11.04.2022, but at the same time he gathered an information that an order by

the District Magistrate, Bijnor has already been passed under Section 95(1)(g) its Proviso ceasing his financial and administrative powers on 25/ 26.05.2022)\n this connection true copy of the impugned order dated 25/26.05.2022 passed by the District Magistrate, Bijnor is being filed herewith and marked as ANNEXURE NO.4 to this writ petition.

11. That the petitioner was served with the impugned order dated 25/26.05.2022 on 31.05.2022 at Block itself while he went to give his reply to the notice dated 11.04.2022, as well as the impugned order passed by the District Magistrate, Bijnor was served to the petitioner on 31.05.2022.

5. A counter affidavit has been filed by Sri Virendra Yadav, Block Development Officer Haldaur Bijnor on behalf of respondent Nos.2, 3 and 4. It is stated in paragraph 11 of the counter affidavit that the petitioner will not get any benefit from his Medical Certificate, copy of which is appended as Annexure No.2 to the writ petition. It is argued that doctor advice, bills of medicines etc. were not submitted by him, therefore, the petitioner is not entitled for any relief. It is argued that the petitioner has stated in the petition that he was on bed rest from 15.04.2022 to 15.05.2022 while the petitioner has submitted his reply to the notice dated 11.04.2022 in the office of District Panchayat Raj Officer Bijnor on 27.04.2022 and along with the aforesaid reply, he also submitted copy of the Bank Statement under his signature and stamp on which the date is mentioned as 19.04.2022, copy of the reply is appended as Annexure No.1 to the counter affidavit. It is argued that from perusal of the same, it is clear that the petitioner was healthy from

19.04.2022 to 27.04.2022. In this view of the matter, it is argued that the petitioner has not approached this Court with clean hands, therefore, the petition is liable to be rejected. In paragraph 11 of the counter affidavit a judgement passed in the case of Ramjas Foundation Vs. Union of India reported in (2010) 14 SCC 38 has been cited and relevant paragraph is also quoted and on the basis of the same, it is argued that if a litigant does not come to the Court with clean hands, he is not entitled to be heard and indeed, such a person is not entitled to any relief from any judicial forum.

6. For rebutting the counter affidavit, no rejoinder affidavit has been filed by the petitioner, hence the averments made in the counter affidavit is treated to be true.

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

8. From perusal of the record, it transpires that pursuant to the notice dated 11.04.2022, the petitioner was directed to submit his reply within fifteen days but according to the case set up by the petitioner in the writ petition due to ill health, he was not able to submit his reply and when he went to the office of District Panchayat Raj Officer, Haldaur on 31.05.2022, then he transpires that the order has already been passed against him. In the counter affidavit, copy of the reply dated 27.04.2022 was appended as Annexure CA1. Apart from the same, there is clear finding recorded in the order impugned that the District Magistrate Bijnor/respondent No.2 that reply has been duly submitted by the petitioner and after considering the same, the order impugned has been passed. The relevant part is quoted below:-

"कारण बताओं नोटिस निर्गत किया गया था तथा निर्गत कारण बताओं नोटिस के सम्बन्ध में ग्राह प्रधान एवं सम्बन्धित सचिव द्वारा अपना स्पष्टीकरण प्रस्तुत किया। "

9. From perusal of the same, it is clear that finding regarding filing of the reply in respect of the show cause notice has been deliberately and willfully concealed by the petitioner while filing the present writ petition.

10. The issue regarding approaching the Court by concealing the facts has been examined by Hon'ble the Supreme Court on number of occasions and it has been opined that the same is polluting the stream of justice.

11. In **Abhyudya Sanstha Vs. Union of India, (2011) 6 SCC 145**, Hon'ble the Supreme Court, while declining relief to the petitioners therein, who did not approach the court with clean hands, opined as under:-

"18. ... In our view, the appellants deserve to be non suited because they have not approached the Court with clean hands. The plea of inadvertent mistake put forward by the learned senior counsel for the appellants and their submission that the Court may take lenient view and order regularisation of the admissions already made sounds attractive but does not merit acceptance. Each of the appellants consciously made a statement that it had been granted recognition by the NCTE, which necessarily implies that recognition was granted in terms of Section 14 of the Act read with Regulations 7 and 8 of the 2007 Regulations. Those managing the affairs of the appellants do not belong to the category of innocent, illiterate/uneducated persons, who are not conversant with the relevant statutory

provisions and the court process. The very fact that each of the appellants had submitted LPASW No. 82/2019 Page 7 application in terms of Regulation 7 and made itself available for inspection by the team constituted by WRC, Bhopal shows that they were fully aware of the fact that they can get recognition only after fulfilling the conditions specified in the Act and the Regulations and that WRC, Bhopal had not granted recognition to them. Notwithstanding this, they made bold statement that they had been granted recognition by the competent authority and thereby succeeded in persuading this Court to entertain the special leave petitions and pass interim orders. The minimum, which can be said about the appellants is that they have not approached the Court with clean hands and succeeded in polluting the stream of justice by making patently false statement. Therefore, they are not entitled to relief under Article 136 of the Constitution. This view finds support from plethora of precedents.

19. In **Hari Narain v. Badri Das AIR 1963 SC 1558, G. Narayanaswamy Reddy v. Govt. of Karnataka (1991) 3 SCC 261** and large number of other cases, this Court denied relief to the petitioner/appellant on the ground that he had not approached the Court with clean hands. In **Hari Narain v. Badri Das (supra)**, the Court revoked the leave granted to the appellant and observed:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court

naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it LPASW No. 82/2019 Page 8 would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterises as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked."

20. In **G. Narayanaswamy Reddy v. Govt. of Karnataka's case (supra)**, the Court while noticing the fact regarding the stay order passed by the High Court which prevented passing of the award by the Land Acquisition Officer within the prescribed time period was concealed and in the aforesaid context, it observed that:

"2. ... Curiously enough, there is no reference in the special leave petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter- affidavit. In our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the special leave petitions are liable to be rejected. It is well settled in law that the relief under Article 136 of the Constitution is discretionary and a petitioner who approaches this Court for

such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the special leave petitions."

21. In **Dalip Singh v. State of U.P., (2010) 2 SCC 114**, Hon'ble the Supreme Court noticed the progressive decline in the values of life and observed:

"1. For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahinsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final." (emphasis supplied)

12. In **Moti Lal Songara Vs. Prem Prakash @ Pappu and another (2013) 9 SCC 199**, Hon'ble the Supreme Court, considering the issue regarding concealment of facts before the Court, while observing that "court is not a laboratory where children come to play", opined as under:

"19. The second limb of the submission is whether in the obtaining factual matrix, the order passed by the High Court discharging the accused-respondent is justified in law. We have clearly stated that though the respondent was fully aware about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. Any one who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim suppressio veri, expressio falsi, i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. We are compelled to say so as there has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused-respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum.

20. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure is bound to collapse". However, as the order has been obtained by practising fraud and suppressing material fact before

a court of law to gain advantage, the said order cannot be allowed to stand." (emphasis supplied)

13. Similar view has been expressed in *Amar Singh v. Union of India and others*, (2011) 7 SCC 69 and *Kishore Samrite v. State of Uttar Pradesh and others*, (2013) 2 SCC 398.

14. In a recent judgment in *ABCD Vs. Union of India and others* (2020) 2 SCC 52, Hon'ble the Supreme Court in the matter where material facts had been concealed, while issuing notice to the petitioner therein, exercising its suo-motu contempt power, observed as under :

*"15. Making a false statement on oath is an offence punishable under Section 181 of the IPC while furnishing false information with intent to cause public servant to use his lawful power to the injury of another person is punishable under Section 182 of the IPC. These offences by virtue of Section 195(1)(a)(i) of the Code can be taken cognizance of by any court only upon a proper complaint in writing as stated in said Section. In respect of matters coming under Section 195(1)(b)(i) of the Code, in *Pushpadevi M. Jatia v. M.L. Wadhawan etc.*, (1987) 3 SCC 367 prosecution was directed to be launched after prima facie satisfaction was recorded by this Court.*

16. It has also been laid down by this Court in *Chandra Shashi v. Anil Kumar Verma* (1995) 1 SCC 421 that a person who makes an attempt to deceive the court, interferes with the administration of justice and can be held guilty of contempt of court. In that case a husband who had filed a fabricated document to oppose the prayer of his wife seeking

transfer of matrimonial proceedings was found guilty of contempt of court and sentenced to two weeks imprisonment. It was observed as under:

"1. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.

2. Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.

* * *

14. The legal position thus is that if the publication be with intent to deceive the court or one made with an intention to defraud, the same would be contempt, as it would interfere with administration of justice. It would, in any case, tend to interfere with the same. This would definitely be so if a fabricated document is filed with the aforesaid mens rea. In the case at hand the fabricated document was apparently to deceive the court; the intention to defraud is writ large. Anil Kumar is, therefore, guilty of contempt."

15. In **K.D. Sharma Vs. Steel Authority of India Limited and others (2008) 12 SCC 481** it was observed:

"39. If the primary object as highlighted in *Kensington Income Tax Commrs., (1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA)* is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

18. In **Dhananjay Sharma Vs. State of Haryana and others (1995) 3 SCC 757** filing of a false affidavit was the basis for initiation of action in contempt jurisdiction and the concerned persons were punished."

16. In the case of **A. Shanmugam Vs. Ariya Kashatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and others reported in (2012) 6 SCC 430**, it is held by the Hon'ble Apex Court that the when the Court finds falsehoods, concealment, distortion, obstruction and confusion in pleadings and documents, the Court should in addition to full restitution impose actual realistic cost. The relevant paragraph 42 and 43 of the aforesaid judgement is reproduced below:-

42. *The appellant is also guilty of introducing untenable pleas. The plea of adverse possession which has no foundation or basis in the facts and circumstances of the case was introduced to gain undue benefit. The court must be cautious in granting relief to a party guilty of deliberately introducing irrelevant and untenable pleas responsible for creating unnecessary confusion by introducing such documents and pleas. These factors must be taken into consideration while granting relief and/or imposing the costs.*

43. *On the facts of the present case, the following principles emerge:*

43.1. *It is the bounden duty of the court to uphold the truth and do justice.*

43.2. *Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.*

43.3. *The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful.*

43.4. *Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrongdoer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice."*

17. It was held in the judgments referred to above that one of the two cherished basic values by Indian society for centuries is "satya" (truth) and the same has been put under the carpet by the petitioner. Truth constituted an integral part of the justice-delivery system in the pre-Independence era, however, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, the values have gone down and now a litigant can go to any extent to mislead the court. They have no respect for the truth. The principle has been evolved to meet the challenge posed by this new breed of litigants. Now it is well settled that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. Suppression of material facts from the court of law, is actually playing fraud with the court. The maxim *suppressio veri, expressio falsi*, i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted.

18. For the reasons mentioned above, in my opinion, the present petition deserves to be dismissed with cost of Rs.25,000/-.

19. Ordered accordingly.

20. The amount of cost shall be deposited by the petitioner with U.P. State Legal Services Authority, Lucknow within a period of four weeks from today.

(2023) 5 ILRA 1465
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 18666 of 2017

The Joint Director Agriculture (Extension)
& Ors. ...Petitioners

Versus

Sri Chhote Lal ...Respondent

Counsel for the Petitioners:

Sri Vivek Shandilya, C.S.C., Sri Dhananjai Singh (S.C.)

Counsel for the Respondent:

Sri Rudra Pratap Singh, Sri Anil Kumar Yadav, Sri Sudhanshu Narain

A. Civil Law - U.P. Industrial Disputes Act, 1947 - Section 6(4) , 4K, 6N-Reinstatement-

the case of the petitioners is to the effect that the engagement of the respondent-workman as a labour was under a temporary arrangement for the purposes of working under the Rice Scheme which did not remain operative after 1987 and, therefore, consequential termination of the services of the respondent workman was not illegal- that reference was made at a very belated stage of 10-11 years after the termination and there being no finding by the Labour Court in the impugned award as to whether the respondent was or was not gainfully employed during the intervening period or thereafter, I find that the reinstatement with 25% back-wages along with continuity in past service was not justified-However, in the facts and circumstances of the case, a consolidated and lump sum amount of compensation could have served the purpose to console the respondent whose services were terminated, not only in the light of the documents but also considering his service book which describe the nature of his appointment with all other aspects associated with it-considering the nature of the interim order

dated 25.05.2017 passed in the present petition, in pursuance whereof a sum of Rs.5,00,000/- was deposited by the petitioners out of which a sum of Rs.2,00,000/- has admittedly been released in favour of the respondent.(Para 1 to 48)

The writ petition is partly allowed. (E-6)

List of Cases cited:

1. St. of U.P. thru Secy Irrigation Vs Mohd Rais (2021) 169 FLR 520
2. St. of U.P. & ors. Vs Uttam Singh (2021) AIR SC 3909
3. Chairman, Town Area & anr. Vs St. of U.P. & ors. (2013) 11 ADJ 197
4. St. of Karnataka & anr. Vs Ravi Kumar (2009) 13 SCC 746
5. Haryana State Coop. Land Development Bank Vs Neelam (2005) 5 SCC 91
6. Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub Division, Kota Vs Madan Lal (2013) 14 SCC 543
7. Nagar Mahapalika Vs St. of U.P. & ors.. (2006) 5 SCC 127
8. Municipal Council, Sujanpur Vs Surinder Kumar (2006) 5 SCC 173
9. Haryana State Electronics Development Corp. Ltd. Vs Mamni (2006) 9 SCC 434
10. Uttaranchal Forest Development Corp. Vs M.C. Joshi (2007) 9 SCC 353
11. G.D.A. & anr. Vs Ashok Kumar & anr. (2008) 4 SCC 261
12. Telecom District Manager Vs Keshab Deb, reported in 2008 (8) SCC 402
13. Jagbir Singh Vs Haryana State Agriculture Marketing Board (2009) 15 SCC 327
14. Uttar Pradesh State Electricity Board Vs Laxmi Kant Gupta (2009) 16 SCC 562

15. BSNL Vs Man Singh (2012) 1 SCC 558

Writ Petition

16. Sr. Superintendent Telegraph (Traffic), Bhopal Vs Santosh Kumar Seal & ors. (2010) 6 SCC 773

17. Assistant Engineer, Raj. Dev. Corp. & anr. Vs Gitam Singh(2013) 5 SCC 136

18. State of U.P. Vs P.O., Labour Court & anr. (2017) 7 ADJ 393

19. Nagar Mahapalika Vs St. of U.P. (2006) AIR SC 2113

20. Haryana State Electronics Devpt Corpn Vs Mamni (2006) AIR SC 2427

21. Sita Ram Vs Moti Lal Nehru Farmers Training Institute (2008) AIR SC 1955

22. Jagbir Singh Vs Haryana State Agriculture Marketing Board & anr. (2009) AIR SC 3004

23. Sr. Superintendent, Telegraph (Traffic) Bhopal Vs Santosh Kumar Seal & ors. (2010) AIR SC 2140

24. Incharge Officer Vs Shankar Shetty (2010) 9 JT SC 262

25. Div. Engr., Telecom, Jhansi Vs P.O. & anr.. (2011) 4 ADJ 199

(Delivered by Hon'ble Kshitij Shailendra, J.)

The Challenge

1. The Joint Director Agriculture (Extension), Gorakhpur Division, Gorakhpur, Project Officer (Agriculture) under the District Agriculture Officer, District Basti and the Block Development Officer, Farinda, District Maharajganj, as co-petitioners, have filed the present writ petition challenging the impugned award dated 30.11.2015, published on 28.03.2016, passed by the Presiding Officer, Labour Court, Gorakhpur in Adjudication Case No.75 of 1999.

2. As per the pleadings contained in the writ petition, the respondent Chhote Lal (hereinafter referred to as the "workman") was temporarily engaged in the year 1986-87 under the Rice Scheme as an internal arrangement as Kamdar/Chowkidar and when the Rice Scheme was abolished, the continuity of 96 Kaamdars/Chowkidars was cancelled by the Government Order dated 17.10.1987 and, thereafter, the services of the workman were terminated after giving him a notice dated 01.08.1988. Thereafter, under the order dated 11.05.1999 passed by the Deputy Labour Commissioner, Gorakhpur, an industrial dispute was referred to the Labour Court, U.P., Gorakhpur to examine the question as to whether the termination of the workman was proper or legal with effect from 01.09.1988 and, if not, what relief/compensation the workman was entitled to. It is further pleaded that before the Labour Court, the parties made their submissions and led evidence. The case of the petitioners was that the workman had obtained his appointment by committing fraud and when the said fraud had come to the knowledge of the petitioners, the services of the respondent-workman were terminated. It is further pleaded that after abolition of Rice Scheme, there was no vacancy and, therefore, the workman had no right of reinstatement. It is further pleaded that the dispute was raised after a long period of 10-11 years from the date of termination and that the respondent had been paid salary upto 31.08.1988 which includes the salary of one month from the date of notice dated 01.08.1988. Further case of the petitioners before the Labour Court was, as also pleaded in the writ petition, that the Agricultural Department is a Government Department and not an

"Industry' and therefore the Labour Court had erred in treating the dispute as covered by the provisions of U.P. Industrial Disputes Act and, hence, the award is illegal.

3. In sum and substance, the case of the petitioners is to the effect that the engagement of the respondent-workman as a labour was under a temporary arrangement for the purposes of working under the Rice Scheme which did not remain operative after 1987 and, therefore, consequential termination of the services of the respondent workman was not illegal.

4. The Labour Court, by the impugned award dated 30.11.2015, has directed reinstatement of the respondent-workman on his post with continuity in past services along with 25% back-wages with effect from 01.09.1988.

Counter Affidavit

5. A counter affidavit has been filed on behalf of the respondent-workman stating that the Agricultural Department falls within the definition of "Industry' and the services of the respondent-workman were neither temporary nor dependent upon the Rice Scheme. Reliance has been placed upon various annexures which also form part of the writ petition to explain the nature of the services rendered by the respondent-workman.

Rejoinder Affidavit

6. A rejoinder affidavit has been filed by the petitioners substantially reiterating the version contained in the writ petition. It has also been mentioned that pursuant to the interim order dated 22.05.2017 passed by this Court in the present writ petition, an amount of Rs.5,00,000/- was deposited in the account

of Labour Court, Gorakhpur through R.T.J.S. vide Treasury Token No. 331769925, dated 07.09.2017 and Voucher No.14, dated 08.09.2017.

Interim order passed in this case

7. This Court while entertaining the present writ petition passed following interim order dated 22.05.2017:-

"This writ petition has been filed against the award of the Labour Court, Gorakhpur dated 30.11.2015 by which the said Labour Court has answered the reference in favour of the respondent-workman and granted all relief of his reinstatement with 25% back wages.

Learned counsel for the petitioners submit that the respondent-workman had worked briefly for a period of two years on the post of Kamdar under Rice Scheme and that he had been terminated on 01.08.1988. The workman sought a reference belatedly in the year 1999 which has been answered in his favour by the impugned award that was published on 28.03.2016. He would therefore submit that the relief of reinstatement in such a case could not be granted to the respondent-workman as the reference has been made after a delay of eleven years and also because admittedly the respondent-workman has remained out of work for almost 29 years. Therefore, he would submit the only claim that could have been considered by the Labour Court was of compensation in lieu of reinstatement and back wages. However, the Labour Court has granted the relief of reinstatement with 25% back wages without even recording the finding that the respondent-workman had not been gainfully employed during the pendency of the dispute.

Sri Sudhanshu Narain, learned counsel for the respondent workman on the other hand would contend that the respondent is entitled to reinstatement with 25% back wages.

Matter requires consideration.

Sri Sudhanshu Narain, learned counsel for the respondent workman prays for and is granted four weeks' time to file counter affidavit. Petitioner will have two weeks' thereafter to file rejoinder affidavit.

List on 08.08.2017. In the meanwhile it is provided subject to deposit of Rs. 5,00,000/- before the Labour Court, Gorakhpur within a period of six weeks from today the implementation of the award shall be remain stayed. Of the amount so deposited, Rs. 2,00,000/- shall be paid out to the respondent workman without any security and the balance amount shall be invested in an interest bearing term deposit account of a Nationalized Bank and shall abide by the final order passed by this Court."

A later stage during course of proceedings

8. Later on, in the year 2019, arguments were advanced for modification of the interim order praying release of remaining amount of Rs.3,00,000/- as the amount of Rs.2,00,000/- directed under the interim order dated 22.05.2017, was admittedly paid to the respondent-workman but remaining amount was lying deposited. However, this Court, keeping in view that the matter is ripe for hearing on merits, made the interim order absolute by order dated 24.05.2019.

9. I have heard Sri Dhananjai Singh, learned Standing Counsel for the petitioner and Sri Anil Kumar Yadav, learned counsel for the sole respondent.

Contentions raised by petitioner side

10. Learned Standing Counsel for the petitioners has mainly raised following arguments:-

(i) Agricultural Department of the Government does not fall within the definition of "Industry" and, therefore, the impugned award under the provisions of U.P. Industrial Disputes Act, 1947 is unsustainable;

(ii) The respondent workman was temporarily engaged under the Rice Scheme of the Government which was abolished in the year 1987 and, thereafter, no requirement to keep the respondent in service remained and, consequently, the termination of his services is not illegal; and

(iii) The industrial dispute, even otherwise, was raised at a very belated stage of 10-11 years and, therefore, the direction for reinstatement with 25% back-wages along with continuity of past service is not according to law.

(i) Analysis of first contention

11. In so far as the first contention is concerned, the submission is that the Agricultural Department being a Government Department, the matter could not be adjudicated upon by the Labour Court.

12. Meeting this argument, the learned counsel for the respondent-workman has vehemently argued that the

issue as to which establishment would fall within the definition and meaning of 'Industry' has been explained time and again by the Supreme Court and keeping in view the settled proposition of law, even the Agricultural Department of the U.P. Government shall fall within the definition of 'Industry' and, hence, there is no illegality in the impugned award on this scope.

13. In support of his submission, learned counsel for the respondent-workman has placed reliance upon the judgment of this Court in the case of **State of U.P. through Secretary Irrigation Vs. Mohd Rais** reported in 2021 (169) FLR 520, with special reference to paragraphs 5, 7, 8, 9, 10 and 11.

"5. Learned counsel appearing on behalf of opposite party no.1 refuting the submission advanced by learned counsel for petitioner has in turn placed reliance upon judgment rendered by Hon'ble the Supreme Court in the case of Des Raj vs. State of Punjab & Ors. reported in AIR 1988 Supreme Court 1182 to submit that a Government Department such as the Irrigation Department has already been held to come within the purview of term 'Industry' but the subsequent judgment rendered in the case of K. Soma Setty (supra) has been passed without noticing the aforesaid two judgments, which should therefore prevail. Learned counsel has also relied upon judgment rendered by Hon'ble the Supreme Court in the case of Workmen of American Express International Banking Corporation vs. Management of American Express International Banking Corporation reported in AIR 1986 Supreme Court 458 to submit that for the purposes of calculation of 240 days of service, weekends and other gazetted holidays are

required to be taken into account. Learned counsel has also relied upon a Full Bench Decision of this Court rendered in Ganga Saran vs. Civil Judge, Hapur reported in AIR 1991 Allahabad 114 to submit that in case of a conflict between judgments of Hon'ble Supreme Court consisting of equal authorities, the concerned High Court must follow judgment which appears to lay down the law elaborately and accurately irrespective of time line. Learned counsel also placed reliance on a Single Judge judgment rendered by High Court of Bombay in Executive Engineer, Yavantmal Medium Project Division & Anrs. vs. Anant S/o Yadao Murate & Another reported in 1997 ILLJ 91 wherein after considering the contradictory judgments of Hon'ble Supreme Court regarding Irrigation Department being an 'Industry' has followed the judgment rendered in the case of Des Raj (supra).

.....

7. As has been indicated hereinabove, the Hon'ble Supreme Court in the case of Des Raj (supra) has held that an Irrigation Department of particular Government to be an Industry in terms of the Act of 1947. The said judgment has taken into account various other judgments rendered by Hon'ble the Supreme Court particularly a Constitution Bench judgment rendered in Bangalore Water Supply and Sewerage Board vs. A. Rajappa, reported in (1978) 2 SCC 213. On the contrary, the subsequent judgment rendered by Hon'ble Supreme Court in case of K. Soma Setty (supra) has not adverted to the aforesaid judgments of Des Raj (supra) and Bangalore Water Supply and Sewerage Board (supra).

8. Upon perusal of Judgment rendered in the case of Desh Raj (supra) as

compared to judgment rendered in the case of *K. Soma Setty* (supra), it is apparent that in the case of *Desh Raj* (supra) Irrigation Department has been held to come within the definition of Industry whereas judgment of *K. Soma Setty* holds otherwise. As such, there is clear conflict in the two judgments which are of Coordinate Bench.

9. The proposition of law required to be followed in conflicting judgments rendered by Hon'ble the Supreme Court by Benches of Coordinate strength has been discussed in the Full Bench of this Court in *Ganga Saran* (supra). The Full Bench after considering the relevant aspect has held as follows:

" 7. One line of decision is that if there is a conflict in two Supreme Court decisions, the decision which is later in point of time would be binding on the High Courts. The second line of decisions is that in case there is a conflict between the judgments of Supreme Court consisting of equal authorities, incidence of time is not a relevant factor and the High Court must follow the judgment which appears to lay down law elaborately and accurately.

8. Similar situation arose before a Full Bench of Punjab and Haryana High Court in the case of *M/s Indo Swiss Time Limited, Dundahera, vs. Umrao*, AIR 1981 Punj & Har 213. What the Full Bench in the said case held is extracted below (at pp. 219-220 of AIR) :

Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the superior Court are of co-equal Benches and therefore, of

matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extant then both of them cannot be binding on the courts below. Inevitably a choice, though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of coequal Benches of the Superior Court are earlier later is a consideration which appears to me as hardly relevant."

This decision was followed by the Bombay High Court in the case of *Special Land Acquisition Officer vs. Municipal Corporation*, AIR 1988 Bombay 9. The majority of Judges in the Full Bench held that if there was a conflict between the two decisions of equal benches which cannot possibly reconcile, the courts must follow the judgment which appear to them to state the law accurately and elaborately. We are in respectful agreement with the view expressed by the Full Bench of Punjab & Haryana High Court in the case of *M/s Indo Swiss Time Limited v. Umrao*, (AIR 1981 Punj & Har 213) (Supra) especially when the Supreme Court while deciding *Qamaruddin's case* (1990 All WC 308) (Supra) did not notice the U.P. amendment to S.115, C.P.C. and earlier decision of the Supreme Court."

10. The aforesaid aspect has also been dealt with by a learned Single Judge of the High Court of Bombay in which

judgment rendered by Hon'ble the Supreme Court in the case of Des Raj (supra) has been followed:

"13. On considering all the concepts of industry and after reviewing the various tests which need not be repeated, as the tests were laid down in Bangalore Water Supply case (supra). The concept of sovereign and regal function was explained in Chief Conservator of Forests (supra). The Apex Court in para 13 specifically rejected an argument that welfare activities partake sovereign functions on the ground that if such a view was taken it would be eroding the view taken by it in Bangalore Water Supply's case. While observing that welfare activities partake sovereign functions the Apex Court did not notice this in Sub-Divisional Inspector of Post, Vaikam and Other (supra). Therefore, considering the various precedents of the Apex Court itself it is clear that the law declared by the Apex Court is that welfare activities do not necessarily partake sovereign functions. In Executive Engineer, State of Karnataka the reliance was placed on the judgment in the case of Union of India v. Jai Narain Singh (supra). In Union of India v. Jai Narain Singh, the Apex Court has merely noted that the Central Ground Water Board is not an Industry. It is not possible to discern from that judgment as to what were the reasons for the Apex Court to so hold. The other judgment relied on is that of State of Himachal Pradesh v. Suresh Kumar Varma & Anr. (supra). On a perusal of the fact and the law laid down it does not seem that the issue as to whether a particular department was an industry or not was in issue. What was in issue was whether the work charged employees who perform duty of transitory nature were appointed to posts and their appointments were on daily

wage basis in an appointment to a post. The Apex Court therein noted that such appointments were not appointments to the posts and, therefore, no directions could have been given to re-engage them in any work or appoint them against existing vacancies. Thus the two judgments relied upon by the Apex Court to arrive at the conclusion arrived at in Executive Engineer, State of Karnataka (supra), nowhere have laid down the tests to hold as to why Irrigation Department is to be excluded from the definition of industry. As pointed out earlier, even the case of Sub Divisional Inspector of Post, Vaikam and Others was considered by the Apex Court in Physical Research Laboratory and explained the same in paragraph 10 of the judgment. After that, it proceeded to apply the tests as laid down in Bangalore Water Supply. In the case of Des Raj v. State of Punjab (supra) the Apex Court had considered the tests laid down in various earlier judgments of the Apex Court itself, culminating in the judgment in Bangalore Water Supply (supra) and thereafter had arrived at a conclusion that the Irrigation Department falls within the definition of Industry within the meaning of Section 2(j) of the I.D. Act. I am, therefore, of the considered opinion that the view laid down in Des Raj's case is the better in point of law and hence it is the view in Des Raj's case which will have to be followed. Once it is so held and as I have already set out earlier the work of the Irrigation Department of the State of Punjab and the material placed before this Court including the written submissions filed on behalf of the petitioners show that the projects undertaken by the irrigation department of the State of Maharashtra is discharging the same or similar functions as the Irrigation Department of the State of Punjab. It, therefore, follows that the projects of the

Irrigation Department or work connected with that of the State of Maharashtra, on the same tests as applied by the Apex Court in Des Raj's case would fall within the definition of an industry for the purpose of Section 2(j) of the I.D. Act."

11. Upon applicability of said factors to the present case, it is clear that the judgment rendered by Hon'ble the Supreme Court in Des Raj (supra) has elaborately dealt with the question as to whether Irrigation Department of the Government would come within the definition of Industry or not. After considering the Constitution Bench Judgment of Hon'ble Supreme Court rendered in Bangalore Water Supply and Sewerage Board (supra), the Hon'ble Supreme Court has reached a definite conclusion that Irrigation Department of the Government would come within the definition of Industry."

14. He has further placed reliance upon the judgment of Supreme Court dated 03.08.2021 in the case of **The State of Uttar Pradesh and others Vs. Uttam Singh**, reported in AIR 2021 Supreme Court 3909, with reference to paragraphs 10 and 11, which are quoted herein below:-

"10. We have also taken note of the fact that during his 13 long years of employment and before that having battled the appellants for the period of 6 years to get his dues, the father of the respondent was also transferred from one department to the other, normally an aspect which would be associated with a person who had a regular employment. The most significant aspect is that had the father of the respondent not been considered a regular appointee, there would be no occasion for the Department to volunteer his services to

the State Election Commission to perform election duties, which could have been done only by a Government employee, as is specified under Section 159 of the Representation of the People Act, 1950 ("Staff of certain authorities to be made available for election work").

11. The present case is thus one which is peculiar in its given factual scenario which we have discussed above and thus for all practical purposes, it is a case of an appointment against a regular vacancy. The respondent's father was treated as a regular employee by the aforesaid conduct of the appellants even though he was labelled as a Part Time tubewell operator."

15. He has further placed reliance upon the judgment of this Court in the case of **Chairman, Town Area & another Vs. State of U.P. and others**, reported in 2013 (11) ADJ 197, with special reference to paragraph 14, which is quoted herein below:-

"14. The submission of learned counsel for the petitioner that in respect of true meaning and import of the expression 'Industry' defined under Industrial Disputes Act, the correctness of decision of Apex Court rendered in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa & others, AIR 1978 S.C. 548 has been doubted by Apex Court in Coir Board, Ernakulam, Cochin and Another Vs. Indira Devi P.S. and others, (1998) 3 S.C.C. 259 and further in case of State of U.P. Vs. Jai Bir Singh (2005) 5 S.C.C. Page 1 and decision of the Apex Court rendered in Bangalore Water Supply case has been referred to the larger Bench, also does not make any difference for the reason that the learned counsel for the petitioner could not

point out the final decision rendered by larger Constitution Bench of the Apex Court in respect of the aforesaid references, therefore, I have no hesitation to hold that earlier view taken by the Apex Court is still good law and cannot be held to be detracted by Apex Court itself by now. Accordingly, no different opinion can be given by this court in this regard."

16. While explaining the ratio laid down in the aforesaid authorities, learned counsel for the respondent-workman has referred to an order dated 20.08.1987 forming part of annexure no.4 to the writ petition whereby the respondent-workman was transferred from Basti to Gorakhpur with a recital in the transfer order that the services would be governed by the same Rules which were applicable for Class-IV employees. Further reliance has been placed upon the documents of joining at the transferred place and also to the appointment order dated 20.05.1987 whereby the respondent was directed to be appointed though in the temporary capacity in the pay scale of 315-6-35/Da Ro-6-363-7-384-8-400 Da. Re10-9-440 with a clear recital that admissible allowances shall also be payable to the respondent-workman. He has also placed reliance upon the letter dated 14.07.1988 sent by the Project Officer (Agriculture), Basti to the Joint Director Agriculture (Extension), Gorakhpur Division, Gorakhpur whereby factum of absorption of the respondent-workman was admitted to the petitioners themselves. He has also referred to the relieving letter dated 10.09.1987 forming part of counter affidavit whereby the respondent-workman was relieved from Basti to Gorakhpur and also various other documents to establish that the respondent workman was always treated

as a regular employee/ workman in the petitioner department.

17. The submission of the learned counsel for the respondent-workman, therefore, is that once the Supreme Court as well as this Court has already held in the aforesaid authorities that Irrigation Department and also the departments of the like nature depending upon the services rendered by the said departments, shall be covered by definition of "Industry" and, further, once the respondent was treated as an employee in the petitioners establishment, no error can be pointed out in adjudication of the dispute by the Labour Court and the provisions of U.P. Industrial Disputes Act, 1947 were fully applicable.

18. I find substance in the arguments advanced by the learned counsel for the respondent-workman as in the case of **Des Raj v. State of Punjab** (supra) the Apex Court had considered the tests laid down in various earlier judgments of the Apex Court itself, culminating in the judgment in **Bangalore Water Supply** (supra) and thereafter had arrived at a conclusion that the Irrigation Department falls within the definition of Industry within the meaning of Section 2(j) of the I.D. Act. It was held that the view taken down in **Des Raj's** case was the better in point of law and hence it is the view in **Des Raj's** case which was directed to be followed. Once it was so held and also that the work of the Irrigation Department of the State of Punjab and the material placed before the Surpeme Court including the written submissions filed on behalf of the concerned petitioners that the irrigation department of the State of Maharashtra was discharging the same or similar functions as the Irrigation Department of the State of Punjab, it was held that the projects of the Irrigation

Department or work connected with that of the State of Maharashtra, on the same tests as applied by the Apex Court in **Des Raj's** case would fall within the definition of an industry for the purpose of Section 2(j) of the I.D. Act.

19. In view of the above, the **first contention** of the petitioners that the Agricultural Department of the U.P. does not fall within the definition of 'Industry' does not have any merit and is accordingly rejected.

(ii) Analysis of second contention

20. In so far as the **second contention** to the effect that the respondent was temporarily engaged under the Rice Scheme which was abolished in the year 1987 under the Government Order dated 17.10.1987 and, therefore, the direction of the Labour Court to reinstate the respondent workman with continuity in service along with 25% back-wages is unsustainable, this Court finds from the above noted discussion of various documents relating to the services of the respondent that it cannot be treated that merely because the Rice Scheme was abolished, the respondent would lose his status as that of 'a workman'. The reason is that the Agricultural Department may deploy any labour to serve any purpose of the department and even if it is accepted that the respondent was working under the Rice Scheme of the Government, merely because the Scheme was over, it would not mean that keeping in view the nature of the services of the respondent, he would cease to be a workman, particularly when he was appointed under a pay scale and was transferred from one place to the other and was also held entitled to get various

allowances under the orders of the petitioners-department itself.

21. In view of the above, the notice of termination dated 01.08.1988 whereby the respondent workman was informed that there was no necessity of his service any more, is found to be unsustainable. Hence, the **second point** raised by the petitioners that the respondent would not be treated as a retrenched workman, does not have any merit and is accordingly rejected.

(iii) Analysis of third contention

22. In so far as the **third contention** of the petitioners to the effect that the industrial dispute was raised after a belated stage of 10-11 years in the year 1999 whereas the services of the respondent workman were terminated in the year 1988 and therefore relief of reinstatement with continuity in past service along with 25% back-wages is not according to law, this Court proceeds to examine this aspect of the matter in the light of law laid down by this Court and Supreme Court governing the issue.

23. There is no dispute about the fact that the petitioner worked from 1987 to 1988 and his services for any reason whatsoever, were terminated in August-September, 1988 and the dispute was agitated after 11 years.

24. Learned Standing Counsel for the petitioners has argued that the Labour Court, in the impugned award, has not recorded any finding that the respondent workman was not gainfully employed during the aforesaid period of 11 years and, therefore, direction for reinstatement with other relief, is contrary to law.

25. **Per contra**, learned counsel for the respondent workman submits that once the termination was illegal, the award of the Labour Court is perfectly in accordance with law.

26. Before arriving at a conclusion in this regard, it is necessary to refer to certain authorities of the Supreme Court on the issue as to when reinstatement with other consequential reliefs can be ordered by a Labour Court in such circumstances.

27. In **State of Karnataka and another Vs. Ravi Kumar** reported in 2009 13 SCC 746, long delay in seeking reference of the dispute rendered the reference stale and Supreme Court held that it should have been rejected by the Labour Court. In that case reference was sought after fourteen years.

28. In **Haryana State Cooperation Land Development Bank Vs. Neelam** reported in 2005 (5) SCC 91, the Supreme Court held delay of seven years in approaching the Labour Court to be relevant factor to refuse relief of reinstatement.

29. In **Bharat Sanchar Nigam Ltd. Vs. Bhurumal** reported in 2014 (7) SCC 177, it has been held that relief of reinstatement with full back-wages, when termination is found to be illegal is not to be granted mechanically in all cases. In case of termination of a daily wage worker, made in violation of Section 25F of the Industrial Disputes Act, 1947 it was held reinstatement with back-wages was not automatic and instead workman should be given monetary compensation.

30. The Supreme Court in the case of **Assistant Engineer, Rajasthan State**

Agriculture Marketing Board, Sub Division, Kota Vs, Madan Lal reported in (2013) 14 SCC 543, after considering the law on the subject, held that though Limitation Act is not applicable to such cases, yet delay in raising the dispute is an important circumstance and Labour Court must consider before it exercises discretion irrespective of objection has or has not been raised by the other side.

31. Further in the case of **Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota Versus Mohan Lal** reported in (2013) 14 SCC 543 in similar circumstances, a muster roll employee in a government establishment who had been found to have worked for 286 days in one twelve calendar month period prior to his dis-engagement, and in whose case the industrial dispute was raised after six years, was found not entitled to reinstatement but compensation in lieu thereof, Rs. One lac only.

32. In **Nagar Mahapalika vs. State of U.P. and Ors.** reported in 2006,(5) SCC 127, it was held by Supreme Court that non compliance with the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947 (this provision is broadly pari materia with Section 25-F), although, leads to the grant of a relief of reinstatement with full back wages and continuity of service in favour of the workman, the same would not mean that such relief is to be granted automatically or as a matter of course. It was emphasised that the Labour Court must take into consideration the relevant facts for exercise of its discretion in granting the relief.

33. Supreme Court in **Municipal Council, Sujanpur vs. Surinder Kumar** reported in 2006 (5) SCC 173, reiterated

the above legal position. That was a case where the Labour Court had granted reinstatement in service with full back wages to the workman as statutory provisions were not followed. The award was not interfered with by the High Court. However, the Court granted monetary compensation in lieu of reinstatement.

34. In ***Haryana State Electronics Development Corporation Ltd. v. Mamni*** reported in 2006 (9) SCC 434 following Nagar Mahapalika (supra), Supreme Court held that the reinstatement granted to the workman because there was violation of Section 25F, was not justified and modified the order of reinstatement by directing that the workman shall be compensated by payment of a sum of Rs.25,000/- instead of the order of the reinstatement.

35. In ***Uttaranchal Forest Development Corporation v. M.C. Joshi*** reported in 2007 (9) SCC 353, the services were terminated on 24.11.1991 in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act. He had completed 240 days of continuous work in a period of twelve months preceding the order of termination. The workman approached the Conciliation Officer on or about 02.09.1996, i.e., after a period of about five years. The Labour Court granted to the workman, M.C.Joshi, relief of reinstatement with 50% back wages. In the writ petition filed by the Corporation, the direction of reinstatement was maintained but back wages were reduced from 50% to 25%. The Supreme Court substituted the award of reinstatement by compensation for a sum of Rs.75,000/-.

36. In ***Ghaziabad Development Authority and Another v. Ashok Kumar***

and Another reported in 2008 (4) SCC 261], the Apex Court was concerned with the question as to whether the Labour Court was justified in awarding relief of reinstatement in favour of the workman who had worked as daily wager for two years. His termination was held to be violative of U.P. Industrial Disputes Act. The Supreme Court held that the Labour Court should not have directed reinstatement of the workman in service and substituted the order of reinstatement by awarding compensation of Rs.50,000/-

37. In ***Telecom District Manager v. Keshab Deb***, reported in 2008 (8) SCC 402, the termination of the workman who was a daily wager, was held illegal on diverse grounds including violation of the provisions of Section 25-F. Supreme Court held that even in a case where order of termination was illegal, automatic direction for reinstatement with full back wages was not contemplated. The Court substituted the order of reinstatement by an award of compensation of Rs.1,50,000/-.

38. In ***Jagbir Singh v. Haryana State Agriculture Marketing Board*** reported in 2009 (15) SCC 327, the workman had worked from 01.09.1995 to 18.07.1996 as a daily wager and was granted compensation of Rs.50,000/- in lieu of reinstatement with back wages.

39. It is also necessary to refer to subsequent three decisions of Supreme Court, namely, ***Uttar Pradesh State Electricity Board vs. Laxmi Kant Gupta*** reported in 2009 (16) SCC 562, ***Bharat Sanchar Nigam Limited vs. Man Singh*** reported in 2012 (1) SCC 558 and ***Senior Superintendent Telegraph (Traffic), Bhopal vs. Santosh Kumar Seal and Others***, reported in 2010 (6) SCC 773,

where the view has been taken in line with the cases discussed above. As a matter of fact in **Santosh Kumar Seal** (supra), Apex Court awarded compensation of Rs.40,000/-to each of the workmen who were illegally retrenched as they were engaged as daily wagers about 25 years back and worked hardly for two or three years. It was held that the relief of reinstatement cannot be said to be justified and instead granted monetary compensation.

40. In the case of **Assistant Engineer, Rajasthan Development Corporation and Anr. v. Gitam Singh** reported in 2013 (5) SCC 136], Supreme Court on consideration of the most of the cases cited above reiterated the principle regarding exercise of judicial discretion by the Labour Court in a matter where the termination of the workman is held to be illegal being in violation of Section 25-F by holding that the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute before grant of relief in an industrial.

41. The aforesaid authorities have been considered by this Court in its judgment in the case of **State of U.P. Vs. Presiding Officer, Labour Court and another** reported in 2017 (7) ADJ 393.

42. Further, The Supreme Court in several authorities some of which are mentioned below has held that if the only defect in the termination order is non payment of retrenchment compensation as required by Section 25 F of Industrial Dispute Act (or Section 6 N of U.P.I.D.

Act) then it is not always necessary to direct reinstatement with full back wages and that in such situation more often than not proper relief may be to award consolidated damages/compensation particularly when the employer is Government or Governmental agency and relevant rules have not been followed before appointment.

- **Nagar Mahapalika v. State of U.P.**, AIR 2006 SC 2113

- **Haryana State Electronics Devpt Corpn v. Mamni**, AIR 2006 SC 2427

- **Sita Ram v. Moti Lal Nehru Farmers Training Institute**, AIR 2008 SC 1955

- **Jagbir Singh Vs. Haryana State Agriculture Marketing Board and another**, AIR 2009 SC 3004

43. In **Senior Superintendent, Telegraph (Traffic) Bhopal Vs. Santosh Kumar Seal and others**, reported in AIR 2010 SC 2140, it has been held that if daily wagers had worked for 2 or 3 years and their services were terminated without payment of retrenchment compensation then consolidated damages should be awarded to them (Rs.40,000/- to each of the workmen was awarded in the said case). It has also been held that daily wager does not hold a post and can not be equated with permanent employee. This view has been reiterated in **Incharge Officer Vs. Shankar Shetty** reported in JT 2010(9) SC 262.

44. The aforesaid authorities have been considered by this Court in its judgment reported in **2011 (4) ADJ, 199: Divisional Engineer, Telecom, Jhansi Vs. Presiding Officer and another**.

Conclusion

45. Keeping in view the law laid down in the aforesaid authorities as well as the undisputed factual position that reference was made at a very belated stage of 10-11 years after the termination and there being no finding by the Labour Court in the impugned award as to whether the respondent was or was not gainfully employed during the intervening period or thereafter, I find that the reinstatement with 25% back-wages along with continuity in past service was not justified.

46. However, in the facts and circumstances of the case, a consolidated and lump sum amount of compensation could have served the purpose to console the respondent whose services were terminated, not only in the light of the documents but also considering his service book which describe the nature of his appointment with all other aspects associated with it.

47. In view of the above and also considering the nature of the interim order dated 25.05.2017 passed in the present petition, in pursuance whereof a sum of Rs.5,00,000/- was deposited by the petitioners out of which a sum of Rs.2,00,000/- has admittedly been released in favour of the respondent, the writ petition is **partly allowed.**

48. The impugned award dated 30.11.2015, published on 28.03.2016, passed by the Presiding Officer, Labour Court, Gorakhpur in Adjudication Case No.75 of 1999 is **hereby quashed in part and is modified** directing payment of compensation to the respondent workman which this Court assess to be Rs.5,00,000/-. Since under the interim order, a sum of Rs.

2,00,000/- (rupees two lac only) has already been released in favour of the workman and the remaining sum of Rs. 3,00,000/- was invested with a nationalized bank in an interest bearing deposit account, it is directed that the aforesaid sum of Rs.3,00,000/- along with accrued interest upto the date shall be released in favour of the respondent-workman within a period of **two months** from the date a certified copy of this order is produced before the Labour Court along with appropriate application. The Labour Court shall ensure that the bank concerned shall facilitate release of the said amount along with the interest accrued upto date in favour of the respondent-workman without any hindrance.

(2023) 5 ILRA 1478

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 13.04.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 19644 of 2016

Raj Kumar	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:
Sri Nipun Singh, Sri Sumit Suri

Counsel for the Respondents:
C.S.C.

(A) Civil Law – Constitution of India, 1950 - Article – 226 – Stamp Act, 1899 – Section 2(14), 47 & 47-A - UP Stamp Valuation of Property Rules, 1997- Rule 3(1)(A), 7(3)(C), - UP Zamindari Abolition & Land Reforms Act, 1950 – Sections 3(14) & 143 - Sale deed – agricultural land - proceeding u/s 47-A of Act, 1899 for deficiency

in stamp duty – objection - impugned order for recovery of stamp duty including penalty passed – appeal – dismissed – burden of prove - court finds that, stamp duty as per circle rate, no declaration u/s 143 of Act, 1950 of the said land and admittedly, no spot inspection has been carried out which was mandatory, as per Rules 7(3)(c) of the Rules, 1997 – The entire burden lay upon the St. to established beyond reasonable doubt, and nothing to this effect has been brought on the record, rather, not only the findings recorded in the orders impugned are contrary to the provisions of the Act, 1899 & Rules, 1997 – held, chargeability of the stamp duty has to be examined with reference to the date of execution of instrument and further, if inspection is carried out today that would be wholly irrelevant and therefore, in remanding the matter, to the authorities, would be a futile exercise – hence, writ petition succeeds and is allowed – impugned orders are hereby quashed – and a writ of Mandamus is also issued to refund the amount deposited by the petitioner prior to filing of writ petition along with 6% interest p.a. within a period of three months. (Para – 17, 19, 24, 25, 26, 27)

(B) Civil Law – Constitution of India, 1950 - Article – 226 – Stamp Act, 1899 – Sections 2(14), 47 & 47-A - UP Stamp Valuation of Property Rules, 1997- Rule – 3(1)(A), 7(3)(C), - UP Zamindari Abolition & Land Reforms Act, 1950 – Sections 3(14) & 143 - Sale deed - of an agricultural land - deficiency in stamp duty – objection - recovery citation - stamp duty along with penalty was imposed – appeal – dismissed – Quantum of Stamp duty – court finds that, it is well settled law that unless '*mens rea*' is established on the part of the purchaser, no penalty can be imposed, even if the provision of penalty is a creation of statute and there is no nay finding on record, whereunder any opinion has been framed by the authorities that petitioner – held, penalty presupposes culpability and an intention to conceal or to play fraud with the authorities - therefore, imposition of penalty is contrary to the law as per rule 3(1)(a) of the Rules, 1997. (Para – 19, 20)

(C) Civil Law – Constitution of India, 1950 - Article – 226 – Stamp Act, 1899 – s

2(14), 47 & 47-A - UP Stamp Valuation of Property Rules, 1997- Rule 3(1)(A), 7(3)(C) - UP Zamindari Abolition & Land Reforms Act, 1950 – Sections 3(14) & 143 - Sale deed - of an agricultural land - deficiency in stamp duty – objection - recovery citation - stamp duty along with penalty was imposed – appeal – dismissed – Instrument – petitioner takes pea that since the sale deed was declared as void or invalid, no deficient stamp duty could be levied – court observed that, as per the definition, it is clear that even if, no rights are created by an Instrument, but they are purported to be created – therefore, merely because the sale deed has been declared as invalid in any subsequent proceedings, the same would be of no consequence insofar as the present case under the Stamp Act, - hence, argument of the petitioner to this effect is hereby discarded. (Para – 21, 22)

Writ Petition Allowed. (E-11)

List of Cases cited:

1. Varun Gopal Vs St. of UP & ors. (2015 vol. 2 ADJ 311),
2. Vijay Kumar Vs Commissioner Vs Commissioner Meerut Division - 2008(7) ADJ 293,
3. The Institute of the Franciscan Clarist Sisters Vs St. of UP & ors. – AIR 2020 All. 189,
4. Anirudha Kumar and Ashwani Kumar Vs Chief Controlling Revenue Authority, UP Allahabad & anr.– 2000 (3) AWC 2587,
5. Smt. Sushila Verma Vs St. of U.P. & ors. (2006 (2) AWC 1492),
6. Sudama Vs Chief Controlling Authority – 2013 (4) AWC 3571,
7. Ajay Agrawal & ors. Vs Commissioner Lucknow & ors. – 2023 (2) ADJ 561 (LB),
8. Ram Khelawan @ Bachha Vs St. of UP & anr.(2005 (2) AWC 1087),
9. Smt. Asha Kapoor Vs Additional Collector (F&R), Ghaziabad & ors. – 2008 (72) ALR 125,

10. Om Prakash Umar Vs St. of U.P. & ors. – 2014 (1) AWC 120,

11. Shahid Ali Vs Commissioner Bareilly Division Bareilly & ors. (2013)(v) ADJ 425),

12. Har Charan Lal Ice & Cold Storage Pvt. Ltd. Vs St. of UP & ors. (2013 (2) AWC 1731).

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Nipun Singh along with Shri Sumit Suri, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The petitioner purchased 1.1152 hectares of agricultural land by a registered sale deed dated 27.01.2011, which recites that the land covered by the instrument is purely agricultural in nature and has been purchased for cultivation activities.

3. The proceedings under section 47-A of Indian Stamp Act, 1899 (as applicable in the State of U.P.) were registered against the petitioner pointing out deficiency in the stamp duty on the ground that in respect of the same Khasra No. 69/1 minjumla, in the past, four other sale deeds were executed, on which stamp duty was paid at residential rates. Therefore, an opinion was formed that stamp duty in respect of the petitioner's sale deed was deficient.

4. The petitioner appeared in the proceedings and filed objections dated 08.08.2011 stating that stamp duty as per the prevalent circle rate applicable for the agricultural land had been paid. It was further stated that declaration under section 143 of U.P. Zamindari Abolition & Land Reforms Act, 1950 had not been made in respect of the land covered by the instrument; that paddy crops were standing on the agricultural field; that no spot

inspection was conducted by the authorities and that the Sub Registrar had submitted a report without examining the factual position of the spot.

5. By the first order impugned dated 06.05.2013, deficiency in payment of stamp duty to the tune of Rs. 2,78,600/- (Rupees two lac seventy eight thousand six hundred only) has been imposed along with four times penalty to the tune of Rs. 11,14,400/- (rupees eleven lac fourteen thousand four hundred only) with further stipulation that the petitioner shall be liable to pay an interest at the rate of 1.5 % per month from the date of execution of the instrument till recovery. The petitioner filed an appeal against the said order, which has been dismissed by the Chief Controlling Revenue Authority by second order impugned dated 07.09.2015.

6. The orders impugned are based upon stamp duty paid on one sale deed out of four, which was treated as an exemplar so as to determine the quantum of stamp duty in relation to the petitioner's sale deed. The document number of the said sale deed is 7353 of 2010, a copy whereof has been annexed as Annexure No. 8 to the writ petition. A perusal of the said deed shows that the area covered by it was 139.36 Square meters, for which purchaser had paid stamp duty at residential rates and the property was described as a residential plot. Insofar as objections taken by the petitioner in the proceedings are concerned, it has been observed by the Chief Controlling Revenue Authority that in case the petitioner was aggrieved by non-making of spot inspection, he should have moved successive applications, but he moved it only once. Regarding another application dated 06.05.2013, it was observed that in fact, it was a date fixed for passing final

order by the first authority and it appears that the application was moved on the date of decision and, therefore, it may be an afterthought.

7. Shri Nipun Singh, learned counsel for the petitioner submits that the land described in the instrument was and still is purely agricultural in nature. He further submits that once no declaration under section 143 of U.P. Zamindari Abolition & Land Reforms Act, 1950 was made in respect of property covered by the instrument, the nature of land will continue to be agricultural. He further submits that the area of the land purchased by the petitioner is around 11000 Square meters, whereas the exemplar sale deed No. 7353 of 2010, relied upon by the Authorities below, is only in relation to a very small portion of the same Gata i.e., 139.36 Square meters, which was described as a residential plot. He also submits that conducting the spot inspection in such matter was necessary as per Rule 7(3)(c) of the U.P. Stamp (Valuation of Property) Rules, 1997 and, therefore, once objection with regard to spot inspection was specifically raised by the petitioner, it was incumbent for the Authorities to conduct spot inspection and then form an opinion regarding alleged deficiency and, therefore, placing reliance on mere one sale deed of a very small portion of the land and treating the same as an exemplar for deciding the matter of payment of stamp duty, is not according to law.

8. He further submits that the Authorities have placed burden of proving the case upon the petitioner, rather, since these proceedings were initiated by the State, the burden to establish alleged deficiency in payment of stamp duty was upon the State and no

contrary burden could be placed upon the petitioner.

9. He has placed reliance upon a decision of this Court in the case of **Varun Gopal vs State of U.P. and others** reported in 2015 (2) ADJ 311, with special reference to paragraph 24 of the same, which is reproduced herein-below:

*"24. The sine qua non for invoking provisions of Section 47-A(3) of the Act is that the Collector had reason to believe, that the value had not been properly set forth in the instrument as per market value of the property. Once the instrument is registered and the stamp duty as prescribed by the Collector was paid, the burden to prove that the market value was more than the minimum prescribed by the Collector under the rules, was upon the Collector. The report of the Sub-Registrar or Tehsildar was not sufficient to discharge that burden. (**Vijay Kumar v. Commissioner Meerut Division**, 2008(7) ADJ 293)."*

10. He has further placed reliance upon another judgment of this Court in the case of **The Institute of the Franciscan Clarist Sisters vs State of U.P. and others**, reported in AIR 2020 All 189, wherein the property purchased was agricultural in nature and there was no declaration under section 143 of the U.P. Zamindari Abolition & Land Reforms Act, 1950.

11. Shri Nipun Singh has further argued that, even otherwise, sale deed No. 7353 of 2010 could not have been treated as an exemplar, inasmuch as under the order dated 27.09.2014 passed by the Tehsildar, in mutation proceedings, the said sale deed has been treated as invalid for the

reason that it was executed by a minor and, therefore, no rights were transferred or conferred by the same.

12. A counter affidavit has been filed by the State, in paragraph no. 10 whereof it is stated that the provisions of section 143 of U.P. Zamindari Abolition & Land Reforms Act, 1950 are irrelevant for the purposes of deciding the chargeability of stamp duty. In paragraph 17 of the counter affidavit, it is stated the spot inspection was not required in the present case as the property was earlier transferred by applying non-agricultural rates. Learned Standing Counsel, therefore, submits that the orders impugned do not require any interference.

13. Rejoinder affidavit has been filed reiterating the version contained in the writ petition, and further evidence has been brought on record to establish that nature of land not only on the date of execution of sale deed, but also as on today is purely agricultural in nature and different crops are standing on the spot.

14. Having heard the learned counsel for the parties, I find that non-declaration of land as Abadi under section 143 of U.P. Zamindari Abolition & Land Reforms Act, 1950 is an admitted fact. The contention of the State to the effect that the said non-declaration is not relevant in the proceedings under the Indian Stamp Act cannot be accepted for the reason that in exercise of statutory powers under the Indian Stamp Act, as applicable in the State of U.P., Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 have been framed. Rule 3(1)(a) of the Rules, provide as follows:

"Facts to be set forth in an instrument.-In case of an instrument

relating to immovable property chargeable with an ad valorem duty, the following particulars shall also be fully and truly stated in the instrument in addition to the market value of the property-

(1) In case of land-

(a) included in the holding of a tenure-holder, as defined in the law relating to land tenures-

(i) *the Khasra number and area of each plot forming part of the subject-matter of the instrument;*

(ii) *whether irrigated or unirrigated and if irrigated, the source of irrigation;*

(iii) *if under cultivation whether do-fasali or otherwise;*

(iv) *land revenue or rent whether exempted or not and payable by such tenure-holder;*

(v) *classification of soil, supported in case of instruments exceeding twenty thousand rupees in value, by the certified copies, or extracts from the relevant revenue records issued in accordance with law;*

(vi) *location (whether lies in an urban area, semi-urban area, or countryside); and*

(vii) *minimum value fixed by the Collector of the district."*

15. Admittedly, on the date of execution of the sale deed, the provisions of U.P. Zamindari Abolition & Land Reforms Act, 1950 were applicable. The

definition of "land" as contained under section 3(14) of the U.P. Zamindari Abolition & Land Reforms Act, 1950, reads as follows:

(14) "Land"[except in Sections 109, 143 and 144 and Chapter VII] means land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming;

16. In view of the definition of land contained in the **law relating to land tenures**, i.e. U.P. Zamindari Abolition & Land Reforms Act, 1950, the fact that the land was not declared as Abadi under section 143 of U.P. Zamindari Abolition & Land Reforms Act, 1950 as explained under section 3(14) of the said Act, in itself becomes a relevant factor for determining the nature of land that was subject matter of instrument. This Court in various authorities has held that when the land is purchased for agricultural purposes and declaration under section 143 of the U.P. Z.A. & L.R.Act, 1950 has not been made and merely because the land is situated in close vicinity of the non-agricultural land, the same would not lose its character as the agricultural land for the purposes of levy of stamp duty. Reference can be made to few authorities of this Court in the case of **Aniruddha Kumar and Ashwini Kumar vs Chief Controlling Revenue Authority, U.P. Allahabad and another**, reported in 2000 (3) AWC 2587; **Smt. Sushila Verma vs State of U.P. and others** reported in 2006 (2) AWC 1492 and **Sudama vs Chief Controlling Authority and others**, reported in 2013 (4) AWC 3571.

17. Moreover, had the allegation of the State been to the effect that though the land was purchased for agricultural

purposes, but its user was immediately changed and on the date of sale deed, it was being used for any other purpose like, industrial, commercial or even residential, the situation would have been different. Even in those situations, spot inspection at the relevant point of time was a necessity, but, admittedly, in the present case, no spot inspection has been carried out. Necessity of spot inspection and its mandatory nature, with reference to Rule 7 (3) (c) of the aforesaid Rules of 1997, has been reiterated, time and again by this Court in various authorities including **Ajay Agarwal and others vs Commissioner Lucknow and others**, reported in 2023 (2) ADJ 561 (LB), and **Ram Khelawan alias Bachcha vs State of U.P. and another**, reported in 2005 (2) AWC 1087.

18. Insofar as reliance placed upon the exemplar is concerned, comparing the area purchased by the petitioner, i.e. around 11000 square meters, a sale deed covering a very small area of about 139.36 square meters cannot be said to be a rational approach.

19. The observations/findings recorded in the orders impugned are also contrary to principles of burden of proof particularly, in a case where proceedings arise out of a fiscal statute. Once the State was proceeding to impose deficient stamp duty upon the petitioner, the entire burden lay upon the State to establish beyond reasonable doubt that the petitioner made some concealment at the time of getting the sale deed executed in his favour or that within a close proximity of dates, the user of the land in dispute was changed so as to levy additional stamp duty. Nothing to this effect has been brought on record, rather, not only the findings recorded in the orders impugned are contrary to the provisions of

the Indian Stamp Act, 1899, as applicable in the State of U.P. as well as U.P. Stamp (Valuation of Property) Rules, 1997, but certainly contrary to the law consistently laid down by this Court.

20. Insofar as the imposing four times penalty is concerned, it is well settled that unless "**mens rea**" is established on the part of the purchaser, no penalty can be imposed, even if the provision of penalty is a creation of statute. Regarding imposition of penalty, reference can be made to a judgment of this Court in the case of ***Smt. Asha Kapoor vs Additional Collector (Finance & Revenue), Ghaziabad and others***, reported in 2008 (72) ALR 125, where this Court has held that penalty can be imposed if there is an attempt to evade the stamp duty and **penalty presupposes culpability and an intention to conceal or to play fraud with the authorities.** I do not find any finding on record, whereunder any opinion has been formed by the respondent-Authorities that the petitioner defrauded the Government having mens rea at the time of getting the sale deed executed. Even the annexures to the writ petition disclosing the nature of land have not been disputed by the State in the counter affidavit. I also find that the sale deed in question conforms to the statutory requirements of disclosure of necessary particulars as per rule 3(1)(a) of the Rules of 1997. Therefore, imposition of penalty is also contrary to law of the land.

21. Insofar as the contention of Shri Nipun Singh to the effect that since the sale deed was declared as void or invalid, no deficient stamp duty could be levied upon the petitioner, the Court it is not impressed by the said submission in view of the definition of "**Instrument**" as contained under section 2 (14) of the

Indian Stamp Act, 1899, which reads as follows:

14. Instrument.- "instrument" includes-

(a) every document, by which any right or liability is, **or purports to be, created, transferred, limited, extended, extinguished or recorded;**

22. As per the aforesaid definition, it is clear that even if, no rights are created by an Instrument, but they are **purported to be created**, the document shall fall within the definition of "instrument" so as to invoke the provisions of Indian Stamp Act, 1899. This Court in the case of ***Om Prakash Umar vs State of U.P. and others***, reported in 2014 (1) AWC 120, has held that the validity of the transfer made in favour of the transferee is not a relevant criteria so as to grant exemption from payment of stamp duty. Therefore, merely because the sale deed has been declared as invalid in any subsequent proceedings, the same would be of no consequence insofar as the present case under the Indian Stamp Act is concerned. The argument advanced by the petitioner to this effect is hereby discarded.

23. Learned Standing Counsel submits that in case, non-conduct of the spot inspection is treated as an illegality behind passing of the orders impugned, the matter may be remanded to the authorities for conducting or getting conducted spot inspection and then pass a fresh order.

24. However I find that no fruitful purpose would be served in remanding the matter to the Authorities and infact remand in this case would be a futile exercise for

the reason that the instrument in question was executed on 27.01.2011 and it is well settled that chargeability of the stamp duty has to be examined with reference to the date of execution of instrument. Proposition to this effect has been consistently laid down by this Court in various authorities including *Shahid Ali vs Commissioner Bareilly Division Bareilly and others*, reported in 2013 (6) ADJ 425 and *Har Charan Lal Ice & Cold Storage Pvt. Ltd. Vs State of U.P. and others*, reported in 2013 (2) AWC 1731. Therefore, the insistence of learned Standing Counsel regarding remand is liable to be rejected, also for the reason that if inspection is carried out today, i.e. in the year 2023 that would be wholly irrelevant for the purposes of determination of stamp duty on the date of execution of sale deed i.e. 2011. Therefore, such spot inspection would neither be of any significance nor relevant for the purposes of deciding the matter.

25. In view of above, the writ petition succeeds and is **allowed**.

26. The order dated 06.05.2013 passed by respondent No. 3, Collector/District Magistrate, Gautam Budh Nagar in Case No. 14/2011-12 (State vs Rajkumar) as well as order dated 07.09.2015 passed by respondent No. 2, Chief Controlling Authority/Board of Revenue, U.P. Circuit Road, Meerut in Appeal No. 107/M/2013-14 (Rajkumar Bhati vs State of U.P.) are hereby **quashed** by issuing a writ of **Certiorari**.

27. A writ of **Mandamus** is also issued to the effect that any amount deposited by the petitioner either prior to filing of this writ petition or in pursuance of any interim order passed in the present case, shall be refunded to the petitioner

along with simple interest at the rate of 6% per annum from the date of its deposit till the date of actual payment, within a period of **three months**, on moving appropriate application by the petitioner along with certified copy of this order before the authority concerned.

(2023) 5 ILRA 1485
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.

Writ-C No. 26600 of 2007

Agya Pal Sareen ...Petitioner
Versus
A.D.M., G.B. Nagar & Ors. ...Respondents

Counsel for the Petitioner:
 Sri R.K. Pandey

Counsel for the Respondents:
 C.S.C., Sri Anuj Srivastava, Sri V.P. Mathur,
 Sri Ramendra Pratap Singh

Civil Law - The U.P. Land Acquisition Act, 1894- claim of compensation rejected being time barred-impugned order- Petitioner submitted his application u/s 18 of Act, 1894-noticedated 12.04.2004 served upon the Petitioner was not accompanied with the copy of the award-Petitioner came to know on 13.01.2004 only after receiving copy of notice dated 12.08.2004 -date of collector's award mentioned in proviso (b) to sec. 18 (2) of the Act, 1894-must be treated the date on which Petitioner came to know about the award-harmonious construction-six months period from the date of Collector's award will start from 24.08.2004 and will expire on 24.02.2005- Application was well within time-impugned order bad.

W.P. allowed. (E-9)

List of Cases cited:

1. Officer on Special Duty (Land Acquisition) & ors. Vs Shah Manilal Chandulal & ors.(1996) 9 SCC 414
2. Bhagwan Das Vs St. of U.P. (2010) 3 SCC 545
3. Madan & anr. Vs St. of Mah., (2014) 2 SCC 720
4. Vijay Mahadeo Rao Kubade Vs St. of Mah., (2018) 8 SCC 266

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

1. Heard learned counsel for the petitioner, Sri Anuj Srivastava, learned counsel for the respondent no.2 and learned Standing Counsel for the respondent Nos.1 and 3.

2. By means of present petition, the petitioner has challenged the order dated 27/28.04.2007 passed by respondent no.1 by which application for petitioner under Section 18 of U.P. Land Acquisition Act, 1894 (*hereinafter referred to as the "Act, 1894"*) for referring the matter for determination of court regarding amount of compensation was rejected on the ground that the same was time barred.

3. Factual matrix of the present case is that the State has issued notification dated 06.01.1992 under Section 4 of the "Act, 1894" and thereafter notification dated 22.09.1992 under Section 6 of the "Act, 1894" for acquiring the land for plan development by respondent no.2- Noida Development Authority. By way of above notification, 1/3rd part in Khasra No. 151 belongs to petitioner in village Hazipur, Pargana and Tehsil Dadari, District-

Gautam Budh Nagar was acquired. The award for the portion land of the petitioner in Khasra No.151 was also given on 13.01.2004 by respondent No.1. After delivering the award, registered notice dated 12.08.2004 under Section 12(2) of "Act, 1894" was also issued to the petitioner which was received by the petitioner admittedly on 24.08.2004. After receiving the aforesaid notice, petitioner filed an objection dated 25.08.2004 against the notice dated 12.08.2004 but no action was taken. Thereafter the petitioner submitted an application dated 20.09.2004 before the Collector, Gautambudh Nagar under Section 18 of the "Act, 1894" to refer the matter to the Court for determination of higher/correct compensation for the acquired land of the petitioner. When the above application dated 20.09.2004 remained undisposed then the petitioner preferred a Writ Petition No. 6180 of 2007 before this Court and the same was disposed of by order dated 08.02.2007 directing the Collector to decide the application dated 20.09.2004 submitted by the petitioner under Section 18 of the "Act, 1894".

4. In pursuance of the order dated 08.02.2007 of this Court, respondent no.1 has passed the impugned order dated 27.04.2007 after hearing the parties including the petitioner and rejected the same on the ground that the same is time barred because the application of the petitioner under Section 18 was submitted on 20.09.2004 but as per Section 18(2)(b) of the "Act, 1894". It should have been filed within six months from the date of award i.e. till 12.07.2004.

5. Contentions of learned counsel for the petitioner is that the impugned order dated 27/28.04.2007 passed by the

respondent no.1 is absolutely erroneous because the petitioner first time came to know about the award dated 13.01.2004 only after receiving the notice dated 12.04.2004 under Section 12(2) of the "Act, 1894" on 24.08.2004. Thereafter he immediately filed his application dated 20.09.2004 under Section 18 of the "Act, 1894" therefore, the same was within six weeks from the date of receiving the notice under Section 12(2) of the "Act, 1894". Therefore, his application under Section 18 of the Act, 1894 was well within time and therefore prayed for quashing of the impugned order.

6. Counsel for the respondent no.2 as well as Standing Counsel for the State have submitted that the impugned order is absolutely correct because application of the petitioner under Section 18 of the "Act, 1894" was time barred because the same was filed beyond six months from the date of award and also relied upon the judgements Officer on **Special Duty (Land Acquisition) and Ors. vs Shah Manilal Chandulal and Ors.** reported in (1996) 9 SCC 414 and **Bhagwan Das vs State of U.P.** reported in (2010) 3 SCC 545 to show that Section 5 of Limitation Act is not applicable in the application under Section 18 of the "Act, 1894".

7. Considering the rival contention of parties and perusal of record, we find it is admitted position that the petitioner submitted his application under Section 18 of the "Act, 1894" on 20.09.2004 though he received notice dated 12.04.2004 under Section 12(2) of the "Act, 1894" on 24.08.2004.

8. Section 18(2) of the "Act, 1894" provides the limitation for filing the application for referring the matter to the

court. For ready reference, Section 18 of the "Act, 1894" is quoted hereinbelow;

"18(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made, -

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under Section 12, sub-section(2), or within six months from the date of the Collector's award, whichever period shall first expire."

9. From perusal of Section 18(2)(a) of the "Act, 1894", it is clear that if the person/tenure holder was present or represented before the Collector at the time of making award then the limitation period is six weeks from the date of Collector's award. While Section 18(2)(b) provides in other cases, where the person was not present/ represented before the Collector at the time of making award then limitation period would be six weeks from the date of receipt of the notice from the Collector under Section 12(2) of the Act, 1894 or within six months from the date of Collector's award, **whichever period shall first expire.**

10. Hon'ble Supreme Court in the case of **Madan and another vs State of Maharashtra** reported in (2014) 2 SCC 720 observed that expression the date of Collector's award used in proviso (b) to

Section 18(2) of the Act must be understood to mean that date when the award is either communicated to the party or is known by him either actually or constructively. It was further held in the above judgement that it will be unreasonable to construe the words "from the date of Collector's award" used in proviso to Section 18 in a literal or mechanical way. Para 9 and 10 of the judgement **Madan and another (supra)** is quoted hereinbelow;

"9. From the order dated 29.10.1993 passed in L.A.R. No. 75/1992, it is, inter alia, clear that there was a dispute amongst the land owners (the appellants are one set of such land owners) in respect of their respective shares in the acquired land on account of which no apportionment of compensation was made by the Collector who made a Reference under Section 30 of the Act to the court. Further, in the order dated 29.10.1993 it is recorded that the appellants had no knowledge of the Award till the order dated 4.9.1991 came to be passed in the Reference under Section 30. In Harish Chandra Raj Singh (supra) this Court has held that the expression "the date of the award" used in proviso (b) to Section 18(2) of the Act must be understood to mean the date when the award is either communicated to the party or is known by him either actually or constructively. It was further held by this Court that it will be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way. In the present case, it has already been noticed that a finding has been recorded by the Reference Court in its order dated 29.10.1993 that "the petitioners had no knowledge about the passing of the award till the date of payment of compensation on 5.9.1991

because they were held entitled to receive the compensation after the decision of Reference under Section 30 dated 4.9.1991."

10. What transpires from the above is that it is for the first time on 4.9.1991 (date of the order under Section 30 of the Act) that the appellants came to know that they were entitled to compensation and the quantum thereof. It is not in dispute that the Reference under Section 18 was made within 6 weeks from the said date i.e. 4.9.1991. In the above facts, it is difficult to subscribe to the view taken by the High Court to hold that the Reference under Section 18 was barred by limitation."

11 Similarly in the judgement of **Vijay Mahadeo Rao Kubade vs State of Maharashtra** reported in **(2018) 8 SCC 266**. Hon'ble Supreme Court observed that if the land owner did not get copy of award along with notice under Section 12(2) of "Act, 1894" then notice will not be treated as valid notice, therefore, subsequent submission of application for reference under Section 18(2) will not be treated as time barred. Paras 10 and 11 of the aforesaid judgement are being quoted hereinbelow;

"10. Learned counsel for the petitioner, Ms. Bansuri Swaraj, relies on the judgment of Premji Nathu v. State of Gujarat and Anr., (2012) 5 SCC 250, wherein this court has observed as under;

"20. In the light of the above, it is to be seen whether the conclusion recorded by the Reference Court, which has been approved by the High Court that the application filed by the appellant was barred by time is legally sustainable.

21. A careful reading of the averments contained in Para 2 of the application filed by the appellant under Section 18(1) shows that the notice issued by the Collector under Section 12(2) was served upon him on 22.2.1985. Thereafter, his advocate obtained certified copy of the award and filed application dated 08.04.1985 for making a reference to the Court. This implies that the copy of the award had not been sent to the appellant along with the notice and without that he could not have effectively made an application for seeking reference.

22.
On behalf of the State Government, no evidence was produced before the Reference Court to show that the copy of the award was sent to the appellant along with the notice. Unfortunately, while deciding Issue 3, this aspect has been totally ignored by the Reference Court which mechanically concluded that the application filed on 8.4.1985 was beyond the time specified in Section 18(2)(b). The learned Single Judge of the High Court also committed serious error by approving the view taken by the Reference Court, albeit without considering the fact that the notice issued by the Collector under Section 12(2) was notice was essential for effective exercise of right vested in the appellant to seek reference under Section 18(1). (emphasis supplied).

11. The learned counsel appearing on behalf of the Government, has not disputed the aforesaid proposition of law. Accordingly, we are of the opinion that the aforesaid observations are squarely applicable to the present case as the notice dated 04.12.1987, was not accompanied with the award. In this case, there could not have been a valid notice of

the award, by letter dated 04.12.1987, under sub-section (2) of Section 12 of the Land Acquisition Act, until the appellant received a certified copy of the award, which he did on 03.02.1988. Therefore, the reference for enhancement was, accordingly, not barred by limitation."

12. From perusal of record, it is clear that notice dated 12.04.2004 under Section 12(2) of Land Acquisition Act served upon the petitioner on 24.08.2004 was not accompanied with the copy of the award dated 13.01.2004 and petitioner came to know about the award dated 13.01.2004 only after receiving the copy of the notice dated 12.08.2004 under Section 12(2) of the Act, 1894. From legal position discussed above, **it is clear that the date of Collector's award mentioned in proviso (b) to Section 18(2) of the 'Act, 1894' must be treated the date on which the petitioner came to know about the aforesaid award.** Admittedly, the petitioner came to know about the award dated 13.01.2004 only after notice under Section 12(2) dated 12.08.2004.

13. In view of above time period of six month from the date of Collector's award will commence from 24.08.2004 the date on which the petitioner came to know about the award dated 13.01.2004. It is undisputed that the petitioner has submitted application under Section 18(2) before the Collector on 20.09.2004 which was within six weeks from the date of receipt of notice dated 12.08.2004 under Section 12(2) of the 'Act, 1894'. Therefore on harmonious interpretation of proviso (b) of Section 18(2) of the 'Act, 1894' with the law laid down by the Apex Court as mentioned above six months period from the date of Collector's award will start from 24.08.2004 and that will expire on

24.02.2005 and six weeks from the date of receipt of notice dated 12.08.2004 received on 24.08.2004 will expire on 05.10.2004. Therefore the period six weeks from the date of receipt of notice under Section 12(2) had expired first on 5th October, 2004 and six months time from the date of Collector's award had expired subsequently i.e. on 24.02.2005.

Therefore, application of the petitioner dated 20.09.2004 was well within time within six weeks of notice under Section 12(2), therefore, the impugned order dated 27.04.2017 rejecting the application dated 20.09.2004 of the petitioner as time barred is absolutely erroneous hence liable to be quashed. Therefore, the same is quashed and the respondent no.1 is directed to pass appropriate order on the application dated 20.09.2004 of the petitioner under Section 18 of the 'Act, 1894' for referring his case to Court for determination of compensation treating the same within time.

14. Aforesaid exercise will be completed by respondent no.1 within a period of three months from the date of receiving the copy of this order.

15. In view of above, present writ petition is allowed. No order as to cost.

(2023) 5 ILRA 1490
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.05.2023

BEFORE
THE HON'BLE RAJNISH KUMAR, J.

Writ-C No. 31340 of 2017

Hari Sagar Tiwari **...Petitioner**
Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Ambika Prasad Mishra, Dinesh Kumar Ojha

Counsel for the Respondents:

C.S.C., Dilip Kumar Pandey, H S Tiwari,
Yogendra Nath Yadav

Writ Petition – for direction to the authority – to allot the Fair Price Shop in pursuance of a proposal of the Gaon Sabha which was in favour of the petitioner – complaint – said proposal was passed without confirmation and signature of the Pradhan - court finds that, there is a statutory provision for proceedings of the meetings, a proposal which has not been confirmed and signed by the Pradhan, it cannot be said to be a valid proposal and the proposal made therein would be valid – held, no direction can be issued for taking decision in pursuance of the said proposal which has not been confirmed and signed by the Pradhan, therefore it cannot be acted upon – consequently, writ petition dismissed.

(Para – 10, 12)

Writ Petition Dismissed. (E-11)

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

1. Heard, Shri Dinesh Kumar Ojha, learned Counsel for the petitioner, Shri Ajay Singh, learned Standing Counsel and Shri H.S.Tiwari, learned counsel for the respondent no.5.

2. This petition has been filed for a direction to opposite party no.3 to allot the Fair Price Shop of Village-Rampur Kasiha (Rampur), Vikas Khand-Sangipur, Tehsil-Lalganj, District-Pratapgarh to the petitioner in pursuance of the proposal dated 11.10.2017.

3. Submission of learned counsel for the petitioner is that a proposal was made in favour of the petitioner for allotment of

Fair Price Shop in question on 11.10.2017 but without any decision on the same by means of another proposal the respondent no.5 has been recommended for allotment of Fair Price Shop and the shop has been allotted in his favour, which could not have been done without taking any decision on the proposal dated 11.10.2017. He further submits that the Gram Pradhan was present through out the meeting but in the last he left the meeting and did not sign the proposal, which does not make the proposal invalid.

4. On the other hand learned counsel for the respondents submit that the proposal dated 11.10.2017 was not signed by the Gram Pradhan, therefore it is not a valid proposal and could not have been acted upon. It has further been submitted that the Gram Pradhan himself had made a complaint in regard to the bungling in voting in the meeting for the aforesaid proposal dated 11.10.2017, therefore it could not have been acted upon and on the basis of a fresh proposal in which the respondent no.5 was recommended, he has been granted the licence of Fair Price Shop in question. There is no illegality or error in it. Relying on U.P.Panchayat Raj Rules, 1947 learned counsel for the respondents submit that without confirmation and signature of the Pradhan a proposal is not a valid proposal. Therefore it could not have been acted upon.

5. I have considered the submissions of learned counsel for the parties and perused the records.

6. This petition has been filed for a direction for allotment of Fair Price Shop in question in favour of the petitioner in pursuance of the proposal dated 11.10.2017, which has not been signed by

the Gram Pradhan. Therefore the sole issue to be considered is as to whether the proposal which has not been signed by the Gram Pradhan can be a valid proposal or void and can be acted upon or not and a direction can be issued for taking a decision in favour of the petitioner in pursuance of the said proposal or not.

7. Rule 46 of the U.P. Panchayat Raj Rules 1947 (hereinafter referred as Rules 1947) provides that the Pradhan and in his absence the Up-Pradhan shall preside at the meeting of the Gaon Sabha and Gaon Panchayat and in case of absence of both from any such meeting, the member nominated under Rule 46-A shall preside at the meeting or in case the Pradhan has not made such a nomination, the Prescribed Authority may nominate any member. Rule 47 of the Rules 1947 provides the duties of Pradhan. One of the duties of the Pradhan is to convene and preside at all the meetings of the Gaon Sabha and the Gaon Panchayat and the other to control the transaction of business at the meetings and preserve order.

8. Rule 35-A of the Rules 1947 provides the procedure of the meetings of the Gaon Sabha, which is extracted here-in-below:-

"35-A. Procedure at the meeting of Gaon Sabha.- Subject to the provision of Section 11 of the Act, the following procedure shall be followed at the meeting of a Gaon Sabha:

(a) The proceedings of the meeting shall be read and confirmed and then signed by the Pradhan.

(b) The accounts of the period elapsed since the last meeting shall be

presented for information and consideration.

(c) Other items, if any, shall then be taken up and considered."

9. In view of above, as per the procedure prescribed the meeting of the Gaon Sabha shall be convened by the Pradhan and he will also preside the meeting and control the transaction of business in the meeting. The Pradhan and in his absence the meeting shall be presided over by the Up-Pradhan and in his absence the member nominated by Pradhan or prescribed authority, as the case may be. After meeting the proceedings of the meeting shall be read and confirmed and then signed by the Pradhan. Therefore the proceedings of the meeting are not only to be presided and controlled by the Pradhan but confirmed and signed also by the Pradhan after the meeting.

10. When there is a statutory provision for proceedings of the meeting, a proposal which has not been confirmed and signed by the Pradhan, it cannot be said to be a valid proposal and the proposal made therein would be void. Admittedly the proceedings of the meeting dated 11.10.2017 have not been confirmed and signed by the Pradhan, therefore it cannot be said to be a valid proposal and is void.

11. It is also noticed that the Gram Pradhan of the Village himself had made a written complaint in this regard to the Tahsildar, Lalganj, Pratapgarh with request for permission for re-voting on 11.10.2017 itself and to the Sub-Divisional Officer, Lal Ganj. The Tehsildar had submitted a report on 18.10.2017 annexing the list of 304 persons who were of the view that election is valid and 340 persons who were of the

view that election was invalid and were in favour of secret voting.

12. In view of above, the proposal dated 11.10.2017 cannot be said to be a valid proposal, therefore it cannot be acted upon. Hence no direction can be issued for taking decision in pursuance of the said proposal. Even otherwise subsequently another proposal was made, in which the name of respondent no.5 was recommended and he has been appointed. Therefore also no direction can be issued for taking any decision on the aforesaid proposal dated 11.10.2017 which has not been confirmed and signed by the Pradhan and is not in accordance with law. The petition has been filed on misconceived and baseless grounds and it is liable to be dismissed.

13. The writ petition is, accordingly, **dismissed**. No order as to costs.

(2023) 5 ILRA 1492
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-C No. 34819 of 2022

Committee of Management, Maharshi Dayanand Saraswati Vaidik Siksha Samiti, Meerut & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:

Sri Prabhakar Awasthi, Sri Brijesh Kumar, Sri Saurabh Tripathi

Counsel for the Respondents:

C.S.C., Sri Avneesh Tripathi

5 All. Committee of Management, Maharshi Dayanand Saraswati Vaidik Siksha Samiti, Meerut & 1493 Anr. Vs. State of U.P. & Ors.

Civil Law – Constitution of India, 1950 - Article - 226 – UP Educational Institutions (Prevention of Dissipation of Assets) Act, 1974 – Section - 5: - Writ Petition – against impugned order passed by DM, declined to transfer of the land from an intermediate college to a degree College – court finds that, for transfer of land, permission under section 5 of the Act, not been obtained – held, the provisions of the Act, 1974 are mandatory in nature and transfers of land made in transgression of said provisions are void ab initio – hence, court upheld the impugned order and remitted the matter to the Director of Education, Lucknow to decide the representation for transfer of land assets in accordance with law within a period of three months – writ petition, disposed of.
(Para – 6, 12)

Writ Petition Disposed of. (E-11)

List of Cases cited:

M/s G.S. Convent School Vs St. of U.P. & ors.,
2019 (11) ADJ 274

(Delivered by Hon'ble Ajay Bhanot, J.)

1. By the impugned order dated 24.02.2022, the District Magistrate, Meerut has declined to issue no objection certificate as regards land requirements for setting up a degree college. The impugned order finds that the land belongs to the intermediate college being run by the petitioner-committee of management and was transferred to the degree college in the teeth of Section 5 of the U.P. Educational Institutions (Prevention of Dissipation of Assets) Act, 1974 (hereinafter referred to as the 'Act', 1974).

2. Brief facts are these. The land belonging to the intermediate college run by the petitioner-committee of management was transferred to the degree college without prior approval for effecting the

aforesaid transfer under Section 5 of the Act, 1974.

3. Shri Prabhakar Awasthi, learned counsel assisted by Shri Saurabh Tripathi, learned counsel for the petitioners in his usual fairness submits that the permission under Section 5 of the Act, 1974 has not been obtained. However, he contends that no permission was required since the institution is a degree college and only excess land was transferred by the intermediate college.

4. Per contra, Shri I.P.Srivastava, learned Additional Chief Standing Counsel submits that the provision is mandatory in nature and the land transfer being in the teeth of the said provision is liable to be rendered null and void.

5. The land holdings are most critical assets of educational institutions, and have a direct bearing on the quality of education imparted therein. Today land assets of educational institutions are under constant threat of alienation. The managements often cut corners to break profits and land holdings are the first casualties. Over long years dissipation of land assets of institutions has almost disappeared the playgrounds from various schools and colleges in the State of U.P. [See: **M/s G.S. Convent School v. State of U.P. and 3 others** reported at **2019 (11) ADJ 274**]

6. Depletion of land assets of educational institutions causes decline in overall educational standards. The alienation of land assets belonging to the intermediate college are governed and regulated the U.P. Educational Institutions (Prevention of Dissipation of Assets) Act, 1974. The legislation seeks to check the menace of dissipation of land assets of an

educational institution. The said provisions of the Act, 1974 are mandatory in nature and have to be strictly complied with. Transfers of land and property of educational institutions made in transgression of said provisions are void ab initio. Considering the gravity of the problem the legislature may well contemplate more stringent provisions and exemplary penalties to discourage acts of dissipation of assets of educational institutions.

7. Violation of Section 5 of the Act, 1974 is established. The transfer of land of the intermediate college in favour of the degree college is vitiated and void.

8. In this wake, there is no infirmity in the impugned order dated 24.02.2022 passed by the respondent No.3-District Magistrate, Meerut. The relief sought in the writ petition is accordingly declined.

9. At this stage, Shri Prabhakar Awasthi, learned counsel assisted by Shri Saurabh Tripathi, learned counsel for the petitioners contends that the institution has ample land assets to run both the intermediate college as well as degree college. He also submits that the institution shall apply for necessary approval for transfer of the aforesaid land holdings in favour of the proposed degree college. He recasts the relief and prays that the application of the petitioners may be decided within a stipulated period of time.

10. Shri I.P. Srivastava, learned Additional Chief Standing Counsel for the State-respondents No.1, 3, 4 and 5 does not have any serious objection to the aforesaid prayer.

11. Shri Avneesh Tripathi, learned counsel for the respondent-No.2-University

submits that the institution can be granted recognition only after the all relevant eligibility criteria including the availability of no objection certificate in respect of land assets are made available.

12. In this wake, the matter is remitted to Director of Education, Lucknow to execute the following directions:

1. The petitioner-committee of management shall make a fresh application for seeking approval of transfer of land assets by the intermediate college to the degree college along with all supporting documents which shall include the existing maps of structures in the land holdings and also proposed structures for the degree college.

2. The Director of Education, Lucknow shall cause a physical inspection of the institution to be conducted. The inspection shall also compare existing structures to those cited in the representation.

3. The Director of Education, Lucknow shall decide the representation for transfer the land assets in accordance with law within a period of three months from the date of receipt of a certified copy of this order along with a fresh copy of representation.

4. It shall be ensured that separate playgrounds (of the prescribed dimensions) are available in both the institutions even after transfer of land.

With the aforesaid directions, the writ petition is finally disposed of.

5 All. M/s Shalimar Paper Mills Pvt. Ltd., Muzaffarnagar Vs. Spl. Judge/E.C. Act, Muzaffarnagar 1495 & Ors.

(2023) 5 ILRA 1495
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 41480 of 1999

**M/s Shalimar Paper Mills Pvt. Ltd.,
Muzaffarnagar ...Petitioner**
Versus
**Spl. Judge/E.C. Act, Muzaffarnagar & Ors.
...Respondents**

Counsel for the Petitioner:

Sri Pramod Kumar Jain, Sri B.C. Rai, Sri Deepak Kumar Pandey

Counsel for the Respondents:

C.S.C., Sri Narendra Kumar Tiwari, Sri Nipendra Mishra, Sri P.K. Shukla, Sri R.K. Shukla, Sri Manoj Kumar Dwivedi

Civil Laws – Constitution of India, 1950 - Article – 226 – Electricity Act, 1910 – Section 26(vi), - Arbitration Act, 1996 - Section - 34 - writ petition – assailing the impugned order by which the Special Judge EC Act, allowing the application preferred u/section 34 of the Arbitration Act, moved by the respondents department – an agreement between the parties for supply of electricity for a sanctioned load – petitioner challenged the electricity bills raised by the respondent, citing section 26(vi) of the EC Act, which required referral to an Electrical Inspector in case of defective meters – civil suit pending – Court finds that, the specific provision u/section 26(6) of the Electricity Act, 1910 prevails over the general arbitration clause in the agreement, and therefore, the matter should be referred to the Electrical Inspector for resolution – held, the dispute should be resolved by the Electrical Inspector as per Section 26(6) of the Electricity Act, 1910, and directed the petitioner to withdraw the civil suit and approach the Electrical Inspector for resolution – direction

issued accordingly, writ petition is disposed of. (Para – 13, 14, 15, 16)

Writ Petition Disposed of. (E-11)

List of Cases cited:

Belwal Spinning Mills Ltd. & ors. Vs U.P. St. Electricity Board & anr, 1997 (6) SCC 740.

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri B.C. Rai along with Sri Deepak Kumar Pandey, learned counsel for petitioner as well as Sri Manoj Kumar Dwivedi, Advocate holding brief of Sri Narendra Kumar Tiwari, learned counsel for respondent Nos. 2 to 5.

2. The petitioner has approached this Court assailing the judgment and order dated 30.07.1999 passed by Special Judge, EC Act, Muzaffarnagar thereby allowing the application under Section 34 of the Arbitration Act filed by the respondents for relegating the dispute to the Arbitrator.

3. The brief conspectus of the facts is that the petitioner and respondent had entered into an agreement dated 15.02.1985 for supply of electricity for a sanctioned load of 470 KVA. The petitioner is a Papermill which has established its unit at Muzaffarnagar for manufacturing paper.

4. The dispute pertains to the bills raised by the respondent-Electricity Department dated 05.06.1985 and 07.06.1985 amounting to Rs. 41527.60/- and Rs 1,07,605.50/-. In the said bills, it was stated that the meter installed in the premises was defective and was not recording the correct supply of the electricity and hence the said bills were raised. The petitioner disputed the said bills and was of the view that in light of Section

26 (vi) of the Electricity Act, 1910 in case the electric meter was defective, the only remedy as per the Act of 1910 is that the matter has to be referred to an Electrical Inspector who is the only authority under the said Act to return a finding as to whether the meter is defective and only thereafter the bills can be raised by the Electrical Inspector. It was submitted that without following the procedure prescribed, the electricity bills could not have been raised.

5. As the grievance of the petitioner was not redressed and being aggrieved by the aforesaid bills, the petitioner filed a civil suit being Civil Suit No. 288 of 1985 before the Special Judge, EC Act, Muzaffarnagar. Notices were issued to the respondents who had put in appearance before the Civil Court and file their written statements opposing the claim made by the petitioner.

6. Apart from objecting the claim of the petitioner, an application under Section 34 of the Arbitration Act was also made for staying of the proceedings in light of the fact that agreement entered into between the petitioner and respondent, there was specific clause pertaining to deciding of the disputes arising out of the agreement by process of arbitration. Clause 20 of the agreement is as follows:-

"(20) If any question or dispute or difference arises between the parties to this agreement as to the interpretation or effect of any provision or clause herein contained or the construction thereof or as to any other matter in any way connected with or arising out of this agreement of the operation thereof or the rights, duties or liabilities of either party in connection therewith, such question dispute or

difference shall be referred to the Arbitrator/Chairman, U.P. State Electricity Board or the person nominated by him and the award/decision of the said arbitrator shall be final and binding upon the parties.

Provided that if the question, disputes or difference relates to or concerned any dues chargeable to the consumer in terms of this agreement, no reference to arbitration shall at the instance of such consumer be made till the consumer has either deposited with the Supplier the amount of dues in dispute of difference or given a Bank Guarantee of such amount in favour of the Supplier valid upto the period on on year from the date in whcih the award becomes final or the amount or dues in cleared, whichever is earlier."

7. The petitioners had objected to the prayer made by the respondent for referring the matter to the arbitration and specific plea was taken, there exists a specific provision under Electricity Act, 1910 where the dispute which has arisen in the present case was referable to Section 26 (vi) of Act of 1910 and the same should have been referred to the Electrical Inspector rather than invoking the general power of arbitration under the said agreement.

8. Learned counsel for petitioner in support of his submissions, has placed reliance upon the judgment of the Hon'ble Supreme Court passed in the case of **Belwal Spinning Mills Ltd. and Others Vs. U.P. State Electricity Board and another, 1997 (6) SCC 740**, where Hon'ble Supreme Court has held as under:-

"The expression 'check meter' has no special significance or legal incidence

for which there is a bar that check meter cannot be treated as an altered meter if the licensee intends to replace the defective meter by the check meter. It will be open to the Electrical Inspector to ascertain the correctness of the check meter along with the disputed meter when dispute is referred for adjudication by the Electrical Inspector and the licensee found its case with reference to check meter. Prior to the amendment of Section 26(6) of Electricity Act, the Electrical Inspector or the competent person specially appointed by the State Government in this behalf, had a statutory duty to first determine whether the meter in question was defective and thereafter to estimate the quantity of the electricity consumed during such time as the meter in the opinion of the Electrical Inspector or the competent person 'shall not have been correct'. After the amendment of sub-section (6) of Section 26, the Electrical Inspector is the only statutory authority to decide the dispute about the correctness of the meter, if such dispute is raised by either of the parties. If the Electrical Inspector on a reference comes to the finding that the meter has ceased to be correct, the said Inspector has a statutory duty to estimate the amount of energy supplied to the consumer or electrical energy contained in the supply during such time not exceeding six months as the meter shall not, in the opinion of such Inspector, have been correct.'"

9. The question which engages the attention in the present case is as to whether the petitioner should be relegated to the remedy for an arbitration under Clause 20 of the agreement or the matter should be referred to the Electrical Inspector in terms of Section 26 (vi) of the Electricity Act, 1910.

10. To answer the aforesaid question, it is necessary to look into the provisions of the Indian Electricity Act, 1910, Section 26 Sub-Section 6 provides as under:-

"Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector; and where the meter has, in the opinion of such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as aforesaid, register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity.

Provided that before either a licensee or a consumer applies to the Electrical Inspector under this sub-section he shall give to the other party not less than seven days' notice of his intention so to do."

11. Apart from the aforesaid statutory provisions, it is also noticed that the agreement entered into between the petitioner and the respondent also provide for resolution of disputes in a situation when the electricity meter has been found to be defective. Clause 10 Sub-Clause (c) of the agreement provides that :-

(c) Should the consumer dispute the accuracy of the supplier's meter/meters, he may, upon giving notice paying the prescribed fee, have the same tested by the Supplier or in accordance with sub section (6) of Section 26 of the Act by the Electrical Inspector to the State Government. In the

event of the meter begin tested by the Supplier and found to be incorrect beyond the limit of accuracy prescribed by the Indian Electricity Rules, 1956, the cost of testing and all reasonable expenses incidental thereto shall be met by the Supplier, and the amount of the bill shall be adjusted in accordance with the result of test taken with respect of the meter readings of the 3 months prior to the month in which the dispute has arisen due regard being paid to the conditions of working, accuracy etc., during the month under dispute, and during the month under dispute, and during the us three months, meter/meters is/are found to be correct within the limits laid down in the Indian Electricity Rules, 1956 or any other statutory modification thereof for the time being enforce, the fees paid by the consumer shall be forfeited to the supplier."

12. A perusal of the aforesaid clause would indicate that the agreement itself provide for a condition that in case there is a dispute with regard to electricity meter, then the same can be resolved in terms of Section 26 (vi) of Electricity Act, 1910.

13. Considering the fact that a specific provision would prevail over a general provision, there is no doubt that if a particular dispute which has arisen as in the present case, the matter can adequately be resolved after referring the matter to the Electrical Inspector. A bare perusal of Section 26 (vi) would also indicate that a reference has to be made to the Electrical Inspector who shall give his opinion about the electricity meter and also estimate about the amount of electricity supplied to the consumer.

14. Considering the fact that a specific provision for resolution of dispute

is existing and it is not disputed by either of the parties that the matter can be referred and resolved by the Electrical Inspector and it also clearly finds mention in the agreement and hence binds both the parties, this Court is of the clear view that dispute can be resolved in terms of Section 26 (vi).

15. Learned counsel appearing on behalf of Electricity Department does not dispute this proposition.

16. In light of the above, the contention of the petitioner has force and accordingly with the consent of the parties, this writ petition is being disposed of in the following terms:

(i) Considering the fact that the matter should be resolved by the Electrical Inspector in terms of Sub-Section 6 of Section 26 of the Electricity Act, 1910, it is provided that the petitioner undertakes to withdraw the civil suit No. 288 of 1985 pending before the Special Judge, EC Act, Muzaffarnagar. Let an application in this regard be moved expeditiously, say, within a period of next one month.

(ii). Subsequent to moving of the application for withdrawal, the petitioner shall move an application before the concerned Electrical Inspector appointed by the State Government raising all his grievances with regard to defective meter No.1418020 as well as bills dated 05.06.1985 and 7.06.1985 within next one month. On receipt of the representation/claim of the petitioner, the Electrical Inspector shall proceed to determine the condition of the meter as well as amount of the electricity consumed during the said period relating to the aforesaid two bills and pass an order in accordance with law within next three months.

(iii). It is provided that till the order is passed by the Electrical Inspector, no recovery shall be made from the petitioner in pursuance of the bills dated 05.06.1985 and 07.06.1985.

(iv). This protection shall be available only till passing of an appropriate order by the Electrical Inspector as directed by this Court.

17. In light of the aforesaid direction, the writ petition is **disposed of**.

(2023) 5 ILRA 1499
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 45294 of 2010

Anil Kumar Gupta @ Rajendra Gupta & Ors.
...Petitioners

Versus

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

Counsel for the Petitioners:

Sri R.K. Gupta

Counsel for the Respondents:

C.S.C.

Civil Laws – Constitution of India, 1950 - Article – 226 – Stamp Act, 1899 – Sections 47, 47-A, 47(a)(3), 47-A/33, 48-A, 56(1-A) & 56(2) - UP Stamp Valuation of Property Rules, 1997- Rule 7, 7(2)(c), 7(3)(C) - Sale deed of an agricultural land – notice for deficiency in Stamp duty while accepting a complaint that, agricultural plot was purchased but with two storied house, valuation of which was not included - recovery citation – Appeal - with a specific plea that no any independent inquiry or inspection was conducted before issuing impugned recovery

order – appeal rejected – writ petition – undoubtedly, as recorded in order of Commissioner himself such a request was made by the petitioner in appeal preferred by him - When such a request is made then, it is mandatory upon authorities concerned to exercise powers conferred under Section 7(3)(c) of Rules and inspect property after giving due notice to parties and only then proceed with matter - in case aforesaid exercise has not been conducted valuable right vested in person who is put under notice is lost and valuable right cannot be exercised by him and procedure as prescribed is required to be followed in letter and spirit - and not inspecting property even after application made by petitioner is clearly arbitrary and illegal – hence, matter is remitted back to the Additional District Magistrate who shall proceed in the matter afresh in accordance with law – direction issued - accordingly, writ petition is allowed. (Para – 13, 15, 16)

Writ Petition Dismissed. (E-11)

List of Cases cited:

1. Wasi Ur Rehman & anr. Vs Commissioner Moradabad Division & ors., (writ - C No. 47533 of 2010 decide don dated 26.2.2015),
2. Chiranji Lal (Dr.) Vs Hari Das (2005) 10 SCC 746,
3. Ramesh Chand Bansal Vs District Magistrate/Collector, 4(1999) 5 SCC 62,
4. Agra City Real St. Development Organisation, Agra Vs St. of U.P & ors.) 2003 (2) SAC 361,
5. Vijay Kumar & anr. Vs Commissioner, 2008(3) AWC 299 All.,
6. Ratna Shankar Dwivedi Vs St. of U.P., AIR 2012 ALL 100,

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri R. K. Gupta, learned counsel for the petitioners as well as learned Standing counsel for respondent No.s 1 to 4.

2. The petitioner has challenged the order dated 5.3.2008 passed by Assistant Stamp Commissioner/ Collector, Stamp, Fatehpur as well as the order dated 30.11.2009 passed by Additional Commissioner (Administration), Allahabad Divisions, Allahabad thereby dismissing the appeal preferred by the petitioner under Section 56 (1-A) of the Indian Stamp Act, 1899. He has also challenged the consequential orders wherein recovery citation dated 26.7.2010 has been issued for realization of the deficient stamp duty.

3. It has been submitted on behalf of the petitioner that respondent No.5 had sold a land measuring 0.0405 square meters of gata No.863 through registered sale deed dated 21st February, 2007 and he has further paid the sufficient court fee on consideration which was agreed between the parties as mentioned in the sale deed. Assistant Stamp Commissioner / Collector Stamp Duty issued notice to the petitioner after registering a case on the ground that the petitioner had not paid adequate stamp duty for registration of the said plot and notices were issued as to why the deficit amount be not recovered from the petitioner. The petitioner had responded to the said notice and submitted his reply to the Sub Divisional Magistrate, Sadar, Fatehpur.

4. It is further submitted that the petitioner has purchased the agricultural land standing in the name of Phool Singh and proceedings have been initiated on the basis of a false complaint at the behest of one Ram Sajiwan. He further submits that adequate consideration of stamp duty has been paid and, hence, prayed that the notice issued to him may be discharged. Additional District Magistrate (Finance and Revenue) considered the response of the

petitioner rejected his defence and upheld the fact that the petitioner had not paid adequate consideration of stamp duty. He took into account the fact that according to the sale deed the agricultural plot was purchased but on the spot two storied house was existing the valuation of which was not included in the sale deed and accordingly there was deficiency in the stamp duty paid by the petitioner.

5. The petitioner being aggrieved by the order dated 5.3.2008 passed by Additional District Magistrate (F & R), Fatehpur preferred an appeal before the Commissioner, Allahabad under Section 56(2) of the Stamp Act. The Commissioner also did not find any merit in the plea taken by the petitioner and affirmed the order of Additional District Magistrate (F & R), Fatehpur by dismissing the appeal by means of order dated 30.11.2009.

6. Assailing both the orders of the authorities learned counsel for the petitioner has submitted that both the authorities concerned have not followed the procedure established under Section 47-A of U.P. Stamp Act as well as Uttar Pradesh Stamp (Valuation of Properties), Rules, 1997 (hereinafter referred to as the Rules of 1997). He submits that entire proceedings were initiated only on the basis of a complaint made by one Ram Sajiwan and without ascertaining any of the facts the respondents have proceeded on the ground that a two story house was existing on the plot purchased by the petitioner and consequently there was deficiency in the court fee. He has further submitted that the petitioner had requested the respondents to inspect the property after due notice to the parties in exercise of the powers under Section 7(2) (c) of the Rules of 1997 but no

such inspection was conducted and the respondents proceeded to reject the contention of the petitioner and upheld the deficiency in stamp fee in the said instrument sought to be registered by the petitioner. In support of his submissions, learned counsel for the petitioner has submitted that he had taken specific plea before the Commissioner in his appeal where this aspect of the matter has been duly recorded by him that the petitioner has sought an independent inquiry /inspection of the said plot and only then the appellate authority should proceed in the matter. Without considering the pleas raised by the petitioner the Commissioner proceeded to uphold the order of Additional District Magistrate (F & R), Fatehpur and misconducted himself and has proceeded contrary to the procedure prescribed under the Rules of 1997.

7. Learned Standing counsel, on the other hand, has opposed the writ petition. He submits that there is no infirmity in the orders passed by the authorities concerned. He has further submitted that there is no dispute with regard to the fact that a two story building was existing on the plot purchased by the petitioner which was not disclosed in the sale deed and consequently when the same was noticed by the authorities concerned the petitioner was put under notice and proceedings were initiated and concluded strictly in accordance with the provisions under Section 48 (A) of the Stamps Act and, hence, supported the order passed by the respondents.

8. Learned counsel for the petitioner while assailing the assessment order as well as the appellate order passed under Section 47 A of the Stamp Act and has submitted that no inspection was ever made at the property and that in case the inspection

would have been made in presence of the petitioner he would have been in a position to demonstrate that there was no building existing on the plot purchased by him and in this regard he submits that the respondents have proceeded in violation of the procedure prescribed under the Rules of 1997. Rule 7 (C) of the Rules of 1997 provides the procedure on receipt of a reference or when suo motu action is proposed under Section 47-A of the Stamp Act. The Rule 7(2) (c) provides that the Collector may inspect the property after due notice to parties to the instrument.

9. The object of the Act is to collect proper stamp duty on an instrument or conveyance. An obligation is cast on the authorities to properly ascertain its true value. The market value of a property may vary from village to village, from location to location and even may differ from the sizes of land area and other relevant factors viz. predominant land-use. Entry in revenue record though relevant is not the sole determining factor of the market value under the Act. This apart there has to be some material before the authority as to what is the likely value of such property in that area. Such 'reason to believe' must be based on tangible, relevant and legally admissible evidence. There must be an intelligible nexus between the 'reason' and the 'belief'. Such belief should not be substitute for roving enquiries or the authorities 'reason to suspect'.

10. In the light of the above objections raised by the petitioner it was necessary for the Collector to exercise the powers under Rule 7 (3) (c) of the Rules of 1997 and conducted spot inspection in presence of the petitioner and there upon proceeded under Section 47 A to assess the valuation of the land.

11. This Court in WRIT - C No. - 47533 of 2010 (**Wasi Ur Rehman And Another Vs. Commissioner Moradabad Division And Others**) decided on 26.2.2015 has held as under:-

"The Indian Stamp Act, 1899 is a law relating to revenue/stamps. Its applicability thus stands restricted to the scheme of the Act. The Stamp Act is a fiscal measure enacted with an object to secure revenue for the State on certain classes of instrument.

It is not enacted to arm a litigant with a weapon of technicality to defect the case of the Revenue. The stringent provisions of the Act are conceived in the interest of the Revenue.

It is a matter of common knowledge that in order to escape such duty by unfair practice, many a time under valuation of a property or lower consideration is mentioned in a sale deed. (**Chiranji Lal (Dr.) v. Hari Das (2005) 10 SCC 746; Ramesh Chand Bansal versus District Magistrate/Collector, 4(1999) 5 SCC 62**). A Stamp Act is a taxing statute and as regards a taxing statute, it is well settled that equity has no place in it. There is no presumption as to a tax, nothing is to be read in, nothing is to be implied, (**Agra City Real State Development Organisation, Agra versus State of U.P & others**) 2003 (2) SAC 361.

Market value has not been defined under the Act, in proceedings under section 47-A (3) refers "to instrument on which duty is chargeable on the market value of the property", Article 23 provides for stamp duty payable on conveyance which refers to market value of immovable

property which is subject of such conveyance.

Market value as referred to in the expression conveyance is the price which a willing purchaser would pay to a willing seller for the property. The court in **Vijay Kumar and another Versus Commissioner, 2008(3) AWC 299 All**, explained the expression "market value":

"The 'market value' means what a willing purchaser would pay to a willing seller for the property having regard to the advantages available to the land and the development activities which may be going in the vicinity and potentiality of the land."

Again in **Ratna Shankar Dwivedi versus State of U.P., AIR 2012 ALL 100** the Court held that:

"The term "market value" has not been defined under the Act. However there are some precedents laying down certain guidelines as to how and in what manner a market value would be determined. The consensus opinion is that the market value of any property is the price which the property would fetch or would have fetched if sold in the open market."

The sine qua non for invoking provisions of Section 47-A (3) of the Act is that the Collector had reason to believe, that the value had not been properly set forth in the instrument as per market value of the property. Once the instrument is registered and the stamp duty as prescribed by the Collector was paid, the burden to prove that the market value was more than the minimum prescribed by the Collector under the rules, was upon the Collector. The report of the sub-Registrar or Tehsildar was not sufficient to discharge

that burden. (Vijay Kumar Vs. Commissioner, Meerut Division) AIR 2008 All 176.

The expression "reason to believe" is not synonymous with subjective satisfaction of the officer. The belief must be held in good faith, it cannot be merely a pretence. It is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not irrelevant or extraneous to the purpose of the section. "

12. In the instant case, the Collector has relied solely upon the spot inspection report while the petitioner, on the other hand, had questioned the said report and filed objection but the objections raised by the petitioner were not even dealt with by the Collector and he proceeded to ascertain the valuation of the land solely on the basis of the spot inspection report which was duly challenged by the petitioner. While assessing the stamp valuation of the land it was open in the present set of circumstances for the Collector to have exercised the powers so vested in him under Rule 7 sub clause 3 (c) of the Rules of 1997 and get the land inspected as requested by the petitioner in his application.

13. It is noticed that according to Rule 7 when reference is received by the Collector after issuance of notice to the parties be directing them to show cause as to why the stamp fee of the property cited in the instrument be not realized in exercise of the powers conferred in sub clause 3 of Rule 7 (3) and inspect the property after due notice to the parties to the instrument. Undoubtedly, as recorded in the order of the Commissioner himself such a request

was made by the petitioner in the appeal preferred by him. When such a request is made then it is mandatory upon the authorities concerned to exercise the powers conferred under Section 7 (3) (c) of the Rules of 1997 and inspect the property after giving due notice to the parties and only then proceed with the matter. In case aforesaid exercise has not been conducted valuable right vested in the person who is put under notice is lost and valuable right cannot be exercised by him and the procedure as prescribed is required to be followed in letter and spirit and not inspecting the property even after the application made by the petitioner is clearly arbitrary and illegal and proceeding with the matter without exercising the power conferred under Section 7 (3) (C) the respondents have clearly proceeded in illegal and arbitrary manner while holding that the petitioner was liable to pay stamp duty even for the double story house which was standing on the said plot.

14. Without even entering into the merits of the other aspects as raised by the petitioner, this Court is of the considered opinion that the impugned orders are illegal and arbitrary having been passed without following the provisions prescribed under the Rules of 1997 and accordingly the orders dated 5.3.2008 passed by respondent No.2 in case No.12 of 2007-08, under Section 47-A/33 of Stamp Act and the order dated 30.11.2009 passed by respondent No.3 in Appeal No.7/21 of 2008 under Section 56 (1-A) of Indian Stamp Act as well as recovery citation dated 26.7.2010 are set aside.

15. The matter is remitted back to Additional District Magistrate (F & R), Fatehpur, who shall proceed afresh in the matter after inspecting the property as

provided under Rule 7 of the Rules of 1997 in accordance with law. He is directed to conclude the proceedings expeditiously after giving due opportunity of hearing to the parties concerned. Let such an exercise be concluded within a period of two months from the date a certified copy of this order is placed before him.

16. Learned counsel for the petitioner submits that in pursuance of earlier direction of this Court the 1/3rd deficient amount of the stamp duty has already been deposited by him before Tahsildar, Fatehpur. It is, therefore, provided that the the said deposited amount shall be adjusted in the order to be passed by Additional District Magistrate (F & R), Fatehpur in pursuance of the directions of this Court.

17. The writ petition is **allowed**.

(2023) 5 ILRA 1504
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 58632 of 2017

Bharat Heavy Electricals Ltd. ...Petitioner
Versus
Deepak Kumar & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Tarun Varma, Sri Ashish Mishra

Counsel for the Respondents:
 Sri Rahul Jain

Civil Laws – Constitution of India, 1950 - Article – 226, 227 – Public Premises Eviction of Unauthorized Occupants Act, 1971 - Sections 9 & 83(9) - Application to issue appropriate direction permitting the

petitioner to get the premises vacated from the respondents who have attained age of superannuation and no longer associated with petitioner – by placing reliance upon a judgment of the Apex Court in case of '*LIC vs Nandini J. Shah*' respondents pleaded that writ petition under Article 226 is not maintainable – court finds that, either sitting in jurisdiction under Article 226 or under 227 court cannot ignore the fact that respondents are occupying official accommodations, which they claim to be associated with their services and therefore, admittedly, those who have attained the age of superannuation, cannot be allowed to remain in occupation in the accommodations, irrespective of the nature of their services or even on the ground that certain sums allegedly payable to them remain unpaid to them – held, the High court, in whatever jurisdiction it sits, always functions on the basic principles of equity, fairness and reasonableness, and therefore, the stand of the petitioner needs consideration and cannot be ignored merely on the ground that the writ petition finally has to be heard either under Article 226 or Article 227 – hence, writ petition allowed – directions issued to vacate the premises and hand over peacefully. (Para – 20, 21, 22)

Writ Petition Dismissed. (E-11)

List of Cases cited:

1. Life Insurance Corporation of India Vs Nandini J. Shah reported in (2018) 15 SCC 356,
2. Kiran Devi Vs Bihar St. Suni Wakf Board & ors. (2021 SCC Online SC 280,
3. M/s Hindustan Auto Agency Vs Steel Authority of India Ltd. (2021) 4 JBCJ 653,

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Sri Ashish Mishra, learned counsel for the petitioner, Sri Rahul Jain, learned counsel for the respondent nos.1 to 8 and learned Standing Counsel for the respondent no.9.

2. The instant application has been filed with a prayer to issue appropriate

direction permitting the petitioner to get the premises vacated from such private-respondents and other contract persons, who have attained age of superannuation and are no longer associated with the petitioner in any manner whatsoever.

3. Sri Rahul Jain, learned counsel for the respondents, has placed reliance upon the judgment of Apex Court in ***Life Insurance Corporation of India v. Nandini J. Shah reported in (2018) 15 SCC 356*** and submits that against the order passed by the appellate court exercising appellate jurisdiction under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, the writ petition under Article 226 of the Constitution of India is not maintainable and the party aggrieved may avail the remedy of filing petition under Article 227 of the Constitution of India. He further contends that miscellaneous application filed in the writ petition under Article 226 of the Constitution of India is also not maintainable.

4. Sri Ashish Mishra, learned counsel for the petitioner submits that at this stage he is pressing only his application dated 24.12.2021 and insofar as the maintainability of the writ petition under Article 226 of the Constitution of India is concerned, the same is also maintainable as held by Hon'ble Supreme Court in the case of ***"Kiran Devi Vs. Bihar State Suni Wakf Board and others (2021 SCC Online SC 280)***.

5. Sri Rahul Jain, placing reliance upon the judgment of Apex Court in the case of Life Insurance Corporation of India (supra), referred to paragraph nos.48, 49 & 50 of the same which are reproduced hereinbelow:-

"48. Even though the respondents have invited our attention to other decisions of High Courts and also of Supreme Court which have analysed the provisions of other legislations, it is unnecessary to dilate on those decisions as we intend to apply the principles underlying the decisions of three-Judge Bench of this Court in Thakur Das (supra), Asnew Drums Pvt. Ltd. (supra), Maharashtra State Financial Corporation (supra), Ram Chander Aggarwal (supra) and Mukri Gopalan (supra), in particular, to conclude that the Appellate Officer referred to in Section 9 of the 1971 Act, is not a persona designata but acts as a civil court.

49. In other words, the Appellate Officer while exercising power under Section 9 of the 1971 Act, does not act as a persona designata but in his capacity as a pre existing judicial authority in the district (being a District Judge or judicial officer possessing essential qualification designated by the District Judge). Being part of the district judiciary, the judge acts as a Court and the order passed by him will be an order of the Subordinate Court against which remedy under Article 227 of the Constitution of India can be availed on the matters delineated for exercise of such jurisdiction.

50. Reverting to the facts of the present case, the respondents had resorted to remedy of writ petition under Article 226 and 227 of the Constitution of India. In view of our conclusion that the order passed by the District Judge (in this case, Judge, Bombay City Civil Court at Mumbai) as an Appellate Officer is an order of the Subordinate Court, the challenge thereto must ordinarily proceed only under Article 227 of the Constitution of India and not under Article 226.

Moreover, on a close scrutiny of the decision of the learned Single Judge of the Bombay High Court dated 14.08.2012 we have no hesitation in taking the view that the true nature and substance of the order of the learned Single Judge was to exercise power under Article 227 of the Constitution of India; and there is no indication of Court having exercised powers under Article 226 of the Constitution of India as such. Indeed, the learned Single Judge has opened the judgment by fairly noting the fact that the writ petition filed by the respondents was under Articles 226 and 227 of the Constitution of India. However, keeping in mind the exposition of this Court in the case of *Ram Kishan Fauji* (supra) wherein it has been explicated that in determining whether an order of learned Single Judge is in exercise of powers under Article 226 or 227 the vital factor is the nature of jurisdiction invoked by a party and the true nature and character of the order passed and the directions issued by the learned Single Judge. In paragraph 40 of the reported decision, the Court adverted to its earlier decision observed thus:

40. xxx xxx xxx Whether the learned Single Judge has exercised the jurisdiction Under Article 226 or Under Article 227 or both, would depend upon various aspects.

There can be orders passed by the learned Single Judge which can be construed as an order under both the articles in a composite manner, for they can co-exist, coincide and imbricate. It was reiterated that it would depend upon the nature, contour and character of the order and it will be the obligation of the Division Bench hearing the letters patent appeal to discern and decide whether the order has

been passed by the learned Single Judge in exercise of jurisdiction Under Article 226 or 227 of the Constitution or both. The two-Judge Bench further clarified that the Division Bench would also be required to scrutinise whether the facts of the case justify the assertions made in the petition to invoke the jurisdiction under both the articles and the relief prayed on that foundation. The delineation with regard to necessary party not being relevant in the present case, the said aspect need not be adverted to. Again in paragraphs 41 and 42, which may be useful for answering the matter in issue, the Court observed thus:

41. We have referred to these decisions only to highlight that it is beyond any shadow of doubt that the order of civil court can only be challenged Under Article 227 of the Constitution and from such challenge, no intra-court appeal would lie and in other cases, it will depend upon the other factors as have been enumerated therein.

42. At this stage, it is extremely necessary to cull out the conclusions which are deducible from the aforesaid pronouncements. They are:

42.1 An appeal shall lie from the judgment of a Single Judge to a Division Bench of the High Court if it is so permitted within the ambit and sweep of the Letters Patent.

42.2 The power conferred on the High Court by the Letters Patent can be abolished or curtailed by the competent legislature by bringing appropriate legislation. 42.3 A writ petition which assails the order of a civil court in the High Court has to be understood, in all circumstances, to be a challenge Under

Article 227 of the Constitution and determination by the High Court under the said Article and, hence, no intra-court appeal is entertainable. 42.4 The tenability of intra-court appeal will depend upon the Bench adjudicating the lis as to how it understands and appreciates the order passed by the learned Single Judge. There cannot be a straitjacket formula for the same. (emphasis supplied)”

6. Sri Rahul Jain has further placed reliance upon the judgment of Jharkhand High Court in “**M/s Hindustan Auto Agency Vs. Steel Authority of India Ltd. (2021) 4 JBCJ 653**” in which the aforesaid decision of Life Insurance Corporation of India has been relied.

7. He, therefore, submits that the matter can only be heard under Article 227 of the Constitution of India, and therefore, the present writ petition is not maintainable as the same was filed under Article 226 of the Constitution of India.

8. Per contra, Sri Ashish Mishra, learned counsel for the petitioner, while placing reliance upon the judgment of the Apex Court in the case of Kiran Devi (supra), has referred to paragraph nos.20, 21 & 22 thereof, which are reproduced as under:-

“20. Therefore, when a petition is filed against an order of the Wakf Tribunal before the High Court, the High Court exercises the jurisdiction under Article 227 of the Constitution of India. Therefore, it is wholly immaterial that the petition was titled as a writ petition. It may be noticed that in certain High Courts, petition under Article 227 is titled as writ petition, in certain other High Courts as revision petition and in certain others as a

miscellaneous petition. However, keeping in view the nature of the order passed, more particularly in the light of proviso to sub-section (9) of Section 83 of the Act, the High Court exercised jurisdiction only under the Act. The jurisdiction of the High Court is restricted to only examine the correctness, legality or propriety of the findings recorded by the Wakf Tribunal. The High Court in exercise of the jurisdiction conferred under proviso to sub-section (9) of Section 83 of the Act does not act as the appellate court.

21. We find merit in the argument raised by Mr. Sanyal that the nomenclature of the title of the petition filed before the High Court is immaterial. In *Municipal Corporation of the City of Ahmedabad Vs. Ben Hiraben Manilal*, this Court held that wrong reference to the power under which an action was taken by the Government would not per se vitiate the action, if the same could be justified under some other power whereby the Government could lawfully do that act. The Court held as under:

*“5. It is well settled that the exercise of a power, if there is indeed a power, will be referable to a jurisdiction, when the validity of the exercise of that power is in issue, which confers validity upon it and not to a jurisdiction under which it would be nugatory, though the section was not referred, and a different or a wrong section of different provisions was mentioned. See in this connection the observations in *Pitamber Vajirshet Vs. Dhondu Navlapa* [ILR (1888) 12 Bom 486, 489]. See in this connection also the observations of this Court in the case of *L. Hazari Mal Kuthiala Vs. ITO, Special Circle, Ambala Cantt* [AIR 1961 SC 200 : (1961) 1 SCR 892 : (1961) 41 ITR 12, 16 :*

(1961) 1 SCJ 617] This point has again been reiterated by this Court in the case of *Hukumchand Mills Ltd. Vs. State of M.P.* [AIR 1964 SC 1329 : (1964) 6 SCR 857 : (1964) 52 ITR 583 : (1964) 1 SCJ 561] where it was observed that it was well settled that a wrong reference to the power under which action was taken by the Government would not per se vitiate that action if it could be justified under some other power under which Government could lawfully do that act. See also the observations of the Supreme Court in the case of *Nani Gopal Biswas Vs. Municipality of Howrah* [AIR 1958 SC 141 : 1958 SCR 774, 779 : 1958 SCJ 297 : 1958 Cri LJ 271].”

22. Later, in *Pepsi Foods Ltd.*, this Court held that nomenclature under which the petition is filed is not quite relevant and it does not debar the Court from exercising its jurisdiction which otherwise it possesses. If the Court finds that the appellants could not 16 (1983) 2 SCC 422 invoke its jurisdiction under Article 226, the Court can certainly treat the petition as one under Article 227 or Section 482 of the Code. This Court held as under:

“26. Nomenclature under which petition is filed is not quite relevant and that does not debar the court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory. If in a case like the present one the court finds that the appellants could not invoke its jurisdiction under Article 226, the court can certainly treat the petition as one under Article 227 or Section 482 of the Code. It may not however, be lost sight of that provisions exist in the Code of revision and appeal but some time for immediate

relief Section 482 of the Code or Article 227 may have to be resorted to for correcting some grave errors that might be committed by the subordinate courts. The present petition though filed in the High Court as one under Articles 226 and 227 could well be treated under Article 227 of the Constitution.”

9. Learned counsel for the petitioner, therefore, submits that nomenclature of a petition, which is either under Article 226 or under Article 227, is immaterial and it is the nature of order under challenge that would govern the proceedings and would not debar the Court exercising its jurisdiction, either under Article 226 or under Article 227 of the Constitution of India.

10. Sri Ashish Mishra further submits that irrespective of nomenclature of the petition, the contents of the application dated 24.12.2021 and the prayer made therein can very well be examined by this Court leaving the question of maintainability of the writ petition to be considered at any subsequent stage.

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

12. The present writ petition has been filed with the prayer to call for the records pertaining to the impugned order dated 24.08.2017 passed by the First Additional District Judge, Gautam Budh Nagar in Misc. Civil Appeal No.54 of 2016. Further prayer is to quash the impugned order dated 24.08.2017. The court of First Additional District Judge, Gautam Budh Nagar, vide impugned order dated 24.08.2017, while allowing the appeal filed by the private respondents (herein) remanded the matter to the Estate Officer for holding fresh proceedings.

13. This Court, at this stage, is examining the application dated 24.12.2021 and finds that the grievance of the petitioner is to the effect that irrespective of the services/engagements of the private respondents, those occupants who have attained age of superannuation i.e. 60 years, should be directed to vacate the official accommodations. It has been pleaded in paragraph 9 of the application that respondent no.3 (Akbar) and respondent no.6 (Ranvir Singh) have attained age of superannuation, and therefore, they may be directed to vacate the premises for the reason that dwelling units in the petitioner establishment are limited in numbers and several regular employees of the petitioner establishment are seeking accommodation in the premises, however, due to the continuous occupation of the premises by the respondents, the same are not being vacated, causing great and irreparable prejudice to other employees of the petitioner establishment.

14. Though, by order dated 14.3.2023, this Court granted time to the learned counsel for the respondents to file counter affidavit to the application dated 24.12.2021, no counter affidavit has been filed, and therefore, the facts mentioned in the affidavit supporting application no.14 of 2021 remain unrebutted, at least insofar as superannuation of certain persons is concerned.

15. The submission of Sri Rahul Jain to the effect that since the writ petition is not maintainable, the present application can also not be considered has been examined by this Court and I find that whether the order impugned in the writ petition which has been passed in exercise of powers under Public Premises (Eviction of Unauthorized Occupants) Act, 1971 can

be interfered with in exercise of powers under Article 226 or 227 of the Constitution of India, is a matter to be examined by the Court while finally hearing the present writ petition on merits or on the question of maintainability as well.

16. Insofar as Application No.14 of 2021 is concerned, its adjudication is not dependent upon the nomenclature of the petition, that is to say that whether the present writ petition which has been filed under Article 226 of the Constitution of India needs to be converted into a petition under Article 227 or whether the Court hearing the present writ petition as it is, can exercise powers under Article 227, is not significant at this stage.

17. The Court is considering the fact as to whether the respondents, who claim to be employees of the petitioner establishment which fact has been seriously disputed by the petitioner in the light of the averments relating to nature of engagement of the respondents, have any right to remain in occupation of the official accommodations even after attaining age of superannuation.

18. Sri Rahul Jain does not dispute the fact that some of the respondents have attained age of superannuation. Further, he submits that reason for not vacating the official accommodations is that the petitioner establishment has not cleared off the financial dues admissible to the said respondents, which include their post retiral benefits.

19. Learned counsel for the petitioner, Sri Ashish Mishra submits that question of payment of any remuneration/ sums/ arrears/post retiral dues, if any, would

21. The High Court, in whatever jurisdiction it sits, always functions on the basic principles of equity, fairness and reasonableness, and therefore, the stand of the petitioner- Bharat Heavy Electricals Limited to the effect that scarcity of official accommodations is causing grave problems for the establishment as well as their regular employees on account of non vacation of the premises by the retired respondents, needs consideration and cannot be ignored merely on the ground that the writ petition finally has to be heard either under Article 226 or under Article 227 of the Constitution of India.

Motor accident claim - Accident occurred on 14.05.1985. Deceased was a 25-year-

old labourer (rajmistri) earning Rs. 1050/- per month. He was survived by his father, widow, and two minor children — a son and a daughter. Held: The father, brother, and sister cannot be granted non-pecuniary damages when the wife, falling under Class-1 heirs, is the recipient of the benefits. Income of the deceased was considered to be Rs. 750/- per month. As the deceased was 35 years old, 40% was added towards future loss of income, 1/3rd was deducted for personal expenses, and a multiplier of 18 was applied considering the age of the deceased. Additionally, Rs. 50,000/- was granted for non-pecuniary damages. Insurance company was held liable to pay interest from the date of filing of the claim petition, irrespective of when it was joined as a party respondent. Interest was awarded at 7% per annum from the filing of the claim petition until the judgment of the tribunal, and thereafter at 6% per annum on the awarded amount. (Para 9, 10)

Allowed. (E-5)

List of Cases cited:

1. *Gobald Motor Services Ltd. & anr. Vs R.M.K. Velusamy, 1962 SCR (1) 929*
2. *V. Padma Vs Venugopal, reported in 2012 (1) GLH (SC), 442*
3. *Bajaj Allianz General Insurance Comp. Pvt. Ltd. Vs U.O.I. & ors., vide order dated 27.1.2022*

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

1. Heard Sri Madhav Jain, learned counsel for the appellant and Sri Subhash Chandra Srivastava, learned counsel for the Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and order dated 29.04.1997 passed by

M.A.C.T/XVth-Additional District Judge, Agra (hereinafter referred to as "Tribunal") in M.A.C.P. No. 185 of 1987 awarding a sum of Rs. 98,000/- as compensation with interest at the rate of 10%.

3. The deceased is survived by his father, wife, son and daughter. Deceased being 25 years of age is not in dispute. He was a labourer doing labour work is not in dispute. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent-Insurance Company has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. Brief facts as culled out from the record are that on 14.05.1985 at about 6:30 hrs, deceased Mohar Singh was going Agra from his by-cycle and when he reached near village Digner a bus bearing no. U.S.Y-9555 driven by its driver rashly and negligently dashed into the by-cycle of the Mohar Singh and as a result of which Mohar Singh died on the spot.

5. The accident occurred on 14.05.1985. The deceased was 25 year old labour (rajmistri) and was earning Rs. 1050/- p.m. He was survived by his father, widow and two minor children a son and a daughter. The tribunal has considered his income to be Rs.750/-, granted multiplier of 16 and Rs. 2000/- to his widow under non pecuniary damages and ultimately assessed the total compensation to be Rs. 98,000/- with 10% interest from 22.02.1993 till payment was made.

6. It is contended by Sri Madhav Jain, learned counsel for the appellant that income should be considered at Rs. 1000/- plus 40% to be added under future loss of

income even under the old act under the judgment of **Gobald Motor Services Ltd. and another v. R.M.K. Velusamy, 1962 SCR (1) 929** the should be added for future loss of income and 1/3rd may to be deducted for personal expenses and the multiplier of 18 would be admissible, Rs. 70,000/- may be given under non pecuniary damages.

7. As against this, Sri Subhash Chandra Srivastava, learned counsel for the Insurance Company vehemently submits that in absence of any evidence on record the income considered by the tribunal is just and proper, however, he could not point that addition of future loss of income which has not been given is just and proper, multiplier granted is just and proper.

8. While considering the facts and circumstances of the case, this Court accepts the the submission of Sri Subhash Chandra Srivastava, learned counsel for the Insurance Company that father, brother and sister cannot be granted non pecuniary damages when the wife is falling under class-1 and is the recipient of the benefits. This Court feels that income of the deceased can be considered to be Rs. 750/- p.m to which as he was 35 years of age and as to the thumb rule and in view of the decisions in **Gobald Motor Services (supra)** and **Susamma Thomas (supra)** 40% should be added towards future loss of income, 1/3rd will have to be deducted and multiplier of 18 looking to the age of the deceased will have to be granted and Rs. 50,000/-for non pecuniary damages will have to be granted.

9. Hence, the total compensation payable to the appellants is computed herein below:

i. Income: Rs. 750/- per month

ii. Percentage towards future prospects : 40% namely Rs.300/-

iii. Total income : Rs.750 + 300= Rs.1050/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.700/-

v. Annual loss: Rs. 700 x 12 = Rs. 8400

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.84,00 x 18 = Rs.1,51,200/-

viii. Amount under non pecuniary heads : Rs. 50,000/-

ix. Total compensation : Rs.2,01,200/-

10. As far as issue of rate of interest is concerned, the tribunal has considered the grant of interest only after the insurance company was impleaded as a party respondent. The liability to pay compensation arises when the claim petition is filed. The question of interest even under the old act would be to pay compensation from the date claim petition is filed. The said decision of the tribunal requires reconsideration and the principles for grant of interest will have to be look into. The accident took place in the year 1987, the insurance company would be liable to pay interest not from 1993 but from the date of filing of the claim petition. Hence, the interest is to be from the date claim petition is filed irrespective of the joining of the insurance company as a party respondent. This takes this Court to the percentage of interest granted by the tribunal and objected by the insurance company. Thus rate of interest could not have been 10% in the year 1987, even the rates in the year of accident and when the matter was decided in the year 1997 were not more than 9% is the submission of the learned counsel for the insurance company who has orally objected for

slashing the interest as the matter has remain pending before this Court also for no fault of the insurance company.. The oral objection under Order 43 Rule 1 C.P.C of Sri Subhash Chandra Srivastava is accepted. The interest is to be paid from the date of filing of claim petition which is the law and it cannot be from the date the insurance company was impleaded, however, due to passage of long time the said order is disturbed for awarded amount the interest at 7% from filing of the claim petition till the judgment of tribunal and thereafter it would be at 6% on the awarded amount.

11. No other grounds are urged orally when the matter was heard.

12. In view of the above, the appeal is partly allowed. Total compensation of Rs. 2,01,200/- is allowed with interest at 7% from the date of filing of the claim petition till judgment and award of the tribunal and 6% thereafter till amount is deposited. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be deposited by the respondent-Insurance Company within a period of 12 weeks from today with interest as directed above. The amount already deposited be deducted from the amount to be deposited.

13. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma Vs. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

14. Fresh Award be drawn accordingly in the above petition by the tribunal as per

the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

15. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

16. Record be sent back to tribunal forthwith.

17. This Court is thankful to both the learned Advocates for ably assisting this Court.

(2023) 5 ILRA 1513

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.04.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 944 of 2018

Smt. Meena & Ors.

...Appellants

Versus

U.O.I. & Anr.

...Respondents

Counsel for the Appellants:

Sri Sanjay Kr. Srivastava, Sri Ajay Kr. Srivastava

Counsel for the Respondents:

Sri Arvind Kumar Goswami

A. Motor Accident Claim - Deceased Age - Appellants asserted that the age of the deceased was 19 years at the time of the accident. Original copy of the school leaving certificate of the deceased was produced. PW-1 testified that the age of the deceased was 19 years, which could not be shaken during the cross-examination. School leaving certificate was not impeached by the respondents. Trial Court, however, relied on newspaper cuttings, the F.I.R., and the post-mortem report and recorded that the age of the deceased was 16 years. *Held:* Newspaper reports could not be considered admissible evidence in the facts of the case. The entry in the column of the post-mortem report is not conclusive proof of the age of the deceased. Finding of the Trial Court on the age of the deceased was perverse and liable to be set aside. Age of the deceased was held to be 19 years. (*Para 9, 10, 11, 12*)

B. Motor Accident Claim - Deceased Income - Deceased worked as an employee in an aluminum workshop. Reliable guides to determine income in such cases are the minimum wages notified by the appropriate government from time to time. A worker in an aluminum workshop possesses various skills, often acquired on the job. Workmen in this category may not have formal qualifications, but their technical skills cannot be doubted. It is due to these skills that they render useful work and are retained in establishments. The Court held that the deceased was a skilled workman whose job was of a perennial nature, and he was drawing regular monthly wages. The monthly wages of the deceased were fixed at Rs. 5,000/-. (*Para 21, 22, 23*)

Allowed. (E-5)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Santosh Kumar Srivastava, learned counsel for the appellants-claimants, Shri Arvind Kumar Goswami, learned counsel representing Union of India.

2. This appeal arises out of the judgment and order dated 25.11.2017 passed by the learned Motor Accident Claims Tribunal/Additional District Judge, Court No.10, Meerut (hereinafter referred to as "Tribunal") in Motor Accident Claim Case No.293 of 2014 awarding a sum of Rs.1,42,000/- as compensation with interest @ 7% annual interest.

3. The learned Tribunal partly allow the claim of the appellants-claimants for the death of one Akib (deceased). The claimants are the legal heirs and dependent of the deceased - Akib, who died in an accident which occurred on 26.2.2014.

4. Shri Santosh Kumar Srivastava, learned counsel for the claimants-appellants contends that the amount awarded by the learned Tribunal is liable to be enhanced. Learned Tribunal recorded the perverse findings as regards the income of the deceased.

5. Shri Arvind Kumar Goswami, learned Central Government Counsel submits that income was correctly determined by the learned tribunal on notional basis since the appellants-claimants failed to prove the income of the deceased.

6. The respondents-Union of India have not challenged the fact of the accident or the liability of the driver. They are only resisting the enhancement in the compensation awarded to the claimants-appellants.

I. Compensation awarded by the learned tribunal:

7. The compensation awarded by the learned tribunal in the impugned judgment dated 25.11.2017 is depicted in a tabulated form hereunder:

Sr. No.	Heads	Amount (in rupees)
1	Monthly Income (A)	1,250/-
2	Annual Income (A x 12 = B)	1,250/- x 12 = 15,000/-
3	Future prospects (C)	50% of 15,000/- = 7,500/-
4	Annual Income + Future Prospects (B + C = D)	15,000+7,500/- =22,500/-
5	Deduction towards Personal Expenses (E)	1/3 of 22,500/- =7,500/-
	Annual Loss of Dependency (F)	7,500/-
6	Multiplier (G)	16
7	Total loss of dependency (F x G = H)	7,500 x 16 =1,20,000/-
8	Conventional Heads: (I) (a) Loss of Love and affection (b) Loss of Mental Pain (c) Funeral	(a) 10,000 + (b) 10,000 + (c) 2,000/- =22,000/-
9	Total compensation (H + I = J)	1,42,000/-
10	Interest	7.00%

8. The issue which arises for consideration in this appeal is that :-

(A) Whether the learned Tribunal had correctly determined the age of the deceased in the record?

(B) Whether the learned Tribunal had correctly determined the income of the deceased or not?

(C) Compensation to which the claimants are entitled.

8(A). Determination of age :-

9. The accident took place on 26.2.2014. The claimants-appellants have asserted in the claim petition that the age of the deceased was 19 years at the time of accident. The original copy of the school leaving certificate of the deceased was produced before the learned Tribunal and marked as paper no. 21C/12. PW-1 - Abid Ali in his testimony before the trial Court had testified that the age of the deceased was 19 years. His statement was consistent with the pleadings in the claim petition as well as in the evidence and in the record. His testimony could not be shaken during the cross-examination. The school leaving certificate was not impeached by the respondents before the learned tribunal. This Court has also examined the school leaving certificate and upon its perusal it appears to be a printed document.

10. The learned Trial Court while finding that the age of the victim of deceased was 16 years as relied on newspaper cuttings, F.I.R. and the post-mortem report. The aforesaid documents do not state the correct age of the deceased. The newspaper reports could not be considered as admissible evidence in the facts of the case. The entry in column of the post-mortem is not conclusive proof of the age of the deceased.

11. The evidence in regard to the age produced by the claimants-appellants is credible and the Court below erred by returning findings to it.

12. This Court finds that the finding of the Court below on the judgment of the age of the victim of deceased is perverse and liable to be set aside. The age of the deceased was 19 years.

8(B). Income of the deceased :-

13. The consistent claim of the claimants-appellants was that the deceased was working as an employee in an aluminum work shop. P.W.1-Abid Ali (father of the deceased) had testified before the Court below that the deceased was working under an aluminum contractor in his establishment. He was drawing a salary of about Rs.9000/- per month.

14. PW-3 - Mehboob, who was the employer of the deceased, also deposed before the learned tribunal that the deceased was an employee in his establishment who was drawing a salary of Rs.8,000/-to Rs.9,000/- per month. Under cross-examination, P.W.3-Mehboob admitted that he did not maintain the workers' register in his establishment.

15. The learned tribunal disbelieved the testimony of PW-1 and PW-3, as regards, the income and employment of the deceased on the footing that PW-3 had admitted that he was not maintaining the register of regular employees in his establishment. The certificate issued by the employee of the deceased contains a recital that the deceased earned Rs.8,000/- to R.9,000/- per month. The said certificate was discarded by the learned tribunal on the footing that the employee had admitted in his cross-examination that he did not maintain a regular register of workman in his establishment.

16. I am afraid the learned tribunal was misdirected in facts and law. The applicant was working in the informal sector of the economy. The aforesaid sector is largely undocumented. It is the common knowledge that in such small establishment

employers often do not maintain regular registers of their employees.

17. The testimonies of P.W.1 and P.W.3, the pleadings and the evidences establish that the deceased was working as a casual workman in the aluminum workshop.

18. The P.W.1 and P.W.3 in their testimonies remained firmed as regards the employment of the deceased as a casual worker in the aluminum factory of the P.W.3. On this issue the witnesses could not be shaken under cross-examination.

19. In the wake of the aforesaid depositions of the P.W.1 and P.W.3, pleadings and evidences in the record, this Court finds that the deceased was working as a casual workman in the aluminum workshop of P.W.3.

20. The learned tribunal erred in law by a mechanically applying the notional income of Rs.15,000/- per annum to the facts of this case.

21. The determination of the income in such cases when the employers do not maintain a proper documentation of the employees often a vexed question. However, there are reliable guides to determine income in such cases including the minimum wages notified by the appropriate government from time to time. A worker in an aluminum workshop possesses various skills which are often acquired on the job. The workmen in this category may not have formal qualifications, but their technical skills cannot be doubted. It is on account of these skills that they render useful work and are retained in the establishments.

22. Considering the nature of the work and the testimonies of P.W.1 and P.W.3, this Court can safely conclude that the deceased was a skilled workman whose job was of a perennial nature and he was drawing a regular monthly wages.

23. In the wake of preceding discussion, the monthly wages of the deceased are fixed at Rs.5,000/-.

24. In view of the above, the judgment and order dated 25.11.2017 passed by the learned Motor Accident Claims Tribunal/Additional District Judge, Court No.10, Meerut is set aside and is accordingly modified.

8(C). Determination of Compensation to which claimants-respondents are entitled:

25. In the wake of preceding discussion, the amount of compensation awarded to the claimants is tabulated below:

- i. Date of Accident -26.02.2014
- ii. Date of death -26.02.2014
- iii. Name of the deceased -Akib
- iv. Age of the deceased -19 years
- v. Occupation of the deceased -

Worker in Aluminum Fabrication Establishment

- vi. Income of the deceased - Rs.7,000/-
- vii. Name, Age and Relationship of claimants with the deceased

Sr. No.	Name	Age	Relation
1	Smt. Meena	43	Mother
2	Abid Ali	45	Father
3	Asif	15	Brother

viii. Computation of Compensation

Sr. No.	Heads	Amount (in rupees)
1	Monthly Income (A)	5,000/-
2	Annual Income (A x 12 = B)	5,000/- x 12 = 60,000/-
3	Future prospects (C)	50% of 60,000/- = 30,000/-
4	Annual Income + Future Prospects (B + C = D)	60,000 + 30,000/- =90,000/-
5	Deduction towards Personal Expenses (E)	1/2 of 90,000/- =45,000/-
	Annual Loss of Dependency (D-E = F)	90,000-45,000/-= 45,000/-
6	Multiplier (G)	18
7	Total loss of dependency (F x G = H)	45,000 x 18 =8,10,000/-
8	Conventional Heads: (I) (a) Loss of Love and affection (b) Loss of Mental Pain (c) Funeral	70,000/-
9	Total compensation (H + I = J)	8,10,000 + 70,000/- =8,80,000/-
10	Interest	7.00%

II. Conclusion and Directions:

26. The amount of compensation to which the claimants-appellants have thus been found entitled shall be deposited by the corporation within three months before the learned tribunal. Thereafter the learned tribunal shall release the amount to the claimants without delay. The amount already disbursed to the claimants (if any) shall be duly adjusted.

27. The instant appeal is partly allowed to the extent indicated above.

(2023) 5 ILRA 1518
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

First Appeal No. 43 of 2023

Smt. Monica Saravanan **...Appellant**
Versus
R. Sarwanan **...Respondent**

Counsel for the Appellant:
Sri Sujan Singh

Counsel for the Respondent:

**Civil Law - Family Courts Act, 1984-
Section 10 - Hindu Marriage Act, 1955 -
Section 13 - Divorce Petition – Power of
attorney - Whether wife can appoint her
father to do pairvi of the Divorce Petition
on her behalf, through special power of
attorney? - Held - Safeguard noted in
*Syed Wasif Husain Rizvi Vs Hasan Raza
Khan & 6 others*, AIR 2016 All 5, would
generally apply to power of attorney filed
in court proceedings on behalf of the
principal/donor or on behalf of a party to
a lis. Power of attorney by which the
donor authorises the donee must be
brought on the record and must be filed
together with the petition/application;
The affidavit which is executed by the
holder of a power of attorney must
contain a St.ment that the donor is alive
and specify the reasons for the inability of
the donor to remain present before the
Court to swear the affidavit; and The
donee must be confined to those acts
which he is authorised by the power of
attorney to discharge. In the event the
Court requires oral evidence, that can be
ensured through video conference. (Para
11, 12, 14)**

Allowed. (E-5)

List of Cases cited:

1. S. Ramachandra Rao Vs S. Nagabhushana Rao & ors. (AIR 2022 SC 517)
2. Manju Devi Vs St. of Raj. & anr., (2019) 0 Supreme (SC) 462.
3. Haseen Siddiqui @ Jahangir Vs St. of U.P. & ors., (2013) 0 Supreme (All) 2700.
4. Syed Wasif Husain Rizvi Vs Hasan Raza Khan & ors., (AIR 2016 All 52).

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard learned Counsel for the plaintiff-appellant/wife.

2. The instant appeal is directed against the order dated 17.11.2022, passed by the Principal Judge, Family Court, Agra, in Case No.3039 of 2022, (Smt. Monica Saravanan versus R. Saravanan), on an Application (8-Ga) filed by the appellant, wherein, the prayer of the appellant, appointing her father, to do pairvi in the case through special power of attorney, as appellant would not be available in the country, as she intends to proceed to Canada to pursue her carrier. Application came to be rejected by the impugned order, wherein, it is noted by the learned Trial Court that the application under Order 3 Rule 2 CPC has not been instituted through an agent or power of attorney holder. It is further noted that the appellant-plaintiff is present in the Court and submits that for further proceedings she has appointed her father through special power of attorney to do pairvi in the matter. The application came to be rejected, as in the opinion of the

Court, the power of attorney has not been filed in the representative capacity.

3. Learned Counsel for the applicant submits that the Court below committed an error in rejecting the Application (8-Ga), the suit under Section 13 of the Hindu Marriage Act, 1955, was filed by the appellant, and in order to pursue her carrier she has to proceed abroad, therefore, the appellant was justified to appoint a confidant through special power of attorney to do parivi. Further, an undertaking was also given that she would be bound by the outcome of the judicial proceedings. Learned Counsel for the appellant further submits that her oral evidence, if required, or directed by the Court, the appellant is prepared to join the court proceedings through video conference which is permissible under the Code of Civil Procedure, as well as, the Evidence Act.

4. Attention of the Court has also be drawn to Section 10 of the Family Courts Act, 1984, which provides the procedure applicable to the Family Courts, which reads as under:-

"10. Procedure generally.--(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of

1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."

5. Further Section 11 of the Family Courts Act, 1984, mandates that proceedings to be held in camera, which reads as under:-

"11. Proceedings to be held in camera.--In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires."

6. Reliance have been placed upon the judgments passed by Supreme Court in ***S. Ramachandra Rao versus S. Nagabhushana Rao & Others (AIR 2022 SC 517) Paragraph 14*** and ***Manju Devi versus State of Rajasthan and another, (2019) 0 Supreme (SC) 462.***

7. Further, reliance have also been placed upon the judgments of this Court in the case of ***Haseen Siddiqui @ Jahangir versus State of U.P. and others, (2013) 0 Supreme (All) 2700.*** Full Bench judgment rendered in ***Syed Wasif Husain Rizvi versus Hasan Raza Khan & 6 others, (AIR 2016 All 52).***

8. The term power of attorney refers to a legal authorization that gives a designated person the power to act for someone else. As such, a power of attorney gives the

agent or attorney-in-fact the authority to act on behalf the principal. The agent may be given broad or limited authority to make decisions about the principal's property, finances, investments, or for any other purpose. A power of attorney is a legal document that involves the agent or attorney-in-fact, and the principal. It is used in the event of a principal's temporary or permanent illness or disability, or when they can't sign necessary documents.

9. A Bench of three learned Judges of the Supreme Court in **A.C. Narayanan versus State of Maharashtra, AIR 2014 SC 630**, observed thus :-

"The power of attorney holder is the agent of the grantor. When the grantor authorises the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity."

10. A special power of attorney is a legal document outlining the scope of authority given to an agent, known as "an attorney in fact," by the principal. Under the special power of attorney, an agent is given the powers to act on behalf of the principal to make specific legal or financial decisions. It is also referred to as Limited Power of Attorney and is used as evidence of the principal's authority to the third person with whom the principal may be dealing with.

11. The Full Bench in **Syed Wasif Husain Rizvi (supra)** answering the reference that writ petition under Article 226 of the Constitution of India can be filed

through a power of attorney holder but cautioned that the institution of the petition may be filed observing adequate safeguards which include:-

(1) The power of attorney by which the donor authorises the donee, must be brought on the record and must be filed together with the petition/application;

(2) The affidavit which is executed by the holder of a power of attorney must contain a statement that the donor is alive and specify the reasons for the inability of the donor to remain present before the Court to swear the affidavit; and

(3) The donee must be confined to those acts which he is authorised by the power of attorney to discharge.

12. The safeguard noted herein above would generally apply to power of attorney filed in court proceedings on behalf of the principal/donor or on behalf of a party to a lis.

13. The trial Court committed an error in rejecting the application of the appellant bringing on record the power of attorney herself. The power of attorney holder (father of the appellant) has been duly authorized by the appellant to appear in the proceedings on her behalf. The appellant can appear through video conference in the event her appearance is required for cross examination, or for any other purposes as directed by the Court. The power of attorney holder has been conferred limited right to file affidavits and to do pairvi on behalf of the appellant, hence, in the absence of the appellant the power of attorney holder has been duly authorised to appear on her behalf.

14. Accordingly, **the impugned order dated 17.11.2022 passed on Application**

8-Ga is set aside. The proceedings of the suit shall be conducted on behalf of appellant through the special power of attorney holder. In the event, the trial Court requires oral evidence of the appellant, that can be ensured through video conference.

15. The appeal is, accordingly, **allowed.**

(2023) 5 ILRA 1521
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Public Interest Litigation (PIL) No. 415 of 2023

Sadaram **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Vinay Kumar Tiwari

Counsel for the Respondents:
 C.S.C., Pankaj Gupta

Public Interest Litigation - Removal of illegal encroachment over public utility land - The Court directed the Principal Secretary, Department of Revenue, Civil Secretariat, U.P., Lucknow, to issue necessary directions/directives/circulars to ensure that the public utility land of Gaon Sabha is free from encroachment and that such public utility land is utilized only for the purpose for which it has been recorded in the revenue records.

Allowed. (E-5)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Vinay Kumar Tiwari, learned counsel for the petitioner and Sri

Yogesh Kumar Awasthi, learned Standing Counsel for the State-respondents no.1, 2 & 3. Notice for opposite party no.4/Gaon Sabha has been accepted by Sri Pankaj Gupta.

2. Sri Ganesh Nath Mishra, learned Advocate, has filed Vakalatnama on behalf of opposite party no.5, the same is taken on record.

3. By means of this petition, the petitioner has prayed following main reliefs:-

"(i) Issue a writ, order or direction in the nature of Mandamus thereby commanding the opposite parties/ Authorities concern to ensure release of Gaon Sabha Land i.e. Gata No. 653/0.1980 hectare, recorded as Rasta in the revenue record situated in Village - Veshahapur, Motiganj, Seeha Gaon, Gonda, which are recorded as public utility land in the revenue record, from illegal encroachment of the land grabbers and restore it to its original shape.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the opposite party no. 1 to initiate inquiry against inaction on the part of the authorities concern in not removing encroachment from Gaon Sabha Land i.e. Gata No. 653/0.1980 hectare, recorded as Rasta in the revenue record situated in Village -Veshahapur, Motiganj, Seeha Gaon, Gonda which are recorded as public utility land in the revenue record, from illegal encroachment of the land grabbers, in order to punish the guilty persons/authorities."

4. At the very outset, Sri Ganesh Nath Mishra, learned counsel for opposite party no.5 has raised objection to the effect that

the present petitioner has not disclosed his complete credentials in terms of the High Court Rules, therefore, this PIL may be dismissed on this ground alone. Replying to the aforesaid contention, learned counsel for the petitioner has drawn attention of this Court towards paragraph nos.4, 5 & 6 of the writ petition wherein he has disclosed his credentials strictly in accordance with law in view of the High Court Rules.

5. Having considered the aforesaid paragraphs of the writ petition i.e. paragraph nos.4, 5 & 6, I find that the present PIL is maintainable so far as the prayer of the writ petition is concerned.

6. Sri Yogesh Kumar Awasthi, learned Standing Counsel has produced instructions letter dated 14.05.2023 preferred by the Sub Divisional Officer, Sadar, Gonda addressing to the Chief Standing Counsel of this Court enclosing therewith the comments, order dated 14.05.2023 passed by the Sub Divisional Officer, Sadar, Gonda, spot inspection report, statement of the villagers, Naksha Nazari, copy of Khetauni, other documents and copies of the recall applications dated 04.05.2023 preferred by opposite party no.5 and other persons, same are taken on record.

7. Before advertng to the issue in question, the Court puts its displeasure on record regarding casual and callous approach of the competent revenue authority who despite the specific order being passed on 25.11.2008 has not taken proper and positive efforts and endeavour to vacate/ remove the illegal encroachment from the public utility land, if any, against that encroachment. Therefore, it is expected that the District Magistrate, Gonda shall look into this aspect and shall pass appropriate orders on the administrative

side since this Court time and again has directed in couple of petitions of Public Interest Litigation that if there is any illegal encroachment over any public utility land, the same should be removed forthwith and if any order to remove the illegal encroachment is passed, the same shall be executed forthwith, strictly in accordance with law. Notably, in the present case, the order dated 25.11.2008 has not been executed till date and applications for recall of the order dated 25.11.2008, which have been filed after about 15 years, have been entertained by the Tehsildar (Judicial), Gonda and said applications have been kept pending. Since the recall applications have been filed by some of the villagers including opposite party no.5 on 04.05.2023, meaning thereby the order dated 25.11.2008 has not been assailed before the appellate authority till date. Therefore, in absence of any order being passed by the competent authority against the order dated 25.11.2008, the illegal encroachment over the public utility land is still existing, so this is the glaring example of casual and callous approach of the competent revenue authority, which should be handled by the superior authority on the administrative side for the purposes of setting example that if any competent revenue authority does not act strictly in accordance with law to remove the illegal encroachment from the public utility land, he may be subjected to any proper action, which would be required in the facts and circumstances of the issue in question.

8. It is also pertinent to indicate here that any illegal encroachment over the public utility land is not only illegal and unauthorized but the same creates serious prejudice to the villagers at large of the area and very purpose of public utility land is frustrated since such land has been

encroached illegally by some persons. Therefore, by means of this order, all the competent revenue authorities of the State of U.P. are directed to take up the matter of illegal encroachments seriously and if any complaint is received from any end regarding illegal encroachment over the public utility land of the Gaon Sabha, the spot inspection should be carried out immediately by a team of revenue officials/officers and if it is found that there is any illegal encroachment over the public utility land of the Gaon Sabha, prompt exercise removing the aforesaid illegal encroachment must be undertaken and after conclusion of the case so registered for removal of that illegal encroachment, the order passed by the competent revenue authority should be executed forthwith inasmuch as if the appropriate order for removal of illegal encroachment is not executed well in time, the purpose of passing appropriate order for removing/vacating the illegal encroachment would be meaningless and the illegal encroachment would be persisting for quite long time. The present case is a glaring example of non-execution of the order passed by the competent authority for removing the illegal encroachments.

9. In the present case, the Sub Divisional Officer, Sadar, Gonda has passed order dated 14.05.2023 wherein this fact has been indicated that seven persons have illegally encroached on some part of Gata No.653/0.198 hectare and the Tehsildar (Judicial), Sadar, Gonda has passed the order dated 25.11.2008 for removal and compensation against those persons but the exercise of removing such illegal encroachment is underway, therefore, the Sub Divisional Magistrate has constituted a team consisting of Naib Tehsildar, Revenue Inspector, four

Lekhpals and one Area Lekhpal to remove the illegal encroachment. I am unable to comprehend that when the Sub Divisional Officer, Sadar, Gonda has noticed the fact that the order for removal of illegal encroachment has already been passed on 25.11.2008, as to what action has been taken against the competent revenue authority on the administrative side seeking explanation as to why the illegal encroachment has not been removed in the last more than 14 years.

10. If it is presumed for the argument sake that the order dated 25.11.2008 is an ex-parte order against the illegal encroachers against which the recall applications have been filed on 04.05.2023 wherein the next date for hearing is fixed for 27.05.2023, I fail to understand and comprehend as to why no proper exercise has been carried out to execute the order dated 25.11.2008 within the time so prescribed under the U.P. Revenue Code, 2006 inasmuch as had the order dated 25.11.2008 been executed forthwith, the recall application, if it was so required, would have been filed immediately thereafter and disposal thereof would have been done strictly in accordance with law by the competence authority but on account of callous approach of the competent revenue authority, the order dated 25.11.2008 has not been executed till date and now, applications for recall of the order dated 25.11.2008 are pending consideration. All the aforesaid facts are self-explanatory wherein there is no need to ask any evidence, therefore, it is reiterated that if any appropriate action is not taken on the administrative side against the erring revenue officers/ officials by the District Magistrate concerned, it would encourage them to keep the execution of the orders passed to remove the illegal encroachment

over the public utility land of the Gaon Sabha pending.

11. Khetauni, which has been enclosed with the instructions letter, also indicates that the gata in question is recorded as Rasta (public pathway) in the revenue record and the public pathway/ Rasta may not be encroached by any person as such encroachment would create serious prejudice and hindrance to the public at large. Since the next date for hearing of the restoration/ recall applications has been fixed for 27.05.2023, therefore, I do not find any good ground or reason to keep this PIL pending any longer, accordingly, this PIL is disposed of at the admission stage directing the competent revenue authority to dispose of recall applications, strictly in accordance with law, by affording an opportunity of hearing to the parties concerned, with expedition, if possible on the date fixed or within further fifteen days and shall ensure that the illegal encroachment over the public utility land be removed strictly in accordance with law.

12. The Senior Registrar of this Court shall provide certified copy of this order to the Principal Secretary, Department of Revenue, Civil Secretariat, U.P., Lucknow and the Collector, Gonda within three working days for perusal and necessary action against the erring officials/ officers.

13. Since the aforesaid direction has been issued for the entire State i.e. State of U.P., therefore, the Principal Secretary, Department of Revenue, Civil Secretariat, U.P., Lucknow shall issue necessary directions/ directives/ circular to ensure that the public utility land of Gaon Sabha is free from encroachment and such public utility land be utilized only for the purpose it has been recorded in the revenue record.

14. This PIL is accordingly **disposed of.**

(2023) 5 ILRA 1524
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.05.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ B No. 1002222 of 1999

Kamlesh Kumar ...Petitioner
Versus
Board of Revenue Lucknow & Ors.
 ...Respondents

Counsel for the Petitioner:

T.N Gupta, Durga Prasad, I.D. Shukla, Mehdi Abbas Rizvi, S.K. Mehrotra, S.K. Singh, T.N. Gupta

Counsel for the Respondents:

C.S.C., R.N. Gupta, Seema Devi

Civil Law - U.P. Land Revenue Act, 1901 - Section 218 - Section 218 of the Land Revenue Act h repealed by the U.P. Act No. 20 of 1997 w.e.f. 18.08.1997 - Section 10 of the 1997 Amendment Act - By the impugned order, the Board of Revenue remanded the case for a fresh decision to the Commissioner in accordance with S. 218 of the Land Revenue Act. Held: Following the law laid down in *Shri Ram Vs Board of Revenue U.P., Lucknow & ors.*, 1999 (1) JCLR 1010 and *Ravi Shanker Tripathi Vs Board of Revenue, U.P., Lucknow through its Chairman & Ors.*, 2007 (1) ADJ 23, the Court held that the transitory provision contained in Section 10 of the 1997 Amendment Act saved only those proceedings which were pending before the Board of Revenue. Therefore, the proceedings which were pending before the Commissioner or the Additional Commissioner on 18.08.1997 were

required to be decided under the provisions of Section 219 of the amended Act. The impugned order was set aside.

Allowed. (E-5)

List of Cases cited:

1. *Shri Ram Vs Board of Revenue U.P., Lucknow & ors., 1999 (1) JCLR 1010*

2. *Kali Shanker Dwivedi Vs Board of Revenue & ors., 2000 (18) LCD 1401*

3. *Ravi Shanker Tripathi Vs Board of Revenue, U.P., Lucknow through its Chairman & ors., 2007 (1) ADJ 23*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Shri Mehdi Abbas Rizvi, learned counsel for the petitioner, Shri A.S. Tiwari, learned Additional Chief Standing Counsel for the State-respondents and Ms. Seema Devi, learned counsel for the intervener assisted by Shri Amrendra Nath Tripathi, who has filed his vakalatnama on behalf of the opposite party no.5/intervener. Said vakalatnama is taken on record.

2. By means of this petition, the petitioner has assailed the order dated 29.06.1999 (Annexure No. 1) passed by opposite party no. 1 by which he has remanded the revision to the Commissioner for fresh decision under Section 218 of the U.P. Land Revenue Act, 1901 (hereinafter referred to as "Land Revenue Act") as it was prevailing prior to 18.08.1997.

3. While assailing the aforesaid impugned order, learned counsel for the petitioner has stated that the opposite party no.1 has committed manifest error of law in remanding back the case for fresh decision

to the Commissioner in accordance with Section 218 of the Land Revenue Act as it was applicable prior to 18.08.1997. Further, since Section 218 of the Land Revenue Act has been repealed by the U.P. Act No. 20 of 1997 with effect from 18.08.1997, any proceeding under such Section cannot be instituted now.

4. Shri Mehdi Abbas Rizvi, learned counsel for the petitioner has also submitted that the opposite party no. 1 has no legal authority to supersede the legal provisions of the Land Revenue Act by its quasi judicial order and to prescribe incorrect, confusing and wrong jurisdiction. Further, the opposite party no. 1 has wrongly held that the order dated 16.04.1999 passed by the learned Commissioner is without jurisdiction but in fact the said order is quite just, proper and legal. Therefore, the impugned order dated 29.06.1999 is completely illegal, void, contrary to the law and natural justice. On the first date of admission, this Court has passed the order dated 17.08.1999, which reads as under:-

"Admit.

Issue notice to opposite party no. 2.

Notice on behalf of the opposite party no.1 has been accepted by the learned Chief Standing Counsel and Shri R.N. Gupta, Advocate has accepted notice on behalf of the opposite party no.3."

5. Learned counsel for the petitioner has stated that in view of decision of this Court in re; **Shri Ram versus Board of Revenue U.P. Lucknow and Others, 1999 (1) JCLR 1010**, the issue in question is no more res integra and has held as under:-

"In view of this transitory provision only references which were

pending before the Board of Revenue were saved and revisions pending before the Commissioner or Additional Commissioner were not saved, and as such the Commissioner or the Additional Commissioner ought to have decided the revisions pending before them on 18.08.1997 under Section 219 of the Act. Under the circumstances the judgment passed by the Board of Revenue on 11.01.1999 cannot be sustained.

The writ petition succeeds and is allowed. The order dated 11.01.1999 passed by the Board of Revenue (Annexure No.2 to the writ petition) is set aside. The petitioner is directed to move an application before the Board of Revenue about maintainability of the revision which shall be decided expeditiously, in accordance with law."

6. Notably, on account of two conflicting views, one in re; **Kali Shanker Dwivedi vs. Board of Revenue & Ors., 2000 (18) LCD 1401** and another in re; **Shri Ram** (supra), the issue was referred before the Division Bench in re; **Ravi Shanker Tripathi versus Board of Revenue, U.P., Lucknow through its Chairman & Ors., 2007 (1) ADJ 23**. So as to resolve the controversy in question, paras 5, 12 and 18 in re; **Ravi Shanker Tripathi** (supra) would be necessary to be reproduced herein below:-

"5. We must also reproduce Section 10 of the 1997 Amendment Act which is a transitory provision:

10. Transitory Provisions - Notwithstanding anything contained in this Act all cases referred to the Board under Section 218 of the U.P. Land Revenue Act, 1901, or under Section 333-A of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 as they stood

immediately before the commencement of this Act and pending before the Board on the date of such commencement shall continue to be heard and decided by the Board as if this Act has not been enacted.

12. In the present case the application under Section 218 of the unamended Act was filed prior to 18.08.1997 but it was decided after the amendment had come into force with effect from 18.08.1997. On the said date, the Additional Commissioner, Allahabad Division, Allahabad, had the jurisdiction to decide the Revision under Section 219 of the amended Act. The transitory provision contained in Section 10 of the Act provides that only those proceedings which were pending before the Board on the date of such commencement shall continue to be heard by the Board as if the amendment had not come into force. This clearly demonstrates that other proceedings that were pending were required to be decided under the provisions of the amended Act.

18. In the present case there is a transitory provision contained in Section 10 of the amendment Act which save only those proceedings which were pending before the Board of Revenue. Thus, the proceeding which was pending before the Additional Commissioner on 18.08.1997 was required to be decided under the provisions of Section 219 of the amended Act. We are, therefore, unable to subscribe to the view taken by the learned Judge in Kali Shanker Dwivedi (supra) and agree with the view taken in Sri Ram (supra)." (emphasis supplied)

7. In the aforesaid reference, the Division Bench has answered the reference in Para 34 in re; **Ravi Shanker Tripathi** (supra), which reads as under:-

"34. For all the reasons stated above, we answer the reference that the

decision in the case Kali Shanker Dwivedi (supra) does not lay down the correct law. However, we respectfully agree with the view taken by the learned Judge in the case of Sri Ram (supra)."

8. Therefore, learned counsel for the petitioner has stated that the facts and circumstances of the present case are similar to that of **Shri Ram** (supra), thus, in view of the decision of this Court in re; **Shri Ram** (supra) and **Ravi Shanker Tripathi** (supra), this writ petition is liable to be allowed.

9. Shri Amrendra Nath Tripathi, learned counsel for the intervener has stated that in the judgment of this Court in re; **Shri Ram** (supra) and in re; **Ravi Shanker Tripathi** (supra), the legal position has not been made clear on the point that if any revision has been filed under Section 218 before the Commissioner/Additional Commissioner and after the deletion of Section 218 whether it would be automatically decided under the provisions of Section 219 of the amended Act.

10. Shri Amrendra Nath Tripathi has further submitted that since this legal position has clearly and explicitly not been explained, therefore, the submissions so raised by the learned counsel for the petitioner are not tenable in the eyes of law.

11. Shri A.S. Tiwari, learned Additional Chief Standing Counsel has, however, tried to defend the order dated 29.06.1999 but he could not defend the impugned order in the light of the decisions of this Court in re; **Shri Ram** (supra) and **Ravi Shanker Tripathi** (supra).

12. Having heard learned counsel for the parties and having perused the materials available on record as well as the decisions of this Court in re: **Shri Ram** (supra) and **Ravi**

Shanker Tripathi (supra), I am in agreement on the position of law that since in the present case, there is a transitory provision contained in Section 10 of the 1997 Amendment Act which saved only those proceedings which were pending before the Board of Revenue, therefore, the proceedings which were pending before the Commissioner or the Additional Commissioner on 18.08.1997 were required to be decided under the provisions of Section 219 of the amended Act.

13. Under these circumstances, the judgment passed by the Board of Revenue dated 29.06.1999 (Annexure No.1) cannot be sustained. Therefore, the order dated 29.06.1999 passed by the Board of Revenue, U.P., Lucknow are hereby set aside.

14. Liberty is given to the parties to file an appropriate application/petition before the Board of Revenue, strictly in terms of law and if such application is filed, the same shall be decided expeditiously, preferably within a period of six months from the date of its filing, by affording an opportunity of hearing to the parties concerned.

15. In view of the aforesaid terms, the writ petition is **allowed**.

(2023) 5 ILRA 1527
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.04.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ-B No. 340 of 2023

Smt. Savitri Devi & Anr. ...Petitioners
Versus
Dy. Director of Consolidation, Varanasi & Ors. ...Respondents

Counsel for the Petitioners:

Sri Ankit Mishra, Sri Mohd. Ali

Counsel for the Respondents:

C.S.C., Sri Umesh Chandra Pandey

2. Roop Narain & ors. Vs Deputy Director of Consolidation & ors.2020 (38) LCD 2577

3. Ram Padarath & ors. Vs IInd Additional District Judge, Sultanpur & ors.; Writ Petition No.1732 of 1982

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

Civil Law - Delay Condonation - Limitation Act,1963 - Section 5 - U.P. Consolidation of Holdings Act, Section 11 (1), 48 (1) - Private opposite parties filed an application before A.C.O. seeking mutation on the basis of a Will-Deed allegedly executed by one Sri Bhagauti, the original tenure holder of the property, without impleading the wife of late Bhagauti, stating that she had died whereas she was alive. Consolidation Officer directed that the name of the private opposite parties be entered in the Chak in question. Wife of late Bhagauti was living with the opposite parties and did not know about the aforesaid order, being an illiterate lady; therefore, she could not file any appeal challenging the order dated 26.03.1981. She became aware of the aforesaid order in May 2005 when the behaviour of the private opposite parties became rude towards her. Thereafter, she filed an appeal and revision. Both were dismissed on the ground that there was an inordinate delay of 24 years in assailing the impugned order dated 26.03.1981 passed by the Consolidation Officer. Held: At least one opportunity should have been given to the wife of late Bhagauti so that she could adduce evidence apprising the authority that there was no Will-Deed of her late husband in favour of the private opposite parties. This is not a case wherein the revision should have been decided only on the ground that there was an inordinate delay in assailing the impugned order dated 26.03.1981.

Allowed. (E-5)**List of Cases cited:**

1. Rikhdev & anr. Vs Additional District Magistrate (Finance), Azamgarh & ors.[2012 (30) LCD 712]

1. Heard Sri Mohd. Ali, learned counsel for the petitioners, Sri Upendra Singh, learned Standing Counsel for the State-opposite parties and Sri Umesh Chandra Pandey, learned counsel for the Caveators/ private opposite party Nos.4 to 7.

2. By means of this writ petition, the petitioners have prayed for the following reliefs:-

"(i) to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 27.03.2023, passed by the Deputy Director of Consolidation, Gonda in Revision No.530 of 2017 (Savitri and another vs. Ram Dheeraj (Died) through his legal representatives and others) filed under Section 48 (1) of U.P. Consolidation of Holdings Act, the order dated 04.07.2016, passed by the Settlement Officer of Consolidation, Gonda in Appeal No.769 of 2015-16 (Mst. Kalawati vs. Ram Dhani and others), filed under Section 11 (1) of U.P. Consolidation of Holdings Act and the order dated 26.03.1981, passed by the Consolidation Officer, Kshetra No.3, Utraula, District-Gonda in Suit No.140 of 1980 (Ram Dhani and others vs. Bhagauti and another), as contained in Annexure Nos.1, 2 & 3 respectively to the writ petition.

(ii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties not to

give effect to the impugned order dated 27.03.2023, passed by the Deputy Director of Consolidation, Gonda in Revision No.530 of 2017 (Savitri and another vs. Ram Dheeraj (Died) through his legal representatives and others) filed under Section 48 (1) of U.P. Consolidation of Holdings Act, the order dated 04.07.2016, passed by the Settlement Officer of Consolidation, Gonda in Appeal No.769 of 2015-16 (Mst. Kalawati vs. Ram Dhani and others), filed under Section 11 (1) of U.P. Consolidation of Holdings Act and the order dated 26.03.1981, passed by the Consolidation Officer, Kshetra No.3, Utraula, District-Gonda in Suit No.140 of 1980 (Ram Dhani and others vs. Bhagauti and another), as contained in Annexure Nos.1, 2 & 3 respectively to the writ petition.

The opposite party Nos.1, 2 & 3 may further be commanded to make consequential entry in the name of petitioners in the concerned records of the land of Araj Chak No.268, Khata No.267/2 and 269 being legal heirs and daughters of late Bhagauti, who was recorded tenure holder of the aforesaid land."

3. The basic premise to assail the impugned orders is that the private opposite parties have filed an application dated 06.01.1981 before the court of Assistant Consolidation Officer seeking mutation on the basis of Will-Deed allegedly executed by one Sri Bhaughati on 28.11.1980, the original tenure holder of the property in question, without impleading the wife of late Bhagauti as a party of that case saying that she has died whereas she was alive and remained alive for quite long time thereafter.

4. Learned counsel for the petitioners has drawn attention of this Court towards

an application dated 06.01.1981 (Annexure No.5) wherein it has been categorically indicated that the original tenure holder of the land in question, namely, Sri Bhagauti, has expired and in his life time he had executed a Will in favour of the private opposite parties. Sri Bhagauti was not having any son (male child) and his wife is also not alive. The applicants of that application/ the private opposite parties hereto have stated themselves as real cousin and since they were looking after Sri Bhagauti in his life time, therefore, Sri Bhaugauti has executed a Will-Deed in their favour. On the basis of the aforesaid application, the Consolidation Officer has directed for publication and the said publication was issued on 08.01.1981. As per the order dated 26.08.1981 passed by the Consolidation Officer, no objection has been filed on that publication. Therefore, after recording the evidence of marginal witness of the Will-Deed he directed that the name of private opposite parties be entered in the Chak in question i.e. Chak No.268, 267/2 and 269.

5. Learned counsel for the petitioners has stated that since the mother of the petitioners, namely, Smt. Kalawati, was alive on 26.03.1981 and the application dated 06.01.1981 was a fraudulent application which provided that the mother of the present petitioner, Smt. Kalawati, was not alive, therefore, the order dated 26.03.1981 passed by the Consolidation Officer is liable to be set aside as the aforesaid order is passed on the basis of fraudulent documents. However, the mother of the petitioners was living with the opposite parties and she could not know about the aforesaid order being illiterate lady, therefore, she could not file any appeal challenging the aforesaid order dated 26.03.1981. However, the mother of

the petitioners could know about the order dated 26.03.1981 in the month of May, 2005 when the behaviour of the private opposite parties hereto became rude against her and they stated her not to live with them, therefore, she filed an appeal under Section 11 (1) of U.P. Consolidation of Holdings Act on 24.05.2005 before the Appellate Authority i.e. the Settlement Officer of Consolidation along with an application under Section 5 of Limitation Act.

6. Learned counsel for the petitioners has further stated that the mother of the petitioners was said to be dead by the private opposite parties in the year 1981 but she being alive person has herself filed an appeal on 24.05.2005. The Appellate Authority has heard the application of Section 5 of Limitation Act being filed by the mother of the petitioners and decided the same vide order dated 04.07.2016 rejecting that application on the ground of inordinate delay of 24 years. The Appellate Authority has indicated in his order that the appellant, Smt. Kalawati, was getting old age pension and she was a Ration Card holder, therefore, she may not say that she is an illiterate persona and she may not aware about the law. The Appellate Authority has further stated that inordinate delay of 24 years has not been explained properly in the application filed under Section 5 of Limitation Act.

7. I have perused that application filed under Section 5 of Limitation Act and find that the said application is not happily worded. However, the fact remains that the impugned order dated 26.03.1981 was passed on the application wherein the mother of the present petitioners was declared as a dead person. Feeling aggrieved from the orders dated 26.03.1981

and 04.07.1916 the petitioners filed a revision before the Revisional Authority i.e. the Deputy Director of Consolidation under Section 48 (1) of U.P. Consolidation of Holdings Act. The Revisional Authority has also rejected the revision of the petitioners vide order dated 27.03.2023 on the ground that there is no infirmity or illegality in the order dated 04.07.2016 passed by the Settlement Officer of Consolidation i.e. the Appellate Authority inasmuch as the unexplained delay of 24 years would vitiate the claim of the revisionists/petitioners hereto.

8. Learned counsel for the petitioners has stated that since the very foundation set up by the private opposite parties before the Consolidation Officer is based on the wrong fact and one fraudulent document, therefore, the delay in challenging such order would be meaningless inasmuch as the factum of fraud would vitiate the entire proceedings and the order being passed by the Consolidation Officer.

9. Attention of this Court has been drawn by the learned counsel for the petitioners towards the judgment of this Court rendered in the case in re: ***Rikhdev and another vs. Additional District Magistrate (Finance), Azamgarh and others reported in [2012 (30) LCD 712]*** referring para-36, which reads as under:-

"36. In Indian Bank v. Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550 : JT 1996 (7) SC 135, referring to Lazarus Estates and Smith v. East Elloe Rural District Council, 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888, the Apex Court stated:

"22. The judiciary in India also possesses inherent power, specially under

Section 151 C.P.C., to recall its judgment or order if it is obtained by Fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the Decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the Constitution of the Tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business."

10. On the basis of the aforesaid judgment of the Apex Court learned counsel for the petitioners has submitted that the order passed by the Consolidation Officer dated 26.03.1981 is liable to be quashed.

11. He has further submitted that the aforesaid ground relating to the fraud should have been considered by the Appellate Authority and the Revisional Authority but both the authorities have dismissed the appeal and the revision only on the ground of inordinate delay of 24 years.

12. Per contra, Sri Umesh Chandra Pandey, learned counsel for the private opposite parties has stated that since the delay of 24 years has not been explained by the petitioners while filing the appeal, therefore, the impugned orders being passed by the Appellate Authority and the Revisional Authority are perfectly just and proper. He has also drawn attention of this Court towards para-39 of the judgment of

this Court rendered in re: **Roop Narain and others vs. Deputy Director of Consolidation and others** reported in [2020 (38) LCD 2577]. Para-39 of the judgment reads as under:-

"39. In addition, it may be acknowledged that the jurisdiction of the Deputy Director of Consolidation to decide both questions of fact and law is very wide. It was hedged in with some limitations prior to the amendment made to Section 48 of the Act, introduced vide U.P. Act no.3 of 2002, in the form of Explanation (3). Under the unamended law also, their Lordships of the Supreme Court approved the principle that where the findings are perverse or not supported by evidence, it would be the duty of the Deputy Director to examine the entire case. This was held in Sheo Nand (supra), to which allusion has been made above. Now under the amended provisions of Section 48, very wide powers have been conferred on the Deputy Director to decide all questions of fact and law recorded by any subordinate Authority. He has also been conferred with the power to appreciate any oral or documentary evidence. Indeed, the enlarged powers under Section 48, conferred on the Deputy Director, vide U.P. Act no.3 of 2002, retrospectively w.e.f. November 10, 1980, make for a most non-conventional kind of revisional jurisdiction. But, the statute ordains it to be so. It is the duty of this Court to give full effect to the amended provisions of Section 48, read with Explanation (3). The amended provisions of Section 48 (as amended vide U.P. Act no.3 of 2002) read:

"In Section 48 of the principal Act, after explanation (2) the following explanation shall be inserted, namely:--

"Explanation (3).-The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence."."

13. Sri Pandey has further submitted that even if the petitioners are aggrieved from the Will-Deed instead of filing this writ petition, they should have filed a suit challenging the Will-Deed and if the Will-Deed is declared void, the petitioners may seek their claim on the property in question on the basis of order being passed by the Civil Court, but at this stage the writ petition would not be maintainable.

14. In reply to the aforesaid contention, learned counsel for the petitioners has stated that undisputedly the mother of the petitioners was a widow of the recorded tenure holder and she was alive when the application was filed by the private opposite parties then she should have been impleaded as opposite party in a case filed by the private opposite parties but the private opposite parties deliberately have not impleaded the mother of the petitioner (Smt. Kalawati) as opposite party and she could not know about the publication for the reason that she was living with the private opposite parties after the death of her husband (Sri Bhagauti) and admittedly the private opposite parties were looking after her. In support of the aforesaid arguments, he has referred the judgment of Full Bench of this Court delivered in the case in re: **Ram Padarath and others vs. IInd Additional District Judge, Sultanpur and others; Writ Petition No.1732 of 1982 connected with Writ Petition Nos.1126 & 1129 of 1983:**

6351 of 1982 and others, decided on 26th September, 1988 referring para-40 thereof, which reads as under:-

"40. We are of the view that the case of Indra Dev v. Smt. Ram Piari, 1982 ALJ 1308, has been correctly decided and the said decision requires no consideration, while the Division Bench Case, Dr. Ayodhya Prasad v. Gangaotri, 1981 AWC 469 is regarding the jurisdiction of consolidation authorities, but so far as it holds that suit in respect of void documents will lie in the revenue court it does not lay down a good law. Suit or action for cancellation of void document will generally lie in the civil court and a party cannot be deprived of his right getting this relief permissible under law except when a declaration of right or status and a tenure-holder is necessarily needed in which even relief for cancellation will be surplusage and redundant. A recorded tenure-holder having prima facie title in his favour can hardly be directed to approach the revenue court in respect of seeking relief for cancellation of a void documents which made him to approach the court of law and such case he can also claim ancillary relief even though the same can be granted by the revenue court."

Reference answered.

15. Having heard learned counsel for the parties and having perused the material available on record, I find that while challenging the impugned order dated 26.03.1981 passed by the Consolidation Officer the mother of the petitioners (Smt. Kalawati) has not properly explained the reasons of delay in filing appeal. However, she has only stated that she being an illiterate lady could not know about the order dated 26.03.1981. However, she has

stated in the appeal as well as in the revision that after the death of her husband (Sri Bhagauti), who was the original tenure-holder, she was living with the family members of her husband, who are private opposite parties hereto, and they were looking after her property, therefore, she could not know the things that the family members of her late husband, the private opposite parties hereto, were having any malafide intention in their mind to usurp the property of her late husband on the basis of one Will-Deed whereas to the best of her knowledge there was no such Will-Deed. She has also stated in the appeal as well as in the revision that despite the fact that she was alive when the impugned order dated 26.03.1981 was passed, even when the application dated 06.01.1981 was preferred by the private opposite parties but she has been declared dead. She has also stated in her appeal and the revision that she had not been afforded an opportunity of hearing before the Consolidation Officer. However, the finding on that point has been returned by the Consolidation Officer that the publication was issued before passing the order impugned dated 26.03.1981, but no one has filed objection thereon.

16. Since the specific ground was taken by the mother of the petitioners that the application dated 06.01.1981 (Annexure No.5) was not proper wherein she was declared as dead person, therefore, atleast an opportunity should have been given to the widow of the original tenure-holder to put up her case. So far as the fact that the marginal witnesses of the Will-Deed appeared before the Consolidation Officer and have proved the factum of Will-Deed is concerned, at least one opportunity should have been given to her so that she could

adduce the evidence apprising the authority that there was no Will-Deed of her late husband in favour of the private opposite parties.

17. Notably, this is a case where the mutation has been sought on the basis of one Will-Deed which is not registered one as no recital to this effect has been given from either side and the widow of the original tenure holder was deliberately not made necessary party so the lacuna may not be filled through the publication.

18. In view of the aforesaid discussions, I find that all those aforesaid facts should have been considered by the Revisional Authority and this is not a case wherein the revision should have been decided only on the ground that there was inordinate delay in assailing the impugned order dated 26.03.1981 passed by the Consolidation Officer. Therefore, the Revisional Authority should have passed a fresh order considering the aforesaid facts and grounds so taken by the petitioners before the Revisional Authority.

19. Accordingly, the impugned order dated 27.03.2023 passed by the Revisional Authority i.e. the Deputy Director of Consolidation, Gonda is hereby set aside. The matter is remanded back to the Revisional Authority to pass a fresh order, strictly in accordance with law by affording an opportunity of hearing to the parties concerned by considering the facts and grounds so taken by the petitioners in the revision. Such order shall be passed within a period of six months from the date of production of a certified copy of this order.

20. The instant writ petition is, therefore, partly **allowed**.

(2023) 5 ILRA 1534
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.03.2023

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 20823 of 2022

Usha Kumar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Praveen Kumar Srivastava

Counsel for the Respondents:

C.S.C., Ms. Archana Singh, Sri Pranesh Dutt Tripathi

Civil Law - Service Matter - Recruitment - Assistant Teachers Recruitment Examination, 2019 - In the online form, petitioners mentioned BTC in place of BTC through distance education mode. Candidature was rejected on the ground that BTC by distance education mode had not been disclosed in the online application form. *Issue:* Whether the non-disclosure by the petitioners of their eligibility qualification BTC (by distance education) would dis-entitle them to the allotment of the district. *Held:* Candidates were required to possess BTC irrespective of where and by what mode they had obtained the training qualification. Court found no substance in the submission of the respondents that the petitioners did not disclose in their online application form that they were Shiksha Mitras having obtained the BTC qualification by distance education mode. On account of the said non-disclosure, the software did not identify them as Shiksha Mitras and, consequently, did not extend the weightage admissible to them. In the opinion of the Court, it was due to faulty programming, and since the petitioners had satisfied the eligibility criteria, they

could not be denied the appointment. The respondents were directed to include the names of the petitioners in the list of successful candidates for allotment of the districts. (Paras 10, 12, 13)

Allowed. (E-5)

List of Cases cited:

1. Rekshar Khan Vs St. of U.P. & ors., Writ Petition No.4677 of 2020, dated 08.07.2020
2. Ram Manohar Yadav Vs St. of U.P. & ors., Special Appeal No.834 of 2013, dated 30.05.2013
3. Ashutosh Kumar Srivastava and 60 others Vs St. of U.P. & ors., Writ Petition No.4070 of 2020, dated 30.05.2020

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

1. Heard Sri Praveen Kumar Srivastava, learned counsel for the petitioners, Sri P. D. Tripathi, learned counsel, who has appeared for the Respondent Nos.3 & 4 and learned Standing Counsel for the State Respondent Nos.1 & 2.

2. The writ petitioners, who are working as Shiksha Mitra have approached this Court seeking quashing of the orders dated 05.11.2020 and 10.11.2020 (Annexure No.7 & 8 to the writ petition) respectively. A further prayer in the nature of mandamus commanding the respondents to permit the petitioners to correct the information in their applications forms and the respondents be directed to grant weightage of 25 marks of Shiksha Mitra and consider the candidature for the petitioners for the post of Assistant Teachers.

3. By the impugned orders dated 05.11.2020 and 10.11.2020 the Secretary, Examination Regulatory Authority, U.P. Prayagraj, has rejected the representation of the petitioners preferred pursuant to the directions of this Court by its order dated 27.08.2020 passed in Writ Petition No.4609 of 2020.

4. It is the case of the writ petitioners that they possess the educational qualification of BA along with BTC (Distance Education) and have been working as Shiksha Mitra since the year 2006. The petitioners stood eligible for applying for the post of Assistant Teacher. Accordingly, the petitioners applied under the Assistant Teachers Recruitment Examination, 2019 under OBC category. The petitioners were declared successful having obtained 92 marks and 96 marks respectively as against the minimum qualifying marks of 90 prescribed for OBC/SC/ST candidates. The petitioners contend that they have not been awarded 25 marks as weightage in the selection for 69000 posts of Assistant Teachers as they mentioned BTC in place of BTC through distance education mode. The petitioners contended that they satisfy the eligibility condition for appointment as Assistant Teacher and their candidature could not be rejected simply on the ground that in the online application form BTC by distance education mode had not been disclosed. They contend that no distinction can be drawn between BTC an BTC (by distance education mode). The petitioners nevertheless made representation on 03.06.2020 for correction in the online application form and for grant of the weightage admissible to Shiksha Mitra but no action has been taken. Consequently, the petitioners approached this Court by means of Writ (A) No.4609 of 2020 which was

disposed by vide order dated 27.08.2020 with direction to decide the claim/representation of the petitioners.

5. The Secretary, Examination Regulatory Authority, U.P. Prayagraj, under the impugned orders has rejected the representations of the petitioners which are under challenge in the writ petition.

6. The main thrust of the argument of the learned counsel for the petitioners is that each of the petitioners fulfill the eligibility criteria for appointment of Assistant Teachers. They have obtained BTC qualification from distance education mode which is duly recognized by the respondents. Their candidature ought not to have been rejected on the ground that BTC had been mentioned in the online form instead of BTC (distance education). It is not the case that the petitioners are not eligible and in such view of the matter the writ petition is liable to be allowed and the petitioners candidature as Assistant Teacher pursuant to the Assistant Teacher Recruitment Examination, 2019 are liable to be considered. There is no difference between BTC and BTC (distance education mode) and in any case the mistake on the part of the petitioners cannot be said to be deliberate and intentional so as to derive any advantage. It is also argued that the respondents have adopted pick and choose policy in dealing with similarly circumstanced candidates, while the candidature of same of the equally circumstanced candidates have not been cancelled the candidates of the petitioners have been cancelled. Details of some candidates have been given in Para No.29 of the writ petition.

7. Per Contra, Sri P. D. Tripathi, learned counsel representing the

Respondent Nos.3 & 4 as also the learned Standing Counsel has supported the decision of the Secretary, Examination Regulatory Authority/ Respondent No.2 by submitting that the orders rejecting the claim of the petitioners is entirely justified and does not suffer from any infirmity warranting the interference of the Court.

8. Heard learned counsel for the parties and perused the record. From the perusal of the impugned orders dated 05.11.2020 and 10.11.2020 it is borne out that the representations of the petitioners have been rejected by verbatim reasoning. The Secretary, Examinations Regulatory Authority, U.P., Prayagraj, has heavily relied upon the Government Order dated 01.12.2018 laying down the modalities of filling up the online application form and the precautions that were required to be taken by the candidates particularly when it was clearly laid down that no amendment could be permitted. Much reliance is also placed upon the declaration submitted by the petitioners. Reliance has also been placed to clause 17 of the Government Order dated 01.12.2018 which gave the petitioners the opportunity to rectify any mistake made in their online application forms by submitting fresh online forms after depositing the requisite fee in respect thereof within the time provided. Reliance has also been placed upon decision dated 08.07.2020 of this Court rendered in **Writ Petition No.4677 of 2020 (Rekshar Khan Vs. State of U.P. & others)** and connected 17 writ petitions, decision dated 30.05.2013 passed in **Special Appeal No.834 of 2013 (Ram Manohar Yadav Vs. State of U.P. & others)** decision dated 30.05.2020 rendered in **Writ Petition No.4070 of 2020 (Ashutosh Kumar Srivastava and 60 others Vs. State of U.P. & others)** to reject the representation of the petitioners.

9. The Court has gone through the decisions relied upon by the Respondent No.2 while rejecting the representations of the petitioners by the impugned orders. The decisions are clearly distinguishable and the ratio laid down therein apply to the facts and circumstances akin to that case. In the opinion of the Court the ratio laid down are not applicable to the case of the writ petitioners herein inasmuch as the case of **Rukshar Khan (supra)** related to a case where the petitioner had omitted to mention in the online application form, a claim for a reservation category which the Court did not permit as it would introduce a new aspirant in the concerned reservation pool and in all probability may lead to displacement of a candidate already selected. The decision in the **Special Appeal No.834 of 2013, Ram Manohar Yadav (Supra)** related to filling up incorrectly the online application form which is not the case at hand. The third case of **Ashutosh Kumar Srivastava (Supra)** related to incorrectly filling up the online forms in respect of the marks obtained by the petitioners in the previous examinations which is also not be case at hand.

10. In the opinion of the Court the Respondent No.2, Secretary, Examination Regulatory Authority, has not dealt with the core issue as to whether the non-disclosure by the petitioners of their eligibility qualification BTC (by distance education) would dis-entitle them to the allotment of the district as per their choice as also to the weightage admissible to Shiksha Mitra. The candidates were required to disclose their training qualification acquired. The training qualifications acquired recognized were as follows:-

1. **D. El. Ed. (BTC) from an institution recognized by NCTE and affiliated to the State Government.**

2. Shikshamitra (Trained through distance education method and graduate Shikshamitra passed two years BTC.

3. D. Ed. (Two Years Diploma in Education from NCTE recognized Institute).

4. D. Ed. Special Education (Rehabilitation Council of India (RCI) recognized Institute)

5. Specialized BTC (Operated in Uttar Pradesh Recognized by NCTE).

6. Two Year BTC Urdu Special Training (Operated in Uttar Pradesh)

7. B. El. Ed. (4-year Bachelor of Elementary Education)

8. B. Ed. - Bachelor of Education (from U.G.C./NCTE recognized institution)

11. There are no instructions to the candidates that the candidates were required to fill the information corresponding to the serial numbers which were to be treated as the category code. The fact remains that the candidates were required to be BTC irrespective of wherefrom and by what mode they had obtained the training qualification.

12. The Court finds no substance in submission of the learned counsel for the respondents that the petitioner did not fill in the information that they were Shiksha Mitra having obtained the BTC qualification by distant education made in their online application form and on account of the said non disclosure the

software did not identify them as Shiksha Mitra and consequently, did not extend the weightage admissible to them. In the opinion of the Court, it is the faulty programming and the petitioners have satisfied the eligibility criteria could not be denied the appointment. However, the Court upholds the stand of the respondents that no correction could be made in the online form of the petitioners.

13. In view of the above, the writ petition is **allowed in part**. The impugned orders dated 05.11.2020 and 10.11.2020 (Annexure Nos.7 & 8) to the writ petition respectively) are quashed to the extent it denies the relief of including the names of the petitioners in the list of selected candidates for allotment of the District for appointment as Assistant Teachers. The impugned orders so far as it holds that no correction can be made in the online application forms are upheld. The respondents shall now proceed to include the names of the petitioners in the list of successful candidates for allotment of the Districts and allot the Districts as per their preference and quality point marks and issue the appointment letters accordingly. The entire exercise shall be done within a period of two months from the date of service of certified copy of the order of this Court upon the concerned respondents.

(2023) 5 ILRA 1537

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 29.03.2023

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-A No. 49679 of 2003

Mahendra Shukla

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Satyendra Pandey, Sri Vishal Tandon, Sri Vijay Shankar Shukla, Sri Jai Shankar Mishra

Counsel for the Respondents:

C.S.C.

A. Civil Law - Service Matter - Disciplinary Proceeding - Government Servant (Discipline and Appeal) Rules, 1999, Rule 7. Issue: If the procedure for a major penalty was initiated, is it mandatory to conduct a regular enquiry and further provide an opportunity of oral evidence to the concerned employee? **Held:** Once the procedure is started for a major penalty, the same has to be completed as provided in the Rules, and if the same is left midway, the enquiry proceeding shall be vitiated. Once the enquiry proceeding is vitiated, no penalty, either major or minor, can be imposed upon the employee. (Paras 24, 25)

Petitioner was suspended by the disciplinary authority under the contemplation of a disciplinary proceeding invoking provisions contained under Rule 7 of the Government Servant (Discipline and Appeal) Rules, 1999, for imposing a major penalty. Enquiry Officer served charge sheet. Petitioner submitted his reply/explanation denying all the charges made in the charge sheet. Without conducting a regular enquiry and without supplying documents and papers on the basis of which the petitioner was suspended, respondent No.3 ex-parte took the allegations as proved and petitioner was awarded a minor punishment. **Held:** Enquiry proceeding was initiated after the suspension of the petitioner for imposing a major penalty, but ultimately, without completing the same, a minor penalty was imposed, which was in violation of the Rules as well as the law laid down by the Apex Court. Such an order cannot be sustained in the eye of law. (Para 25)

Allowed. (E-5)

List of Cases cited:

1. Sohan Lal Vs U.P. Cooperative Federation Ltd. & anr.; 2013 (6) ADJ 250 (DB)
2. St. of U.P. & ors. Vs Ashtebhuja Mishra & anr.; 2017(9) ADJ 373 (DB)
3. Kamla Charan Misra Vs St. of U.P. & ors.; 2008 Law Suit (All) 1016 (DB)
4. H.B.V.N.L. Vidyut Nagar, Hisar & ors. Vs Yashvir Singh Gulia; 2013 (SC) 568
5. St. of Uttar Pradesh Vs Saroj Kumar Sinha (2010) 2 SCC 772
6. Roop Singh Negi Vs Punjab National Bank, (2009) 2 SCC 570
7. Subhas Chandra Sharma Vs Managing Director & anr. reported 2000(1) UPLBEC 541
8. Meenglas Tea Est. Vs The Workmen, AIR 1963 SC 1719
9. S.C. Girotra Vs United Commercial Bank 1995 Supp. (3) SCC 212
10. Subhas Chandra Sharma Vs U.P. Co-operative Spinning Mills & ors. reported 2001 (2) UPLBEC 1475
11. Rajesh Prasad Mishra Vs Commissioner, Jhansi Division, Jhansi & ors. reported 2010 (1) UPLBEC 216
12. Mahesh Narain Gupta Vs St. of U.P. & ors. reported (2011) 2 ILR 570
13. Subhash Chandra Gupta Vs St. of U.P. reported 2012 (1) UPLBEC 166
14. St. of U.P. & ors. Vs Ashtebhuja Mishra & anr.; 2017(9) ADJ 373 (DB)

(Delivered by Hon'ble Prakash Padia, J.)

1. The petitioner has preferred this Writ Petition for issuance of a writ of certiorari to quash the order dated 22.09.2000 passed by the respondent No.3/District Magistrate Ballia as well as

order dated 30.04.2003 passed by respondent No.2/Commissioner, Azamgarh Region Azamgarh, which was communicated to the petitioner on 04.06.2003.

2. Brief facts of the case are that petitioner while posted at the office of District Supply Officer Ballia, was suspended by the respondent No.3/District Magistrate Ballia vide its order dated 13.01.2000 and District Supply Officer was appointed as Enquiry Officer. District Supply Officer/Enquiry Officer/respondent No.5 served charge-sheet upon the petitioner on 29.04.2000 on the basis of certain paper which were never provided to the petitioner with a direction to submit reply. The petitioner submitted his reply/explanation vide letter dated 04.05.2000 denying all the charges made in the charge-sheet.

3. After submission of the reply, the petitioner was anticipating that a regular enquiry be conducted in the matter and he shall also be afforded an opportunity to cross examine the witness of prosecution and test the credibility of evidence of prosecution and also be given an opportunity to adduce evidence in his defence. But without conducting regular enquiry and without supplying documents and papers on the basis of which the petitioner was suspended, the respondent No.3 ex-parte took the allegations proved without providing any notice or opportunity of hearing and passed the order of suspension stating that the petitioner has not given any evidence along with the reply. After receipt of notice dated 11.09.2000 issued by respondent No.3 for showing cause on proposed penalty, the petitioner showed the cause vide its letter/reply dated 13.09.2000 stating therein

that whatever fault have alleged to have been levelled on the petitioner were circumstantial and were caused by collectively and alleged charges levelled against the petitioner has not been done by him and the mistake committed due to over burden of work but the respondent No.3 without considering the same and without providing any opportunity of hearing, without supplying the documents and papers and relying only upon the report of the Enquiry Officer, the respondent No.3 passed the order an ex-parte manner. Against the order dated 22.09.2000 passed by respondent No.3, the petitioner preferred the appeal before respondent No.2/Commissioner, Azamgarh Division Azamgarh on 02.11.2000 and the respondent No.2 rejected the appeal the appeal has no force.

4. The main ground of challenge the aforesaid orders is that the petitioner was suspended by the disciplinary authority under contemplation of disciplinary proceeding while invoking provisions contained under Rule 7 of Government Servant (Discipline and Appeal) Rules, 1999 for imposing major penalty but while proceeding was under progress, the petitioner has been awarded minor punishment contrary to the law laid down by this Court in the case of **Sohan Lal Vs. U.P. Co-operative Federation Ltd. and another; 2013 (6) ADJ 250 (DB)** as well as the law laid down by Lucknow Bench of this Court in the case of **State of U.P. and others Vs. Ashtebhuja Mishra and another; 2017(9) ADJ 373 (DB) and Kamla Charan Misra Vs. State of U.P. and others; 2008 Law Suit (All) 1016 (DB)**.

5. Refuting the submission of learned counsel for the petitioner, learned Standing Counsel rely upon a judgment of the Apex

Court in the case of **D.H.B.V.N.L. Vidyut Nagar, Hisar and others Vs. Yashvir Singh Gulia; 2013 (SC) 568** has submitted that if the procedure for imposing major penalty has been started and in the meantime, if the authority comes to the conclusion that it is the case of imposing minor penalty and the minor penalty is awarded, the order cannot be faulted.

6. In response to the argument, learned counsel for the petitioner contended that in case of D.H.B.V.N.L. (supra) there is a provision under the Rules to award minor penalty even in a case where the procedure for awarding major penalty is under progress, whereas there is no such provision under the Government Servant (Discipline and Appeal) Rules, 1999 under which proceeding has been initiated against the petitioner.

7. We have considered the argument raised by learned counsel for the parties and have perused the record.

8. Learned counsel appearing for the petitioner has submitted that neither oral witnesses were examined nor date, time and place were fixed by the Enquiry Officer, therefore, in light thereof, no charges have been proved. It is stated that enquiry proceeding was initiated under the provision of U.P. Government Servant (Discipline and Appeal) Rules 1999 and Rule 7 of Rule 1999 which clearly provides procedure for imposing major penalty. For ready reference, the same may be quoted herein below;

"7. Procedure for imposing major penalties. - Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner :

(i) The disciplinary authority may himself inquire into the charges or appoint an authority subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the disciplinary authority :

Provided that where the appointing authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary; as the case may be, of the concerned department.

(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidence and the name of the witnesses proposed to prove the same alongwith oral evidence, if any, shall be mentioned in the charge-sheet.

(iv) The charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and Inquiry Officer shall proceed to complete the inquiry ex parte.

(v) The charge-sheet, alongwith the copy of the documentary evidences

mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records. In case the charge-sheet could not be served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation :

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his report to the disciplinary authority on the basis of such admission.

(vii) Where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence :

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh

Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) The disciplinary authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner of the disciplinary authority having regard to the circumstances of the case so permits :

Provided that this rule shall not apply in following cases :

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the disciplinary authority is satisfied that for reason to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules."

9. Basic issues before this Court is that if procedure for major penalty was initiated, is it mandatory to conduct the regular enquiry and further provided opportunity of oral evidence to the concerned employee? In this reference, it is necessary to refer certain judgments of Supreme Court as well as of this Court, in which this issue considered.

10. This Hon'ble Court in the matter of **Kamla Charan Misra Vs. State of U.P. and others: 2009 (2) AWC 1259** has considered this issue. For ready reference, para 9 and 10 of this judgment are quoted herein below;

"9. There is one more reason which necessitates the enquiry officer to hold a regular enquiry. In the present case, a charge-sheet was served upon the petitioner and after receipt of the charge-sheet, the petitioner had submitted a reply denying the charges levelled against him. After receipt of the reply to the charge-sheet, the enquiry officer submitted a report on 4.8.1992. While submitting reply to the charge-sheet, the petitioner has specifically

pleaded that the enquiry officer has not conducted the enquiry fairly. Since the respondents have proceeded ahead by adopting the procedure of major penalty and the enquiry officer has completed the enquiry and submitted a report, the defence taken by the learned standing counsel does not seem to be sustainable. Once, the disciplinary authority adopted the procedure of enquiry for major penalty and appointed an officer as enquiry officer, who held the enquiry and submitted a report, in such situation, it shall always be incumbent on the part of the enquiry officer to hold the enquiry adopting the procedure for regular enquiry. Regular enquiry means, after reply to the charge-sheet, the enquiry officer must record oral evidence with an opportunity to the delinquent employee to cross-examine the witnesses and thereafter, opportunity should be given to the delinquent employee to adduce evidence in defence. The opportunity of personal hearing should also be afforded to the delinquent employee. Even if the charged employee does not co-operate with the enquiry, it shall be incumbent upon the enquiry officer to proceed ex parte by recording oral evidence vide Jagdish Prasad Singh v. State of U.P. 1990 LCD 486; Avatar Singh v. State of U.P. 1998 LCD 199; Town Area Committee. Jalalabad v. Jagdish Prasad : AIR1978SC1407 ; Managing Director, U.P. Welfare Housing Corporation v. Vijay Narain Bajpai : (1980)ILLJ222SC ; State of U.P. v. Shatrughan Lal : [1998]3SCR939 ; Chandrama Tewari v. Union of India and Ors. AIR 1998 SC 117 and Anil Kumar v. Presiding Officer and Ors. AIR 1985 SC 1121.

10. In a case in *State Bank of India v. T.J. Pal* 1999 SCC (L&S;) 922 and *Union of India v. S.C. Parasar* 2006 SCC

(L&S;) 496 : 2006 (5) AWC 5129 (SC), Hon'ble Supreme Court ruled that in a departmental proceeding, where the procedure for major penalty is initiated then even if disciplinary authority awards minor penalty, the enquiry should be completed by adopting the procedure prescribed for major penalty.

In view of the above, the argument advanced by the learned standing counsel that the procedure prescribed for minor penalty was rightly followed does not seem to be sustainable."

11. This was also an issue before the Supreme Court in case of **State of Uttar Pradesh v. Saroj Kumar Sinha reported (2010) 2 SCC 772** held that :-

"An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be

observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

12. Similar view was taken by Supreme Court in **Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570:-**

"Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

13. This Court has also taken same view in **Subhas Chandra Sharma v. Managing Director and another reported 2000(1) UPLBEC 541:-**

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary

evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."

14. The Hon'ble Supreme Court in the case of **Meenglas Tea Estate v. The workmen.**, AIR 1963 SC 1719, has held that;

"It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way to cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted".

15. In the case of **S.C. Girotra v. United Commercial Bank** 1995 Supp. (3) SCC 212, Hon'ble Supreme Court has observed that;

"The Supreme Court set aside a dismissal order which was passed without giving the employee an opportunity of cross-examination. In *State of U.P. v. C. S. Sharma*, AIR 1968 SC 158, the Supreme Court held that omission to give opportunity to the officer to produce his witnesses and lead evidence in his defence vitiates the proceedings. The Court also held that in the enquiry witnesses have to be examined in support of the allegations, and opportunity has to be given to the delinquent to cross-examine these witnesses and to lead evidence in his defence. In *Punjab National Bank v. A.I.P.N.B.E. Federation*, AIR 1960 SC 160, (vide para 66) the Supreme Court held that in such enquiries evidence must be recorded in the presence of the charge-sheeted employee and he must be given an opportunity to rebut the said evidence. The same view was taken in *A.C.C. Ltd. v. Their Workmen*, (1963) II LLJ. 396, and in *Tata Oil Mills Co. Ltd. v. Their Workmen*, (1963) II LLJ. 78 (SC).

Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold an ex-parte enquiry where evidence must be led vide *Imperial Tobacco Co. Ltd. v. Its Workmen*, AIR 1962 SC 1348, *Uma Shankar v. Registrar*, 1992 (65) FLR 674 (All)."

16. The above judgment was followed by a Division Bench in **Subhas Chandra Sharma v. U.P.Co-operative Spinning Mills and others** reported 2001 (2) UPLBEC 1475 the Court held thus:

"In cases where a major punishment proposed to be imposed an oral enquiry is a must, whether the employee request, for it or not. For this it is necessary to issue a notice to the employee concerned intimating him date, time and place of the enquiry as held by the Division Bench of this Court in *Subhash Chandra Sharma v. Managing Director*, (2000) 1 UPLBEC 541, against which SLP has been dismissed by the Supreme Court on 16-8-2000."

17. This Court has also taken the same view in the case of ***Rajesh Prasad Mishra v. Commissioner, Jhansi Division, Jhansi and others reported 2010 (1) UPLBEC 216*** and has observed as under:

"Now coming to the question, what is the effect of non-holding of oral inquiry, I find that, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in *State of U.P. & another Vs. T.P.Lal Srivastava*, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in *Subhash Chandra Sharma Vs. Managing Director & another*, 2000 (1) U.P.L.B.E.C. 541.

The question as to whether non holding of oral inquiry can vitiate the entire proceeding or not has also been considered in detail by a Division Bench of this Court (in which I was also a member) in the case of *Salahuddin Ansari Vs. State of U.P. and others*, 2008(3) ESC 1667 and the Court

has clearly held that non holding of oral inquiry is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment."

18. The Division Bench of this Court in the case of ***Mahesh Narain Gupta v. State of U.P. and others reported (2011) 2 ILR 570*** had also deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that those documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. In another case in **Subhash Chandra Gupta v. State of U.P. reported 2012 (1) UPLBEC 166** the Division Bench of this Court after going through the different judgements on this issue observed as under:

"It is well settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any outcome inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541.

A Division Bench decision of this Court in the case of Salahuddin Ansari Vs. State of U.P. and others, 2008 (3) ESC 1667 held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:-

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma Vs.

Managing Director & another, 2000 (1) U.P.L.B.E.C. 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma Vs. U.P.Cooperative Spinning Mills & others, 2001 (2) U.P.L.B.E.C. 1475 and Laturi Singh Vs U.P.Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005."

20. In case of **Sohan Lal Vs. U.P. Co-operative Federation Ltd. and another; 2013 (6) ADJ 250 (DB)**, the same issue was very much before the Court and Court has considered the above issue. For ready reference, para 31, 32, 33, 34 and 35 of this judgment are quoted herein below;

"31. It was, however, pointed out on behalf of respondents that punishment actually awarded to petitioner is only recovery and censure/special adverse entry and both being minor punishment, the punishment order ought not be interfered on the ground that no oral inquiry is held since before imposing a minor punishment oral inquiry is not obligatory.

32. In our view the submission is thoroughly misconceived. From perusal of charge sheet it cannot be doubted that the charges, if have been proved, petitioner could have been liable to be awarded a major penalty. The competent authority also proceeded with an intention that charges, if proved, may result in major penalty and it is for this reason earlier he was suspended and then he appointed an Inquiry Officer. Appointment of Inquiry Officer for holding oral inquiry shows the intention of the disciplinary authority that

the employee may suffer major penalty. In those cases where oral inquiry is necessary i.e. cases of major penalty, inquiry officer is ordinarily appointed otherwise simply by issuing a charge sheet and receiving reply, a minor penalty could have been awarded, which is not the case here.

33. *The intention of disciplinary authority is further clear from the fact that petitioner was placed under suspension. Suspension is permissible only when charges are so serious so as to attract major penalty. Besides, even the show cause notice issued to petitioner proposed a major penalty.*

34. *We are clearly of the view that the ultimate result shall not govern the manner of preceding disciplinary proceedings inasmuch as the authorities, if found no proof of serious charges to justify major penalty, therefore, imposed minor penalty, it would not distract from the fact that proceedings were initiated for major penalty and despite denying adequate opportunity to delinquent employee, i.e., by not holding oral inquiry, he was able to show shallowness of charges which satisfy the disciplinary authority that major penalty is not warranted. If adequate opportunity would have been afforded to delinquent employee, he could have demonstrated that no penalty whatsoever is liable to be inflicted upon him, since, the charges in entirety, are baseless etc. It is the inception of proceedings which will govern the manner of disciplinary proceedings to be conducted and not the ultimate result. Therefore, mere fact that lastly only minor penalty could have been inflicted upon petitioner, would not dilute his legal right that disciplinary inquiry when initiated must have been held in conformity with procedure prescribed,*

attracting provisions, applicable at the inception of inquiry.

35. *After careful consideration of the facts we are of the view that the disciplinary proceedings are vitiated for the aforesaid reasons. The impugned order dated 29.8.2000 passed by respondent no.2 herein is liable to be quashed. Accordingly it is quashed."*

21. This Court in the matter of ***State of U.P. and others Vs. Ashtebhuja Mishra and another; 2017(9) ADJ 373 (DB)*** has also taken the same view.

22. Learned Standing Counsel has placed reliance upon another judgment of this Court in the case of D.H.B.V.N.L. Vidyut Nagar, Hisar and others Vs. Yashvir Singh Gulia; 213 Legal Eagle (SC) 568 and submitted that even if procedure is started for major penalty, disciplinary authority may impose minor penalty.

23. I have carefully perused the above referred judgment of Apex Court, which is distinguishable for the reason that there under the Rules it is provided that if procedure has been started for major penalty, disciplinary authority may impose minor penalty in place of major penalty. Here it is not so.

24. Therefore, in the light of law laid down by the Apex Court and followed by this Court time to time, this fact is very much clear that once the procedure is started for major penalty, the same has to be completed as provided in the Rules and if the same is left away in the mid way, enquiry proceeding shall be vitiated.

25. Once the enquiry proceeding is vitiated, no penalty either major or minor

can be imposed upon the employee. This Court in the matter of Kamla Charan Misra and Sohan Lal (supra) has taken the view that once the enquiry proceeding initiated has not been completed as provided in the Rule and ultimately minor penalty may not be imposed. In present case too, this fact is very much clear that enquiry proceeding was initiated after suspension of petitioner for imposing major penalty but ultimately without completing the same, minor penalty has been imposed, which is in-violation of Rule as well as law laid down by Apex Court as well as of this Court, therefore, such order can not be sustained in the eye of law.

26. In view of above, the order dated 22.09.2000 passed by the respondent No.3/District Magistrate Ballia as well as order dated 30.04.2003 passed by respondent No.2/Commissioner, Azamgarh Region Azamgarh are hereby quashed. The writ petition succeeds and is allowed.

27. The respondents are at liberty to proceed in accordance with law.

(2023) 5 ILRA 1548
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 18527 of 2021

State of U.P. & Ors. ...Petitioners
Versus
Raj Kumar Singh ...Respondent

Counsel for the Petitioners:
 C.S.C., Sri Jagdish Pathak

Counsel for the Respondent:
 Sri Ram Narain

A. Civil Law - Disciplinary proceedings - Uttar Pradesh Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991 - Rule 14 - Issue: Whether the Tribunal was competent to usurp the role of an appellate authority by setting aside the punishment order when, admittedly, the factum of the charge of overstay of leave was not denied by the employee? Held: Courts/Tribunals are not to act as appellate authorities in disciplinary proceedings. Tribunal exceeded its jurisdiction in setting aside the impugned order passed by the Disciplinary Authority imposing punishment on the respondent. At most, Tribunal could have remitted the matter to the Disciplinary Authority to pass a fresh order. Tribunal was not within its jurisdiction and competence to set aside the punishment while sitting in appeal without returning a finding that the disciplinary enquiry stood vitiated for breach of statutory provisions of the Rules, 1991, or that the punishment was not commensurate with the guilt or perverse. (Para 35, 36)

B. Uttar Pradesh Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991 - Appendix-1 of Rules, 1991 - Appendix-1 of the Rules, 1991, specifically provides that the Inquiry Officer may recommend the proposed punishment after concluding the departmental proceedings. The proviso to this Appendix provides that the Inquiry Officer may also, separately from these proceedings, make his own recommendation regarding the punishment to be imposed on the charged police officer. (Para 32)

List of Cases cited:

1. *Syed Yakoob Vs K.S. Radhakrishnan* AIR 1964 SC 477
2. *U.O.I. Vs P. Gunasekaran* 2015 (2) SCC 610
3. *U.O.I. Vs Flight Cadet Ashish Rai* 2006 (2) SCC 364

4. *Hombe Gowda Educational Trust Vs St. of Karn.* 2006 (1) SCC 430

5. *Krushnakant B. Parmar Vs U.O.I. & anr.* 2012 (30) LDC 519

6. *Masood Asghar Vs Uttar Pradesh State Public Service Tribunal, Indira Bhawan, Lucknow & ors.* 2019 (5) ADJ 179 (DB) (LB)

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar -IV, J.)

1. Heard Ms. Monika Arya, learned Additional Chief Standing Counsel for the petitioners and Sri Ram Narain, learned Counsel for the respondent.

2. The respondent-petitioners by the instant writ petition are assailing the order dated 23 March, 2021, passed in Claim Petition No.707 of 2016, by the State Public Services Tribunal, Lucknow (for short, "Tribunal"), allowing the petition of the applicant-respondent setting aside the order of punishment imposed upon the applicant-respondent in disciplinary proceedings.

3. The short question that arises for consideration is, as to whether the Tribunal was competent to usurp upon itself the role of an appellate authority by setting aside the punishment order, when admittedly, the factum of the charge of overstay of leave was not denied by the employee.

4. The facts giving rise to the instant writ petition is that the respondent was working as a Constable since 2003, he was charged for unauthorized absence from duty from 10 November, 2006 to 09 August, 2007, and for the subsequent development of having been arrested, and imprisoned in case crime no.252 of 2008,

under Section 25 Arms Act; case crime no.252 of 2008, under Sections 8/20 NDPS Act and case crime no.184 of 2008, under Section 392 & 411 IPC. In all the cases charge sheet has been submitted against the respondent.

5. Disciplinary proceedings came to be initiated under Rule 14(1) of the Uttar Pradesh Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991 (for short, "Rules, 1991"), for imposition of major penalty. It appears that respondent did not participate in the inquiry, consequently, he came to be dismissed from service by order dated 09 August, 2007, purportedly passed under Rule 8 (2) of the Rules, 1991. The order, however, came to be quashed by this Court in Writ-A No.16992 of 2008, vide order dated 18 April, 2008. The Court, however, left it open to the authorities to conduct an inquiry against the respondent as per rules.

6. On the date of passing of the order by the Court, respondent was languishing in jail on being arrested in the aforementioned criminal cases. The respondent came to be bailed out on 16 July, 2008, but did not report for duty, nor, did he appear before the authority for reinstating him in service. In other words, respondent did not inform the authorities about his imprisonment and registration of criminal cases against him. It is only in the year 2013, he gave an application on 05 April, 2013, to the concerned authority requesting for reinstatement in service. Thereafter, respondent came to be reinstated in service and a fresh disciplinary proceedings was sought to be initiated against him in compliance of the order of the State Government dated 17 January, 2014.

7. A fact finding inquiry was setup to report with regard to his unauthorized

absence and subsequent custody of the respondent in the criminal cases. The Officer submitted a preliminary inquiry report on 30 June, 2014, and supplementary report on 23 September, 2014. Thereafter, respondent was issued charge sheet dated 07 October, 2014, initiating disciplinary proceedings under Section 14(1) of the Rules, 1991, on a charge of being absent unauthorizedly from 16 November, 2006, and for being arrested and imprisoned in the criminal cases lodged against the respondent. The respondent submitted his objections dated 24 October, 2014, to the charge admitting his absence, but furnished explanation for his absence. The witnesses noted in support of the charge were examined in the presence of the respondent and was allowed to cross examine the witnesses on the date and time fixed by the Inquiry Officer. Thereafter, respondent was permitted to file his defence by the Inquiry Officer vide communication dated 05 November, 2014. The respondent filed his reply / application dated 15 November, 2014, submitting that he did not desire to produce any other evidence or witness in defence and requested the Inquiry Officer to consider his explanation submitted earlier and pass appropriate orders. The statement of the respondent was also recorded on the same date i.e. 15 November, 2014. Thereafter, Inquiry Officer submitted Inquiry Report dated 07 January, 2015, wherein, the charge of unauthorized absence was proved against the respondent.

8. The charge against the respondent was that he was directed on 16 November, 2006, to proceed from Agra to the place of his destination at Lucknow University, along-with, Manik Chandra and report for duty at Lucknow, but in midway he vanished and did not join the team at the

destination in Lucknow. Further, respondent had suppressed the registration of the FIR lodged against him and did not inform the authorities with regard to his arrest. Accordingly, Inquiry Officer was of the view that the conduct of the respondent falls under the category of grave indiscipline and carelessness towards his duty. The Inquiry Officer taking a lenient view however recommended punishment to revert the respondent on the lowest pay scale for three years and not to pay salary and other emoluments for the period of unauthorized absence from duty i.e. 16 November, 2006 to 09 August, 2007.

9. Disciplinary Authority issued show cause notice dated 15 February, 2015, calling upon the respondent to submit his objection to the proposed punishment. The respondent filed objections to the notice on 03 March, 2015. Third petitioner - Commandant, 15th Battalion, Agra / Disciplinary Authority, vide order dated 14 May, 2015, imposed punishment of reduction to the lowest pay scale for three years for unauthorized absence from 10 November, 2006 to 09 August, 2007.

10. Aggrieved, respondent filed an appeal before the second petitioner - Deputy Inspector General of Police, PAC Agra, which came to be dismissed by a speaking order dated 26 December, 2015. The respondent instead of filing revision before next higher officer, approached the Tribunal by instituting a claim petition challenging the impugned orders of punishment.

11. The learned Tribunal allowed the claim petition returning a finding that Inquiry Officer had ignored the medical certificates submitted by the respondent which was a justified explanation for his

absence. A finding was returned that the absence was not willful but due to compelling circumstances. The Tribunal was of the opinion that no inquiry was made by the Inquiry Officer with regard to the validity of the medical certificates submitted by the respondents in defence of his unauthorized absence. Further, Tribunal was of the view that the Inquiry Officer committed an illegality proposing the punishment that ought to be awarded to the respondent, therefore, Disciplinary Authority without application of mind mechanically awarded the punishment proposed by the Inquiry Officer.

12. Learned Tribunal set aside the impugned punishment orders primarily on the ground that no inquiry or investigation was made by the Disciplinary Authority or Appellate Authority with regard to the validity of the medical certificates submitted by the respondent, consequently, the medical certificates could not have been disbelieved by the Inquiry Officer.

13. Learned Standing Counsel appearing for the State submits that the learned Tribunal committed an error in sitting in appeal over the findings returned by the Inquiry Officer. The Inquiry Officer did not recommend any punishment, rather, proposed the punishment that may be imposed upon the respondent. The Disciplinary Authority after show cause notice imposed the punishment by a reasoned and speaking order. It was always open to the Disciplinary Authority to have imposed a severe punishment having regard to the nature of charge against the respondent.

14. It is further submitted that the medical certificates clearly shows that the respondent was an outdoor patient for

simple health issues and did not require in-house hospitalization. In the circumstances, the respondent ought to have informed the authorities about his absence and subsequent arrest.

15. It is further submitted that the Inquiry Officer had rightly not accepted the medical certificates as on the face of it, did not disclose any serious ailment which required indoor treatment or confinement to bed. It is finally submitted that Tribunal committed an error usurping upon itself the role of the Disciplinary Authority in setting aside the punishment, rather, the matter should have been remitted to the Disciplinary Authority to pass a fresh order of punishment. The Tribunal could not have set aside the order of punishment without returning a finding that the disciplinary proceeding was vitiated and nonest for non compliance of the provisions of Rules, 1991, or, otherwise.

16. Learned Counsel appearing for the respondent does not dispute the facts and admits that respondent employee had participated in the disciplinary proceedings, filed his objections and cross examined the witnesses. In other words he does not dispute that the procedure contemplated under Rules, 1991, was not duly complied.

17. On specific query, he categorically submits that the factum of the charge of unauthorized absence and that the respondent was arrested in criminal cases was not disputed, but reliance was placed on the medical certificates to explain and justify the unauthorized absence. It is, therefore, submitted that the Tribunal has not committed any illegality or infirmity in setting aside the punishment order, having

regard to the medical certificates. The absence from duty was not wilful and deliberate.

18. Rival submissions fall for considerations.

19. The facts inter-se parties are not disputed.

20. It is settled principle of law that the Courts / Tribunal in exercise of its power of judicial review of disciplinary proceedings cannot sit in appeal and examine the sufficiency of the evidence led in the disciplinary proceedings. The judicial review of disciplinary proceedings is confined and limited to the procedure as to whether the disciplinary proceedings was conducted fairly as per the Rules and that the respondent employee was given full and fair opportunity to present his case before the Inquiry Officer.

21. The Tribunal / Court in exercise of jurisdiction of judicial review of disciplinary proceedings can interfere only when conclusions of the Inquiry Officer is perverse or based on no evidence. On appreciation of evidence, it is not open for the Tribunal / Court to substitute its own opinion based on the appreciation of material on record on the charges proved.

22. A finding of fact recorded by the Disciplinary Authority cannot be challenged on the ground that the relevant and material evidence adduced before the Disciplinary Authority is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact drawn from the said fact are within the exclusive jurisdiction of the Tribunal. [Refer: Syed Yakoob versus K.S. Radhakrishnan¹;

Union of India versus P. Gunasekaran²; Union of India versus Flight Cadet Ashish Rai³ and Hombe Gowda Educational Trust versus State of Karnataka⁴].

23. In the admitted facts of the present case, the factum of the charge of unauthorized absence and subsequent arrest and confinement in jail is not disputed. Further, it is admitted that while on duty the respondent vanished in between and did not report at the station of duty along-with his colleague. It is admitted that the respondent did not inform the authorities that he could not report for duty due his severe illness. It is also admitted that he came to be arrested subsequently in three criminal cases of serious nature and on being enlarged on bail on 16 July, 2008, he reported for reinstatement on 05 April, 2013 i.e. after a lapse of almost five years of absence.

24. In the circumstances, since the year 2006 till 2013, for almost seven years, the respondent being a member of a disciplined Force absented himself without information which is a gross misconduct. The Inquiry Officer on perusal of the medical certificates submitted by the respondent in his defence was justified in not accepting the certificates as it was procured by the respondent to justify his unauthorized absence. The medical certificates relied upon by the respondent has been placed on record.

25. The medical certificates were obtained from Medical Superintendent Officer, Community Health Center Sadabad, Mathura, dated 07 December, 2016, certifying that the respondent was suffering from "pain with tenderness". Accordingly, in the opinion of the Medical Officer, the absence of the respondent from 17 November, 2006 to 07 December, 2006,

was absolutely necessary for 'restoration of his health'. The other medical certificate dated 26 October, 2007, issued by the Senior Medical Officer, District Hospital, Mathura, records that since the respondent was suffering from 'acute lumbar with sciatica', therefore, advised to take rest from 20 February, 2007 to 26 October, 2007. The other medical certificate issued by the District Hospital, Mathura, which is undated, records that respondent was issued OPD No.203920 and advised 15 days plus 8 weeks rest from 08 December, 2006 to 19 February, 2007. It is further noted that the certificates are not relied for M/C (medical certificate) purpose.

26. Supreme Court in **Krushnakant B. Parmar versus Union of India and another**⁵, has held that the absence of the employee must not be wilful but under compelling circumstances. Paragraph 16 and 17 of the report is extracted:-

"16. The question whether 'unauthorized absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be willful."

27. The medical certificates submitted by the respondent, in the opinion of the Inquiry Officer, did not inspire confidence for the reason that the respondent was an outdoor patient and the medical illness of the respondent was not of serious nature so as to preclude him from reporting for duty. The Inquiry Officer opined that had the

medical illness of the respondent been so serious, then in that event, from Sadabad station he would have proceeded to the nearby Agra station for treatment, where superior medical facilities are available. In the circumstances, the explanation of the respondent that he fell ill at Sadabad and from there he went home, based on the medical certificates was not accepted. It is not a case that the Inquiry Officer ignored the medical certificates or disbelieved it, rather, the explanation of the respondent based on the medical certificates submitted by him was not accepted by the Inquiry Officer. The medical certificates admittedly record illness of minor nature. Further, respondent was an outdoor patient and it is not his case that he was confined to bed and was not possible to report for duty. In other words, it is not a case of compelling nature to avoid duty. It is a case of deliberate and willful absence from duty.

28. It is admitted by learned counsel for the respondent that the medical prescription and treatment undertaken by the respondent in support of the medical certificates was not produced, nor, filed before the Inquiry Officer. Further, he admits that the respondent was an outdoor patient. It is also not the case of the respondent at any point of time, that respondent had informed the department of his absence due to his illness or due to his detention in jail pursuant to the FIRs.

29. On the question as to whether the enquiry officer can propose the punishment in his report. In the **State of Uttaranchal and others versus Kharak Singh**⁶, the Supreme Court relying upon an earlier decision rendered in **A.N. D'Silva versus Union of India**⁷, on considering the question whether an enquiry officer can indicate the proposed punishment in his

report, the Court pointed that it is for punishing/disciplinary authority to impose an appropriate punishment and the enquiry officer has no role in awarding punishment. The question of imposing punishment can only arise after enquiry is made and the report of the enquiry officer is received. It is for the punishing authority/disciplinary authority to propose the punishment and not for the enquiry authority.

30 . In **Kharak Singh** (supra) the Court observed that though there is no specific bar in offering views by the enquiry officer, but, in the given facts, it was held that the enquiry officer exceeded his limit by saying that the delinquent officer has no right to continue in government service and he be dismissed from service with the immediate effect.

31. We have perused Appendix-1 of Rules 91, which provides as follows:

"PROCEDURE RELATING TO THE CONDUCT OF DEPARTMENTAL PROCEEDINGS AGAINST POLICE OFFICER [See RULE 14(1)]

Upon institution of a formal enquiry such police officer against whom the inquiry has been instituted shall be informed in writing of the grounds on which was proposed to take action and shall be afforded an adequate opportunity of defending himself

*..... The proceedings shall contain a sufficient record of the evidence and statement of the finding and the ground thereof. **The Inquiry Officer may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged Police Officer.**"*

32. Appendix-1 of Rules, 1991, therefore, specifically provides that Inquiry Officer may recommend proposed punishment after concluding the departmental proceedings. Proviso to this Appendix provides that the Inquiry Officer may also separately from this proceedings make his own recommendation regarding the punishment to be imposed on the charged police officer.

33. Division Bench of this Court in **Masood Asghar Versus Uttar Pradesh State Public Service Tribunal, Indira Bhawan, Lucknow and others**⁸, relying upon an earlier decision observed that the Inquiry Officer making recommendation of the punishment is merely an irregularity and that would not vitiate the enquiry. The only requirement is that the delinquent employee must have notice of the proposed punishment. Paragraph no.9 reads as under :-

"9. A Division Bench of this Court at Allahabad in Yash Pal Singh's case supra has treated the recommendation of the Inquiry Officer, on the point of punishment, as an irregularity and has relegated the matter to the disciplinary authority to reconsider the award of punishment, applying his own mind to the facts of the case. The aforesaid facts are not disputed by the Standing Counsel."

34. In view thereof, we are of the opinion that the learned Tribunal exceeded its jurisdiction in setting aside the impugned order passed by the Disciplinary Authority imposing punishment on the respondent. At the most, Tribunal could have remitted the matter to the Disciplinary Authority to pass a fresh order. The Tribunal was not within its jurisdiction and competence to set aside the punishment

sitting in appeal without returning a finding that the disciplinary enquiry stood vitiated for breach of statutory provisions of the Rules, 1991, or that the punishment was not commensurate to the guilt, or perverse.

35. In *P. Gunasekaran* (supra), Supreme Court reiterated and cautioned the Court / Tribunals not to act as an appellate authority in disciplinary proceedings.

"12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer....."

[Refer: B.C. Chaturvedi versus Union of India and others⁹ and S. Sreesanth versus The Board of Control for Cricket in India¹⁰]

36. In any case, in our opinion, the punishment imposed upon the respondent is of much lesser rigour and not commensurate to the guilt having regard to the fact that respondent was member of a disciplined Force, a more severe punishment was warranted in the given facts. The Disciplinary Authority took a liberal view while imposing punishment having regard to the fact that the respondent was absent from almost seven years and of having indulged in criminal activity.

37. For the reasons recorded herein above, impugned judgement and order dated 23 March, 2021, passed by the Tribunal is set aside and quashed.

38. Accordingly, the writ petition is allowed.

39. No cost.

(2023) 5 ILRA 1555
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 13327 of 2020

Ranveer Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Akhilesh Mishra, Sri Rahul Mishra, Sri Utsav

Counsel for the Respondents:

C.S.C., Sri Shri Ram Pandey

Civil Law - Jal Sansthan (Rural) U.P. Nagarpalika Non-Centralized Services Retirement Benefits Regulation, 1984 (Rules of 1984) - Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021 - Issue: Whether services rendered before regularization by daily wage employees who worked on Class III posts in the Jal Sansthan and were later regularized in continuation of their services is to be counted for the purpose of pension and other retiral benefits ? Held: Daily rated employees perform the same duties as regular employees and are throughout treated as regular employees. They were also regularized in continuation of their work charge services. So far as the Act of 2021 is concerned, the same is applicable only to employees of the State Government. Even otherwise, the Act of 2021 has already been read down by this Court in its judgment dated 17.02.2023 passed in Writ-A No.8968 of 2022 (*Dr. Shyam Kumar Vs. State of U.P. and others*). Respondents were directed to ensure regular payment of pensionary and other retirement benefits to the petitioners, who have already retired,

under the Pension Rules, treating their entire service, including services rendered by them as daily rated employees prior to their regularization, as qualifying services for pensionary benefits, within a period of three months.

Allowed. (E-5)

List of Cases cited:

1. Jai Prakash Vs St. of U.P. & ors., WRIT - A No. - 10405 of 2022 dated 17.03.2023

2. Prem Singh Vs St. of U.P. & ors., (2019) 10 SCC 516

3. Dr. Shyam Kumar Vs St. of U.P. & ors., Writ-A No.8968 of 2022 dated 17.02.2023

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Shri Rahul Mishra, learned counsel for petitioner, Shri Ram Pandey, Advocate appearing for respondent Jal Sansthan and learned Standing Counsel for the State.

2. Petitioners have approached this Court challenging the Order dated 20.02.2020 whereby the respondent authority has refused to enroll employees of the Jal-Sansthan under the old pension scheme on the ground that they were regularized after the old pension scheme was abolished and for a prayer commanding the respondents to pay regular pension to the petitioners by counting their past services rendered on daily wage posts in the respondent-Sansthan.

3. The facts of the case are that the petitioners were appointed as daily wage employees on class III posts in the Jal Sansthan between the years 1989-1991. They were throughout treated as regular

employees and later regularized in the Jal Sansthan between 2005-2011. Counsel for the petitioners informs that some of the petitioners are already retired.

4. Learned counsel for petitioners submits that by letter dated 30.08.2018, respondent-Jal Sansthan (Rural) has adopted U.P. Nagarpalika Non-Centralized Services Retirement Benefits Regulation, 1984 (Rules of 1984) for regulating pension of its employees. Under the same rules, petitioners are entitled to pensionary and other retirement benefits. Further submission is that same rules with regard to employees of the Nagar Palika was interpreted by this Court by its judgment dated 17.03.2023 in **WRIT - A No. - 10405 of 2022 (Jai Prakash vs State of U.P. and 4 others)** wherein daily wage employees who were later regularised in continuation of their services were held entitled for benefits of the Old Pension Scheme. He has further relied on a judgment by a three Judge Bench of Supreme Court in case of **Prem Singh vs. State of U.P. and others, (2019) 10 SCC 516** where it was held that services rendered before regularization must be counted for the purpose of pension and other retiral benefits. The relevant paragraphs of the judgment in the case of Prem Singh (supra) reads:

"8. We first consider the provisions contained in the Uttar Pradesh Retirement Benefits Rules, 1961 (for short 'the 1961 Rules'). Rule 3(8) of the 1961 Rules which contains the provisions in respect of qualifying service is extracted hereunder: "3. In these rules, unless is anything repugnant in the subject or context-

(1)-(7) * * *

(8) 'Qualifying service' means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

(i) periods of temporary or officiating service in a non-pensionable establishment;

(ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contingencies shall also count as qualifying service.

Note. If service rendered in a non-pensionable establishment work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will

not constitute an interruption of service.

9. Regulations 361, 368 and 370 of the Uttar Pradesh Civil Services Regulations are also relevant. They are extracted hereunder:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:

First - The service must be under Government.

Second - The employment must be substantive and permanent."

These three conditions are fully explained in the following Regulations.

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post shall qualify, except-

(i) periods of temporary or officiating service in non-pensionable establishment;

(ii) periods of service in work-charged establishment; and

(iii) periods of service in a post paid from contingencies."

10. The qualifying service is the one which is in accordance with the provisions of Regulation 368 i.e. holding a substantive post on a permanent establishment. The proviso to Rule 3(8) clarify that continuous, temporary or officiating service followed without interruption by confirmation in the same or any other post is also included in the qualifying service except in the case of periods of temporary and officiating service in a non-pensionable establishment. The service in workcharged establishment and period of service in a post paid from contingencies shall also not count as qualifying service.

11. The Note appended to Rule 3(8) contains a provision that if the service is rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies, falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service. Thus, the Note contains a clear provision to count the qualifying service rendered in work-charged, contingency paid and nonpensionable establishment to be counted towards pensionable service, in the exigencies provided therein.

12. The provisions contained in Regulation 370 of the Civil Services Regulations excludes service in a non-pensionable establishment, work-charged establishment and in a post paid from contingencies from the purview of qualifying service. Under Regulation 361 of the Civil Services Regulations, the services must be under the Government and the employment must be substantive and permanent basis.

.....

30. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-charged employees. Rather, the very concept of work-charged

employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In *Narain Dutt Sharma v. State of U.P.* [CA No. _____2019 arising out of SLP (C) No. 5775 of 2018] the appellants were allowed to cross efficiency bar, after '8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak with effect from 15-9-1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs 200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs 205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularised time to time by different orders. However, the services of some of the appellants in few petitions/appeals have not been regularised even though they had served for several decades and ultimately reached the age of superannuation.

31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularised. However, the period spent by them in the work-charged establishment has not been

counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

32. In view of the Note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work-charged, contingencies or nonpensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or

has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularisation had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in the Note to Rule 3(8) of the 1961 Rules, not to count

such service particularly, when it can be counted, in case such service is sandwiched between two temporary or inbetween temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make Rule 3(8) valid and non-discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

35. In view of the Note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of

the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook.

36. There are some of the employees who have not been regularised in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularised under the Government instructions and even as per the decision of this Court in *State of Karnataka v. Umadevi* (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753]. This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one-time measure, the services be regularised of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularised. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the workcharged establishment shall be counted as qualifying service for purpose of pension.

37. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the

work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

5. He further submits that since the same rules for pensionary benefits exist in the respondent authority, therefore, the matter is squarely covered by the said judgment and petitioners herein should also be extended the benefit of the law settled in the case of Prem Singh (Supra).

6. Learned counsel for the Jal Sansthan opposes the applicability of the judgment in the case of Prem Singh (Supra) on the ground that the effect of the aforesaid judgment stands nullified because of the enactment of the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021.

7. So far as Act of 2021 is concerned, the same is applicable only upon the employees of State Government. Even otherwise Act of 2021 is already read down by this Court by judgment dated 17.02.2023 passed in **Writ-A No.8968 of 2022 (Dr. Shyam Kumar Vs. State of U.P. and others)**. Relevant paragraphs of the same reads as:

"9. Therefore, the question now before this Court is whether by bringing Act of 2021, the State Government has done away with the vice pointed out by the Supreme Court in case of Prem Singh (supra). In the said judgment, the Supreme Court found that the State Government has

adopted exploitative labour practice by taking work of regular employees from work charge employees on long term basis without any rationale classification while refusing them benefits available to regular employees. Supreme Court specifically held that the State Government can not get involved in corrupt labour practices. On the aforesaid grounds, the Supreme Court read down the provisions of Rule 3(8) of the Rules of 1961 and struck down Regulation 370 of Civil Services Regulations and Para 669 of the Financial Handbook.

10. It is the duty of State to create new temporary or permanent posts as per its needs and make appointments on the same. Law also permits State to appoint daily wagers or work charge employees, but only when the work is for short period or is in a work charge establishment for fixed duration. Law does not permit the State to take work for long period, extending even for the entire working life of a person, on temporary or work charge basis. In such cases, it is the duty of State to create new posts and make appointments, giving all benefits of regular employees. Otherwise, State would be found to be adopting exploitative labour practice. This is the vice pointed out by the Supreme Court in Prem Singh's case (supra), and instead of removing the same, the State by Section 2 of the Act of 2021 has extended the sphere of its illegality. By Section 2 of the Act of 2021, it desires to take benefit of its own failure of creating posts in time and making appointments on the same, by not counting the said period of such service for pensionary benefits. State still fails to explain the rationale on the basis of which it has created this new classification and the manner in which, by the amended provision, it has removed the irrationality.

In case Section 2 of the Act of 2021 is given a literal meaning it would mean that services rendered by a person on a temporary or permanent post alone can be counted for pension. The same would again be an exploitative device and labour malpractice, as by this, the State Government is again attempting to use persons to work for it on long term basis, just like regular employees, without giving them benefits they are entitled to as regular employees. The very vice pointed by the Supreme Court in the judgment of Prem Singh (supra) with regard to work charge employees is, in fact, now made applicable to even larger number of employees and extended to daily wagers and other persons not working on a temporary or a permanent post including, work charge employees.

In case of V. Sukumaran vs. State of Kerala (2020) 8 SCC 106, the Supreme Court held:

"22. We begin by, once again, emphasising that the pensionary provisions must be given a liberal construction as a social welfare measure. This does not imply that something can be given contrary to rules, but the very basis for grant of such pension must be kept in mind i.e. to facilitate a retired government employee to live with dignity in his winter of life and, thus, such benefit should not be unreasonably denied to an employee, more so on technicalities."

Thus, again to save Section 2 of the Act of 2021 from the vice/arbitrariness, in the spirit of the judgment of Prem Singh (supra), the word 'post' is required to be diluted to save it from arbitrariness and hence, the word 'post' used in Section 2 of the Act of 2021, be it temporary or

permanent, has to be read down as 'services rendered by a government employee, be it of temporary or permanent nature'."

8. The pension rules adopted by the respondent Jal Sansthan (Rural) have already been read down by this Court in the case of Jai Prakash (Supra), being held in violation of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. Relevant portion the said judgment reads:

"The present Rules of 1984 are parallel to the Rules of State Government which have been read down by the Supreme Court, being held in violation of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. In the present case also an artificial classification is created as admittedly, as the daily wage employees perform the same duties as the regular employees and are throughout treated as the regular employee. They were also regularized in continuation of their services. Thus, the matter is squarely covered by the law settled in case of Prem Singh (Supra)."

9. In the present case also an artificial classification is created as admittedly, as the daily rated employees perform the same duties as the regular employees and are throughout treated as the regular employee. They were also regularized in continuation of their work charge services. Thus, the matter is squarely covered by the law settled in case of Prem Singh (Supra) and Dr. Shyam Kumar (supra) and Jai Prakash (supra).

10. Thus, the writ petition is **allowed** and impugned order dated 20.02.2020 is set aside.

11. Respondents are directed to ensure regular payment of pensionary and other retirement benefits to the petitioners who have already retired, under the Pension Rules, treating their entire service, including services rendered by them as daily rated employees prior to their regularization as qualifying services for pensionary benefits within a period of three months.

12. Respondents are further directed to enroll petitioners who have not yet retired under the Old Pension Scheme by adding the services of petitioners rendered by them as daily rated employees.

(2023) 5 ILRA 1562
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.03.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR
UPADHYAYA, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 139 of 2022

Smt. Suman Singh **...Appellant**
Versus
Chairman, Ram Manohar Lohia Inst. Of
Medical Sciences, Lko & Ors.
...Respondents

Counsel for the Appellant:
Sri Rani Singh, Sri Abhineet Jaiswal, Sri
Chinmay Mishra, Sri Gaurav Mehrotra

Counsel for the Respondents:
Sri Anupras Singh, C.S.C., Sri Vinayak
Saxena

A. Interpretation - Liberal interpretation: Any beneficial provision must be given a liberal interpretation in a manner that extends and advances the benefits intended for the beneficiary, and not otherwise. In cases where two interpretations are possible for such a provision, the interpretation that furthers the benefit to the beneficiary must be preferred.

B. Civil Law - Service Matter - Pension - Dr. Ram Manohar Lohia Institute of Medical Sciences Act, 2015 - Old Pension Scheme - New Pension Scheme - G.O. dated 16.09.2010 - Government Order dated 16.09.2010 issued by the State Government in the Department of Finance - Clause 3 of the Government Order provides that those employees who were appointed in a State Government Service/Post that was pensionable prior to 01.04.2005, and are again appointed to any other post, cadre, or service of the State Government or under autonomous institutions, having been relieved from their earlier posting or having resigned from the earlier post in some pensionable service after 01.04.2005, shall also be governed by the Old Pension Scheme. In Clauses 2 and 3 of the said Government Order dated 16.09.2010, the words पेंशनयुक्त

पद / पेंशनयुक्त सेवा (Pensionable Post/Pensionable Service) occur. One possible interpretation of Clauses 2 and 3 of the Government Order dated 16.09.2010 is that the word 'Pensionable' qualifying the words 'Post' and 'Service' in both Clauses should not be confined to the Old Pension Scheme alone. It can be interpreted to include both Pension Schemes, namely, the Old Pension Scheme, which was available prior to 01.04.2005, and the New Pension Scheme, which has been in effect since 01.04.2005. Restricting the construction of the words 'Pensionable Service' or 'Pensionable Post' to mean only those posts and services covered by the Old Pension Scheme would curtail the pension benefits for retired employees or those employees who are to retire in the future. The words

'Pensionable Service' and 'Pensionable Post' in the Government Order dated 16.09.2010 should thus be interpreted to mean Post or Service covered either by the Old Pension Scheme or even by the New Pension Scheme. It is not in dispute that the posts and services at the RML Institute are covered by the New Pension Scheme. Therefore, giving a restricted meaning to the word 'Pensionable Post/Pensionable Service' as it occurs in the Government Order dated 16.09.2010 cannot be accepted. The Court directed that the appellant-petitioner shall be entitled to the benefits of the Old Pension Scheme while serving at the RML Institute as well (Para 21, 22, 29, 34).

Allowed. (E-5)

List of Cases cited:

1. U.O.I. & anr. versus Pradeep Kumari & ors., (1995) 2 SCC 736
2. Bangalore Turf Club Limited versus Regional Director, Employees State Insurance Corporation, (2014) 9 SCC 657
3. Allahabad Bank & anr. Vs All India Allahabad Bank Retired Employees Association, (2010) 2 SCC 44
4. Som Prakash Rekhi Vs U.O.i., (1981) 1 SCC 449

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.

&

Hon'ble Om Prakash Shukla, J.)

1. Heard learned Counsel for the appellant-petitioner, Shri Anupras Singh, learned Counsel representing Dr. Ram Manohar Lohia Institute of Medical Sciences, Shri Vinayak Saxena, learned Counsel representing Sanjay Gandhi Post Graduate Institute of Medical Sciences (hereinafter referred to as "SGPGIMS") and learned State Counsel appearing for the State of U.P.

2. By instituting the proceedings of this Special Appeal, the appellant-petitioner questions the order dated 17.02.2022 passed by learned Single Judge whereby Writ-A No. 2001877 of 2015 has been dismissed and her claim for grant of the benefit of the Old Pension Scheme after being appointed in the Ram Manohar Lohia Institute of Medical Sciences (hereinafter referred to as 'RML') has not been acceded to.

3. Impeaching the order passed by learned Single Judge, it has been argued on behalf of the appellant-petitioner that the construction/interpretation sought to be given by learned Single Judge to the Government Order dated 16.09.2010 is not tenable for the reason that the said Government Order has been issued for conferring certain benefits to the retired employees and accordingly, it has to be read and construed in a manner which furthers the benefit flowing from it rather than curtailing the same. Further submission made on behalf of the appellant-petitioner is that it is the Government Order dated 16.09.2010 issued by the State Government in the Finance Department which holds the field for the reason that it embodies and expresses the general policy decision of the State Government applicable to all rather than the Government Order dated 29.08.2014, which has been issued by the Medical Education Department, that too without consultation with the Finance Department. It has also been urged by the learned Counsel representing the appellant-petitioner that in case of beneficial legislation which will include beneficial subordinate legislation, if two interpretations/constructions are possible, the interpretation which is in favour of the beneficiary, is to be adopted and not the other one.

4. Submission, thus, is that if the Government Order dated 16.09.2010 is interpreted in view of the aforesaid legal propositions, the only feasible conclusion which may be drawn is that the appellant-petitioner will be entitled to be given the benefit of Old Pension Scheme after her appointment in the RML Institute.

5. Opposing the prayers made in this Special Appeal, learned Counsel representing the RML Institute as also the learned State Counsel have, in one voice, submitted that the Government Order dated 16.09.2010 is clear which does not require any interpretation in a manner other than which is apparent from a plain reading of the contents thereof. It has been argued on their behalf that admittedly the posts in RML Institute are non-pensionable neither the services in RML Institute are pensionable, hence, the Government Order dated 16.09.2010 does not confer any right upon the appellant-petitioner to claim the benefit of Old Pension Scheme.

6. Further Submission is that the benefit of Old Pension Scheme will be available only to an employee, who on his new appointment after the New Pension Scheme was promulgated, is working against a pensionable post or in a pensionable service and such an employee is appointed, after promulgation of the New Pension Scheme, against a pensionable post or in a pensionable service. Drawing attention of the Court to the date on which the RML Institute came into existence i.e., in June, 2005, it has been argued that no service or post in RML Institute is pensionable, accordingly, the services rendered by the appellant-petitioner on her appointment in RML Institute after having resigned from service at SGPGIMS being non-pensionable, she shall not be entitled to the benefit of the Old Pension Scheme.

7. It has, thus, been urged by the learned Counsel for the State as also the learned Counsel representing RML Institute that the Special Appeal is liable to be dismissed.

8. We have considered the rival submissions made by learned Counsels in the respective parties and have also perused the records available before us on this Special Appeal.

9. Before we advert to the rival submissions advanced by the learned Counsel for the parties, we may note certain facts which are essential for appropriate resolution of the issues involved in this case.

10. The appellant-petitioner was appointed on the Post of Sister Grade-II in the year 1996 at SGPGIMS. She continued to work on the said post which is, admittedly, pensionable. In the meantime, an advertisement was issued for appointment to the post of Chief Nursing Officer, pursuant to which the appellant-petitioner made her application and on selection, she was appointed by means of an order dated 08.12.2010 on the post of Chief Nursing Officer at RML Institute. In pursuance of the appointment order dated 08.12.2010, she submitted her joining on 11.01.2011 on probation for a period of one year. After completion of her probation on the post of Chief Nursing Officer at RML Institute, she was confirmed on the said post by means of an order dated 31.05.2012 with effect from 11.01.2012. She is, thus, working at present on the post of Chief Nursing Officer as a confirmed employee at RML Institute.

11. It appears that the appellant filed a Writ Petition bearing no. 897 of 2015

before this Court with the prayer inter alia to issue directions to the authorities of RML Institute for giving her the benefit of Old Pension Scheme. The said writ petition was finally disposed of by this Court by means of an order dated 22.06.2015 whereby a direction was given to the Director of Institute to consider and decide the representation of the appellant-petitioner.

12. In compliance of the said order dated 22.06.2015 passed by this Court in Writ Petition No. 897 of 2015, the Director considered the representation made by the appellant-petitioner, however, the said representation did not find favour with the Director which was rejected by means of an order dated 17.08.2015. We may note at this juncture itself that the Director while passing the order dated 17.08.2015 recites that the matter relating to grant of benefit of Old Pension Scheme to the appellant-petitioner was referred to the State Government, which apprised the RML Institute by means of the Government Order/Letter dated 29.08.2014 that since the Institute was established after 01.04.2005, hence, no post available or created in the Institute is covered by the Old Pension Scheme and accordingly, in terms of the Government Order dated 16.09.2010 the appellant-petitioner shall not be entitled to be given the benefit of Old Pension Scheme. Challenging the said order dated 17.08.2015, the appellant-petitioner instituted the proceedings of Writ-A No. 2001877 of 2015 which has been dismissed by learned Single Judge by means of the order dated 17.02.2022 which has been assailed before us in this Special Appeal.

13. The sole question which falls for our consideration, in this case is as to in

what manner the Government Order dated 16.09.2010 issued by the State Government in the Department of Finance is to be construed and interpreted and depending on the construction of the said Government Order as to whether the appellant-petitioner will be entitled to be given the benefit of Old Pension Scheme which was prevalent to the State Government employees as also the employees of various autonomous institutions/bodies functioning under the State Government prior to 01.04.2005.

14. The New Pension Scheme, was promulgated by the State Government by means of a notification dated 28.03.2005, according to which, the State Government had taken a decision to introduce New Pension Scheme which is based on the employee's contribution. The said Pension Scheme in terms of the notification dated 28.03.2005 has been made applicable with effect from 01.04.2005; meaning thereby that the State Government employees or the employees appointed in autonomous institutions of the State Government on or after 01.04.2005 shall be governed by the Pension Scheme which is contributory in nature and such employees shall not be governed by the Old Pension Scheme which was majorly based on the contribution made by the State alone.

15. It is not in dispute that the State Government took a decision to establish Ram Manohar Lohia Institute of Medical Sciences in June, 2005. Earlier, it was run and managed by a State owned society registered under the Societies Registration Act. However, in the year 2015 by means of enacting Dr. Ram Manohar Lohia Institute of Medical Sciences Act, 2015, the Institute functions under the prescriptions available in the said enactment passed by the State Legislature. However, as observed

above, it is not in dispute that RML Institute was established after 01.04.2005, the date with effect from which the New Pension Scheme has been introduced.

16. To remove certain confusions the State Government in the Department of Finance issued a Government Order on 16.09.2010 which formulates the conclusions on the queries which had arisen on account of implementation of the New Pension Scheme. The queries formulated in the Government Order dated 16.09.2010 are embodied in clause 2 of the said Government Order which is extracted herein below:-

"2. वित्त विभाग में इस बिंदु पर स्पष्टीकरण प्रदान किये जाने सम्बंधी संदर्भ प्राप्त होते रहे हैं कि ऐसे कर्मचारी जो राज्य सरकार की किसी पेंशनयुक्त सेवा में दिनांक 01 अप्रैल, 2005 के पूर्व नियुक्त हो चुके थे तथा दिनांक 01 अप्रैल, 2005 को अथवा उसके उपरान्त राज्य सरकार के अधीन किसी अन्य सेवा/संवर्ग में पेंशनयुक्त पद पर नियुक्त होते हैं, तो उन्हें पुरानी पेंशन योजना, जो दिनांक 01 अप्रैल, 2005 के पूर्व लागू थी, से आच्छादित माना जायेगा अथवा नई पेंशन योजना से।"

17. The clarification to the said query can be found in Clause 3 of the said Government Order 16.09.2010 which is also being extracted herein below for reference:-

"3. इस संबंध में मुझे यह कहने का निर्देश हुआ है कि शासन द्वारा सम्यक विचारोपरान्त यह निर्णय लिया गया है कि ऐसे सभी कर्मचारी जिन्होंने राज्य सरकार की अथवा ऐसे समस्त शासन के नियन्त्रणधीन स्वायत्तशासी संस्थाओं और शासन से सहायता प्राप्त शिक्षण संस्थाओं जिनमें राज्य कर्मचारियों की पेंशन योजना की भौति पेंशन योजना लागू थी और उनका वित्त पोषण राज्य सरकार की समेकित निधि से किया जाता है, की पेंशनयुक्त सेवा में दिनांक 01 अप्रैल, 2005 के पूर्व योगदान किया था तथा दिनांक 01 अप्रैल, 2005 को अथवा उसके पश्चात् राज्य सरकार की अथवा शासन की नियन्त्रणाधीन उक्त उल्लिखित स्वायत्तशासी संस्थाओं और शासन से सहायता प्राप्त शिक्षण संस्थाओं की,

पेंशनयुक्त सेवा में अपनी पूर्व सेवा से कार्यमुक्त होकर अथवा तकनीकी त्याग-पत्र देकर नियुक्त होते हैं, तो उसी पेंशन योजना से आच्छादित माने जायेंगे जिसे पेंशन योजना से वे दिनांक 01 अप्रैल, 2005 के पूर्व आच्छादित थे।"

18. What we can gather from Clause 2 of the Government Order dated 16.09.2010 is that the Government was clarifying as to whether such employees who are appointed in a pensionable service prior to 01.04.2005 and are thereafter again appointed after 01.04.2005 in any other service/cadre under the State Government against pensionable post, will they be entitled to be covered by the Old Pension Scheme or they shall be governed by the New Pension Scheme. Clarifying the same, Clause 3 of the Government Order clearly provides that those employees, who were appointed in a State Government Service/Post which was pensionable prior to 01.04.2005 and are again appointed against any other post or cadre or service of the State Government or under autonomous institutions, having been relieved from their earlier posting or having resigned from the earlier post in some pensionable service after 01.04.2005, shall also be governed by the Old Pension Scheme.

19. The reason given by the Director while rejecting the claim of the appellant-petitioner in the order dated 17.08.2015 is based on a Government Order dated 29.08.2014, which we will now examine. The Government Order dated 29.08.2014 has not been issued by the Finance Department of the State Government; neither does it anywhere mention that it was issued with the concurrence of or in consultation with the Finance Department. It is rather a Government Order issued by the Medical Education Department which is the Administrative Department of the RML Institute. The Medical Education

Department, thus, while issuing the Government Order dated 29.08.2014 has attempted to interpret the Government Order issued by the Finance Department on 16.09.2010 and has concluded that since the post sanctioned in RML Institute are not pensionable as such any employee appointed in RML Institute after 01.04.2005 having been relieved from his earlier posting or having resigned from his earlier posting where he was working even against pensionable post, will not be covered by New Pension Scheme.

20. In the context of the aforesaid Government Order dated 29.08.2014 issued by the Medical Education Department, we may refer to the Government Order issued by the Finance Department, dated 16.09.2010 again. In Clauses 2 and 3 of the said Government Order dated 16.09.2010 the word पेंशनयुक्त पद/ पेंशनयुक्त सेवा (Pensionable Post/Pensionable Service) occur. The said provision contained in Clauses 2 and 3 of the Government Order dated 16.09.2010 can be interpreted possibly in two ways.

21. The first interpretation which may be given to the said phrase of the Government Order dated 16.09.2010 is that the words 'Pensionable Post' and 'Pensionable Service' are to qualify the service or post against which an employee was working prior to 01.04.2005 and also against a post or service where he/she is appointed after 01.04.2005. There is no ambiguity in such an interpretation, however, if we read the said Government Order further what we find is that the words 'Pensionable Post' and 'Pensionable Service' can be read to mean the post/service covered only by the Old Pension Scheme. Thus, as observed above, it may be one of the possible interpretations. However, the other possible

interpretation of Clauses 2 and 3 of the Government Order dated 16.09.2010 may be that the word 'Pensionable' qualifying the words 'Post' and 'Service' in both the Clauses will not be confined to Old Pension Scheme alone. It can be read to include both the Pension Schemes, namely, the Old Pension Scheme which was available prior to 01.04.2005 and the New Pension Scheme which is now available with effect from 01.04.2005.

22. In our opinion, restricting the construction of the words 'Pensionable Service' or 'Pensionable Post' to mean only those posts and services which are covered by the Old Pension Scheme will have the impact of curtailing the benefit of pension to the retired employees or those employees who are to retire in future. It is not that the services and posts created and sanctioned in the RML Institute are not pensionable. The post and services are pensionable though are governed and covered by New Pension Scheme promulgated by means of the notification dated 28.03.2005.

23. Pension to a retired employee, in a sense, is, in fact, a beneficial provision which is provided by the employers not only to provide some financial support to the employees after retirement in lieu of the services which he renders in the best times of his life to the employer but also to take care of the needs of such employees in old age. Accordingly, we find that the Government Order dated 16.09.2010 is beneficial in nature and hence, for construing and interpreting such a Government Order we have to consider as to how such beneficial Government Order is to be interpreted.

24. In this regard, we may have reference to certain pronouncements of the

Hon'ble Supreme Court, first of which is, ***Union of India and Another versus Pradeep Kumari and Others, (1995) 2 SCC 736*** wherein it has been observed that, ***'In relation to beneficent legislation, the law is well settled that while construing the provisions of such a legislation the Court should adopt a construction which advances the policy of legislation to extend the benefit rather than a construction which has the effect of curtailing the benefits conferred by it.'***

25. Similarly, Hon'ble Supreme Court in the case of ***Bangalore Turf Club Limited versus Regional Director Employees State Insurance Corporation, (2014) 9 SCC 657*** has observed that the primary rule of interpretation of statutes, though, is the literal rule, however, in case of beneficial legislations the Court has to adopt liberal rule of interpretation to ensure that the benefits are extended to the employees concerned. Para 16 of the said judgment is extracted herein below:-

"16. The primary rule of interpretation of statutes may be the literal rule, however, in case of beneficial legislations and legislations enacted for the welfare of employees, workmen, this Court has on numerous occasions adopted the liberal rule of interpretation to ensure that the benefits extend to those workers who need to be covered based on the intention of the legislature."

26. In relation to the issue concerning payment of gratuity, Hon'ble Supreme Court in the case of ***Allahabad Bank & Another versus All India Allahabad Bank Retired Employees Association, (2010) 2 SCC 44***, has observed that welfare statutes always receive a liberal construction and further that they are required to be so

construed as to secure the relief contemplated by the Statutes.

27. Making reference to another judgment of the Hon'ble Supreme Court in the case of **Som Prakash Rekhi versus Union of India, (1981) 1 SCC 449**, Hon'ble Supreme Court has further observed that welfare benefits such as pension, payment of provident fund and gratuity etc. are in fulfillment of Directive Principles of the State Policy as enshrined in our Constitution, hence, even if two interpretations are permissible to such a provision, the interpretation which furthers the beneficial objects should be preferred.

28. Para 17 of the judgment in the case of **Allahabad Bank (supra)** is quoted hereunder:-

"17. Krishna Iyer, J. in Som Prakash Rekhi v. Union of India¹ stated the principle in his inimitable style that a benignant provision must receive a benignant construction and, even if two interpretations are permissible, that which furthers the beneficial object should be preferred. It has been further observed: (SCC pp. 483-84, para 66)

"66. ... We live in a welfare State, in a 'socialist' republic, under a Constitution with profound concern for the weaker classes including workers (Part IV). Welfare benefits such as pensions, payment of provident fund and gratuity are in fulfillment of the directive principles. The payment of gratuity or provident fund should not occasion any deduction from the pension as a 'set-off'. Otherwise, the solemn statutory provisions ensuring provident fund and gratuity become illusory. Pensions are paid out of regard for past meritorious services. The root of gratuity and the foundation of

provident fund are different. Each one is a salutary benefaction statutorily guaranteed independently of the other. Even assuming that by private treaty parties had otherwise agreed to deductions before the coming into force of these beneficial enactments they cannot now be deprivatory. It is precisely to guard against such mischief that the non obstante and overriding provisions are engrafted on these statutes."

29. From the legal principles discussed above, we are not in doubt that any beneficial provision has to be given a liberal interpretation in a manner that extends and advances the benefits intended to be given to the beneficiary and not otherwise. We are also clear in our mind that in case two interpretations are possible to such a provision, the interpretation which furthers the benefit to the beneficiary has to be preferred and if we examine the Government Order dated 16.09.2010 in the light of these legal principles, we are of the opinion that the same has been interpreted by the Government in the Department of Medical Education by means of the Government Order dated 29.08.2014 in a manner which is not tenable. The words 'Pensionable Service' and 'Pensionable Post' occurring in the Government Order dated 16.09.2010 are thus to be interpreted to mean Post or Service either covered by the Old Pension Scheme or even by the New Pension Scheme. It is not in dispute that the post and services in the RML Institute are covered by the New Pension Scheme. Accordingly, giving restricted meaning to the word 'Pensionable Post/Pensionable Service' as occurring in the Government Order dated 16.09.2010, in our considered opinion, cannot be accepted.

30. In view of the discussions made and reasons given above, we find that the

Counsel for the Petitioner:
Sri Gyan Prakash Ojha, Sri Santosh Yadav

Counsel for the Respondents:
C.S.C., Sri Shyam Mani Shukla

Civil Law - Civil Services Regulation, Article 368 - U.P. Palika (Centralized) Services Retirement Benefit Rules, 1981 - Rule 2(10) - Uttar Pradesh Qualifying Services for Pension and Validation Act, 2021. Post-Retiral Benefits - Petitioner was appointed as a daily wager on a class III post as Clerk on 25.09.1990 in Nagar Nigam. He was regularized on 03.01.2006 and retired on 30.06.2022. Petitioner prayed for the grant of all retiral benefits, including gratuity and regular pension, by counting his past services rendered before his regularization. Matter squarely covered by the law settled in case of Prem Singh and Dr. Shyam Kumar. Court directed the Mukhya Nagar Adhikari, Nagar Nigam, to ensure regular payment of pensionary and other retiral benefits to the petitioner under the Rules of 1981, counting his entire service, including the duty performed as a daily wager employee of the Nagar Nigam, within a period of three months. (Para 9)

Allowed. (E-5)

List of Cases cited:

1. St. of U.P. & ors. Vs Bhanu Pratap Sharma,
Special Appeal No. 97 of 2021

2. Dr. Shyam Kumar Vs St. of U.P., Writ-A No. 8968 of 2022

3. Prem Singh Vs St. of U.P. & ors., (2019) 10 SCC 516

4. The Nagar Ayukt Nagar Nigam Vs Devdatt and 2 Others, Special Appeal Defective No. 482 of 2022

5. Shree Chamundi Mopeds Ltd. Vs Church of South India Trust Association CSI Cinod Secretariat, Madras, 1992 (3) SCC 1

Jaidev Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Petitioner has approached this Court praying for writ of Mandamus commanding the respondents to give all the retiral benefits including gratuity and regular pension under U.P. Palika (Centralized) Services Retirement Benefit Rules, 1981 (herein after referred to as Rules of 1981) by counting his past services rendered before his regularization. Petitioner was appointed as a daily wager on class III post as Clerk on 25.09.1990. He got regularized on 03.01.2006 and retired on 30.06.2022.

2. Learned counsel for the petitioner submits that the petitioner is entitled for post retiral benefits as per Rule 2(10) of the Rules of 1981 which provides retiral benefits as per Article 368 of Civil Services Regulation. Rule 2(10) of Rules of 1981 reads as:

"(10) "Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Service Regulations, as amended from time to time, excepting the following-

(i) periods of temporary or officiating service in a non-pensionable establishment under any Municipal Corporation or Municipal Council;

(ii) periods of service in work-charted establishment; and

(iii) periods of service in a post paid from contingencies:

Provided that period of continued temporary or officiating service under any Municipal corporation or Municipal

Council shall count as qualifying service if it is followed by confirmation of the same post or any other post without any interruption of service.

Note-If service rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies falls between two period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service."

3. Learned counsel for the petitioner places reliance upon the judgment of Division Bench of this Court in ***Special Appeal No.97 of 2021 (State of U.P. and Others Vs. Bhanu Pratap Sharma)***, judgment of a Single Judge bench in the case of ***Writ-A No.8968 of 2022 (Dr. Shyam Kumar Vs. State Of U.P.)*** and a judgment of three Judges Bench of Supreme Court in case of ***Prem Singh vs. State of U.P. and others, (2019) 10 SCC 516*** which considered entitlement for pension and read down provisions of Uttar Pradesh Retirement Benefits Rules, 1961 and the Civil Services Regulation. The relevant paragraphs of the judgment in case of ***Prem Singh (Supra)*** reads:

"8. We first consider the provisions contained in the Uttar Pradesh Retirement Benefits Rules, 1961 (for short the 1961 Rules). Rule 3(8) of the 1961 Rules which contains the provisions in respect of qualifying service is extracted hereunder:

"3. In these rules, unless is anything repugnant in the subject or context:

*(1)-(7) * * **

(8) "Qualifying service" means service which qualifies for pension in

accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except:

(i) periods of temporary or officiating service in a non-pensionable establishment;

(ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contingencies shall also count as qualifying service.

Note. If service rendered in a non-pensionable establishment work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service.

9. Regulations 361, 368 and 370 of the Uttar Pradesh Civil Services Regulations are also relevant. They are extracted hereunder:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:

First : The service must be under Government.

Second : The employment must be substantive and permanent."

These three conditions are fully explained in the following Regulations.

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post shall qualify, except:

(i) periods of temporary or officiating service in non-pensionable establishment;

(ii) periods of service in work-charged establishment; and

(iii) periods of service in a post paid from contingencies."

10. The qualifying service is the one which is in accordance with the provisions of Regulation 368 i.e. holding a substantive post on a permanent establishment. The proviso to Rule 3(8) clarify that continuous, temporary or officiating service followed without interruption by confirmation in the same or any other post is also included in the qualifying service except in the case of periods of temporary and officiating service in a non-pensionable establishment. The service in work-charged establishment and period of service in a post paid from contingencies shall also not count as qualifying service.

11. The Note appended to Rule 3(8) contains a provision that if the service is rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies, falls

between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service. Thus, the Note contains a clear provision to count the qualifying service rendered in work-charged, contingency paid and non-pensionable establishment to be counted towards pensionable service, in the exigencies provided therein.

12. The provisions contained in Regulation 370 of the Civil Services Regulations excludes service in a non-pensionable establishment, work-charged establishment and in a post paid from contingencies from the purview of qualifying service. Under Regulation 361 of the Civil Services Regulations, the services must be under the Government and the employment must be substantive and permanent basis.

.....

30. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees. No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to

another like regular employees as apparent from documents placed on record. In *Narain Dutt Sharma v. State of U.P.* [CA No. _____2019 arising out of SLP (C) No. 5775 of 2018] the appellants were allowed to cross efficiency bar, after "8" years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak with effect from 15-9-1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs 200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs 205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularised time to time by different orders. However, the services of some of the appellants in few petitions/appeals have not been regularised even though they had served for several decades and ultimately reached the age of superannuation.

31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived

of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

32. In view of the Note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work-charged, contingencies or non-pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularisation had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in the Note to Rule 3(8) of the 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In

our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make Rule 3(8) valid and non-discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

35. In view of the Note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook.

36. There are some of the employees who have not been regularised

in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularised under the Government instructions and even as per the decision of this Court in State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one-time measure, the services be regularised of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularised. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

37. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months.

Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

4. He further submits that since similar rules for pensionary benefits exist in the respondent authority, therefore, the matter is squarely covered by the said judgment and petitioner herein should also be extended the benefit of the law settled in the case of Prem Singh (Supra).

5. Shri Shyam Mani Shukla, learned counsel for respondent Nigam opposes the submissions made by counsel for petitioner. He submits that the pensionary benefits are now regulated as per the Uttar Pradesh Qualifying Services for Pension and Validation Ordinance, 2020 (later replaced by Uttar Pradesh Qualifying Services for Pension and Validation Act, 2021), which excludes services rendered before regularization from the definition of 'Qualifying Services' for pension. He has placed reliance on interim order dated 21.12.2022 of this Court in **Special Appeal Defective No.482 of 2022 (The Nagar Ayukt Nagar Nigam Vs. Devdatt and 2 others)** arising out of judgment and order dated 20.04.2022 passed in Writ A No.5082 of 2022. The relevant portion of the aforesaid judgment reads as:

"In Re:- Appeal

The contention of the learned counsel for the appellant is that the learned Single Judge by the impugned judgment and order dated 20.04.2022 has directed consideration of the claim of the petitioner-respondent in light of the decisions of the Apex Court in Prem Singh's case and Division Bench decision in the case of Chetram. It has been submitted that there are several subsequent developments which

could non suit the claim of the petitioner-respondent and even the matter is engaging attention of the Apex Court in Special Leave to Appeal (C) No.5859 of 2022, arising out of judgment of this Court dated 24.08.2021 in Writ-A No.4224 of 2021, wherein an interim order has been passed thereby staying the contempt proceedings.

The matter requires consideration.

Learned counsel for the petitioner-respondent prays for and is allowed three weeks time to file counter affidavit.

List this matter on 18th January, 2023.

Till the next date of listing, the effect and operation of the impugned judgment and order dated 20.04.2022 in Writ-A No.5082 of 2022, shall remain stayed."

6. The aforesaid order passed by Division Bench does not in any manner disturbs any settled law or settles a new law. Suffice would be to refer to the judgment of the Supreme Court in case of **Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras 1992 (3) SCC 1** which clarifies that an interim order does not in any manner impact the law settled by a Court.

7. Judgment in the case of **Bhanu Pratap (supra)** relied upon by the counsel for the petitioner does not consider the interpretation of 'qualifying services' for the purpose of pension as per the U.P. Qualifying Services for Pension and

Validation Ordinance, 2020 (now Act of 2021) are not interpreted.

8. In **Writ-A No.8968 of 2022 (Dr. Shyam Kumar Vs. State Of U.P.)** this Court has interpreted the word 'post' used in Section 2 of the Act of 2021, be it temporary or permanent, and read it down as 'services rendered by an employee, be it of temporary or permanent nature'. Relevant paragraph of the aforesaid judgment reads:

"14. It is settled since long that daily wager employees are entitled to pensionary benefits counting their services from the date of their initial appointment and not from the date of their regularization. Suffice would be to refer to the judgment in cases of Hari Shankar Asopa vs. State of U.P. and another, 1989(1) UPLBEC 501; Yashwant Hari Katakhar vs. Union of India and others, 1996 (7) SCC 113; and Prem Singh (supra). In fact earlier they were covered by Rule 2 of U.P. Retirement Benefit Rules, 1961 and other Civil Services Regulations.

15. Now learned Standing Counsel submits that in view of Section 2 of the Act of 2021, since petitioners were not appointed on a temporary or permanent post initially, therefore, benefit of said services cannot be granted to them.

16. The said aspect of the matter is already discussed above at length. Section 2 of the Act of 2021 is already read down and it is held that the word 'post' used in Section 2 of the Act of 2021, be it temporary or permanent, has to be read down as 'services rendered by a government employee, be it of temporary or permanent nature'.

17. *In view thereof, the petitioners are also covered by the aforesaid interpretation of Section 2 of the Act of 2021 as given in the present judgment. Orders impugned in different writ petitions on the grounds stated above are covered by the earlier judgments as well as by findings given above in this judgment and, hence, petitioners are held to be entitled for counting of their services rendered as daily wagers for pensionary benefits. All impugned orders are set aside."*

9. The present Rules of 1981 are parallel to the Rules of State Government which have been read down by the Supreme Court in the case of Prem Singh (supra), being held violative of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. In the present case also an artificial classification is created as admittedly, as the daily wager employees perform the same duties as the regular employees and are throughout treated as the regular employee. They were also regularized in continuation of their daily wage services. Thus, the matter is squarely covered by the law settled in case of Prem Singh (Supra) and Dr. Shyam Kumar (supra).

10. Hence, the writ petition is **allowed**.

11. Respondent no.2-Mukhya Nagar Adhikari, Nagar Nigam, Bareilly is directed to ensure regular payment of pensionary and other retiral benefits to the petitioner under the Rules of 1981, counting their entire service including the duty performed as daily wager employee of the Nagar Nigam within a period of three months.

(2023) 5 ILRA 1577
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Special Appeal No. 344 of 2021

Chairman & Managing Director, Central Bank Of India, Mumbai Appellant
Versus
Vijay Agarwal ...Respondent

Counsel for the Appellant:
 Sri Vishnu Pratap, Sri Vijay Kumar

Counsel for the Respondent:
 Sri Ajay Rajendra

Civil Law - Service Matter – Back wages - When dismissal order quashed on ground of quantum of punishment and not on merit – In the instant case the employee was out of service pursuant to order of dismissal dated 04.08.2006 until his reinstatement on 24.08.2013. Aggrieved by the dismissal order, the employee filed a writ petition, which came to be allowed only on the quantum of punishment. Writ Court was of the opinion that the punishment imposed was not commensurate with the guilt. Termination of the employee was not held to be wrongful by the writ Court. Rather, the writ Court was of the opinion that a lesser punishment would suffice, having regard to the guilt of the employee. The employee nowhere pleaded that he was not gainfully employed or employed on lower wages during the period of dismissal of service. Held: It cannot be said that the guilt of the employee stood wiped off; rather, reinstatement was directed as a consequence of the imposition of a lesser punishment. The employee would not be entitled to back wages for the period he has not performed

his duties nor consequential benefits, as a consequence of such reinstatement. Having regard to the fact that the employee was out of employment for eight long years, 30% of back wages was directed to be paid to the employee for the period he was out of employment. (Para 12, 13, 14)

Allowed. (E-5)

List of Cases cited:

1. Pradeep S/o Raj Kumar Jain Vs Manganese Ore (India) Ltd. & ors., (2022) 3 SCC 683
2. Deepali Gundu Surwase Vs Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri Vishnu Pratap learned counsel appearing for the appellant/respondent and Sri Ajay Rajendra, learned counsel appearing for the respondent/petitioner.

2. Petitioners, herein, a bank, by the instant intra court appeal has raised challenge to the judgment and order dated 26 July 2021, passed by the learned Single Judge in Writ-A No. 43450 of 2014 (Vijay Agarwal vs. Chairman and Managing Director Central Bank of India and others) to the extent that the impugned order has directed appellant to pay arrears of salary and consequential benefits for the period of dismissal until reinstatement.

3. The respondent/petitioner was out of service pursuant to an order of dismissal dated 4 August 2006 until his reinstatement 24 August 2013. Aggrieved, by the dismissal order the respondent/petitioner filed a writ petition being Writ-A No. 17804 of 2007, which came to be allowed

only on the quantum of punishment imposed on the respondent/petitioner. The writ Court was of the opinion that the punishment imposed is not commensurate to the guilt, accordingly, a lesser punishment would suffice. The operative portion of the order reads thus:

"Hence, the punishment awarded against the petitioner is disproportionate to the charges against him. Hence, the order dated 4.8.2006 passed by the disciplinary authority, respondent no. 3, the order dated 19.12.2006 passed by appellate authority, respondent no. 2 and the charge sheet dated 6.6.2005 (Annexures No. 1,2 and 3 respectively to the writ petition) are hereby quashed. The disciplinary authority will consider the matter afresh for awarding any lesser punishment apart from dismissal or removal from service and will pass an appropriate order as expeditiously as possible preferably within two months after furnishing of the certified copy of this order.

Accordingly, the present petition is hereby allowed. No order as to cost."

4. It appears that the appellant-respondent filed a review petition being Review Application No. 380227 of 2011, seeking review of the writ Court order dated 20 November 2012. The writ Court disposed of the review application clarifying that the writ Court order is required to be complied after reinstating the petitioner/employee, thereafter, consider the matter afresh for awarding lesser punishment. Relevant portion of the order reads thus:

"In view of fact the judgment and order which charge sheet dated 6.6.2005 annexure-3 to the writ petition was

quashed. It is clarified that by judgment and order dated 20.11.2012 only orders passed by the disciplinary authority and appellate authority dated 4.8.2006 and 19.12.2006 are quashed.

The respondents will ensure the compliance of the judgment and order dated 20.11.2012 firstly by reinstating the petitioner employee and subsequently by considering the matter afresh for awarding lesser punishment.

Accordingly, the review petition is finally disposed off."

5. In other words, the writ Court clarified that the appellant/bank is required to award a lesser punishment other than dismissal/removal. The writ Court, however, did not return a finding that the disciplinary enquiry was vitiated or that the petitioner was not found guilty of the charge levelled against him. Thereafter, in compliance, respondent/petitioner came to be reinstated in service and from the stage of charge-sheet a fresh enquiry was conducted, finally the disciplinary authority imposed punishment vide order dated 11 June 2014, bringing down two lower stages of scale of pay permanently w.e.f. 31 July 2013 (order passed on the correction application filed by the appellant) to the order passed on the review petition. Aggrieved by the punishment order, respondent/petitioner again approached the writ Court, wherein, the impugned order has been passed.

6. The appellant/respondents are aggrieved that the writ Court while upholding the order of the disciplinary authority partly, allowed the writ petition, insofar, it deprived the respondent/petitioner arrears of salary for

the period for which the order of dismissal was operative. The relevant portion of the impugned order reads thus:

It becomes relevant to note that upon the matter being remanded all that remained for the respondents to consider was what punishment in substitution was liable to be imposed other than dismissal or removal from service. Once the order of dismissal came to be set-aside by the Court, the only punishment which could have been imposed and was in fact imposed by the respondents themselves was of the petitioner being brought down to two lower stages in the pay scale. The Court has not been shown any power vesting in the respondents to deprive the petitioner of emoluments for the period during which the order of dismissal operated. In view of the aforesaid discussion and to that limited extent, the Court finds itself unable to sustain the decision of the respondents.

The additional submission of Sri Tiwari that on the principle of "no work no pay", the petitioner must be deprived of arrears during the period when the order of dismissal operated, is noticed only to be rejected for the following reasons. The principle of "no work no pay" would apply where a workman or employee on his own chooses not to work or discharge his duties. However, it can have no application to a case where the employer by his own action has prevented the employee from discharging duties. In the present case, the petitioner stood dismissed from service. It is therefore not a case where the petitioner of his volition chose not to discharge duties.

Accordingly, the writ petition is partly allowed. The impugned order insofar as it deprives the petitioner of arrears for

the period from which the order of dismissal operated stands set aside. The petitioner shall be entitled for all consequential benefits.

7. In the aforementioned backdrop, it is submitted that the earlier punishment order of dismissal/removal from service was not set aside by the writ Court on merit. No finding was returned that the findings returned in the enquiry was per se perverse or is not based on the rules applicable to the respondent/petitioner. In other words the findings returned by the enquiry officer with regard to the guilt of the respondent/petitioner was upheld. The writ Court merely remanded the matter to the disciplinary authority to award a lesser punishment as in the opinion of the Court, having regard to the facts and circumstances of the case, the punishment of dismissal/removal from service awarded to the respondent/petitioner was not commensurate to the guilt.

8. This fact was duly clarified by the writ Court in the review petition filed by the appellant/respondent. Thereafter, since the order of dismissal was set aside and the court had directed the appellant/bank to reinstate the respondent, thereafter, pass an order of punishment, it would certainly not mean that the order of dismissal would relate back to the date on which it was passed. The opinion of the writ Court that while setting aside the dismissal order, it would be taken that it had never existed in the eye of law, therefore, the respondent/petitioner is entitled to back-wages is not tenable. The order of punishment was only set aside on technical grounds being not commensurate to the guilt but the enquiry against the respondent/petitioner holding him guilty was upheld and the disciplinary authority

was directed to pass a fresh order of punishment lesser than that of dismissal/removal. In the circumstances it cannot be said that by setting aside the dismissal order the status quo ante would stand restored with all consequential effect. It was subject to outcome of imposition of the penalty to be imposed by the disciplinary authority. The disciplinary authority was within his competence to pass separate order with regard to back wages.

9. In **Pradeep S/o Raj Kumar Jain vs. Manganese Ore (India) Limited and others (2022) 3 SCC 683**, the question before the Supreme Court was as to whether the High Court directing reinstatement of the respondent/petitioner was justified in denying him the benefit of backwages. Reliance was placed on a three Judge Bench decision rendered in **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (2013) 10 SCC 324**, wherein, the principles for entitlement to backwages upon wrongful termination of service was restated. The Court held that in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. Para 38.1 reads thus:

"38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule."

10. Further, the Court held that the aforesaid rule is subject to the rider that while deciding the back wages, other factors have to be taken into consideration that is the nature of misconduct, the financial condition of the employer and similar other factors. It is required for the employee or workman whose services are

terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. Para 38.2 and 38.3 are extracted:

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. ...

11. Applying the principles in the facts and circumstances of this case, termination of the respondent/petitioner was not held to be wrongful by the writ Court. Rather, the writ Court was of the opinion that a lesser punishment would suffice having regard to the guilt of the respondent/petitioner. Further, respondent nowhere pleaded that he was not gainfully employed or employed on lower wages during the period of dismissal of service. Accordingly, it cannot be said that the guilt of the respondent/petitioner stood wiped off while he was punished, rather, reinstatement was directed as a consequence of imposition of a lesser punishment, the respondent/petitioner would not be entitled to back wages, nor, consequential benefits as a consequence of such reinstatement.

12. On specific query, learned counsel for the respondent/petitioner fairly submits that the respondent has not assailed the impugned writ Court order, to the extent the learned Single Judge upheld the enquiry and the guilt of the petitioner.

13. In the circumstances, while imposing lesser punishment, in the opinion of the disciplinary authority the respondent is not entitled to wages for the period he has not performed his duties would be justified in view of Deepali Gundu (supra).

14. The impugned order is, accordingly, set aside to the extent it directs payment of back wages with all consequential benefits. Having regard to the fact that the respondent/petitioner was out of employment for eight long years, it would be equitable that 30% of back wages be paid to the respondent/petitioner for the period he was out of employment. The same shall be computed and released by the appellant-bank within three months from the date of filing of certified copy of this order.

15. No cost.

(2023) 5 ILRA 1581
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 1078 of 2023

Imran Khan		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:
 Sri Akhilesh Kumar, Sri Akhilesh Chandra Shukla

Counsel for the Respondents:
C.S.C.

Civil Law - Service Matter - Compassionate Appointment - Married brother - Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 - Rule 2 clause (c) sub-clause (iv), 'Unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried' - Writ petition filed seeking to declare the expression 'unmarried' in the said Rule ultra vires. Held: Rule-making authority included brothers/sisters of the deceased Government servant in the definition of family provided they were unmarried, and at the same time, the Government servant was also unmarried. If the Government servant is married, then he has a dependent wife/children who are primarily his responsibility. The Court cannot sit in appeal over the judgment and wisdom of the employer in not including unmarried brothers and sisters within the definition of family of a married Government servant. Neither would the Court under Article 226 of the Constitution have any role in determining as to which family member should be included/excluded from the definition of family for the purpose of compassionate appointment. Court cannot suggest the manner in which the rule-making authority should structure or restructure the definition of family. Nothing to show as to how the exclusion of unmarried brothers/sisters from the definition of family of a married Government servant is manifestly arbitrary. Impugned Rule would not fall within the embargo of Article 14 of the Constitution of India. (Para 18, 19)

Dismissed. (E-5)

List of Cases cited:

1. Mohd Ikram Vs St. of U.P. & anr., Writ-A No. 59704 of 2012, decided on 19.11.2012

2. State of T.N. Vs P. Krishnamurthy, (2006) 4 SCC 517

3. Cellular Operators Association of India & ors. Vs Telecom Regulatory Authority of India & ors., (2016) 7 SCC 703

4. Indian Express Newspapers (Bombay) (P) Ltd. Vs U.O.I., (1985) 1 SCC 641

5. Shayara Bano Vs U.O.I. & ors., (2017) 9 SCC

6. Khoday Distilleries Ltd. & ors. Vs St. of Karn. & ors., (1996) 10 SCC 304

7. Sharma Transport Vs Government of A.P. & ors., (2002) 2 SCC 188

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard learned counsel for the parties.

2. By the instant petition, petitioner seeks to declare the expression "*unmarried*" ultra vires, in sub-clause (iv) of clause (c) of Rule 2 of Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. Further, petitioner seeks quashing of the order dated 7 September 2020, passed by the second respondent, Senior Superintendent of Police, Bulandshahar, rejecting the application submitted by the wife of the deceased-employee seeking appointment of the petitioner (brother-in-law) under the Rules, 1974.

3. The facts briefly giving rise to the instant writ petition is that the brother of the petitioner, namely, Javed Khan, working as constable in civil police, unfortunately died-in-harness on 27 August 2021, in an accident. The deceased-employee left behind his wife, aged about,

33 years and three minor sons, aged about, 10, 9 and 5 years, respectively. Apart from his family, the deceased-employee left behind his parents and three brothers, including, the petitioner. The third respondent/wife of the deceased-employee made an application on 12 August 2022, to the second respondent, requesting that petitioner be given compassionate appointment under Rules, 1974, in lieu of her, as he was looking after her minor children after the death of her husband. It is further stated that petitioner is unmarried and was dependent on her husband. The application came to be rejected by the impugned order dated 7 September 2022, passed by the second respondent, recording therein that petitioner does not fall within the definition of "family" under Rules, 1974, being unmarried brother of the deceased-employee who was married.

4. Reliance has been placed by the learned counsel for the petitioner on the decision rendered by the Single Judge in **Mohd Ikram Versus State of U.P. and another**².

5. The definition of "family" reads thus:

"2(c) "family" shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons/adopted sons;

(iii).....

(iv) Unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government

servant, if the deceased Government servant was unmarried."

6. Rules, 1974 came to be amended from time to time³. However, sub-clause (iv) continued as such. Accordingly, unmarried brothers/sisters of married government servant was not included in the definition of family.

7. In the given facts, the impugned Rule remains the same, insofar, it relates to the petitioner, prior to the amendment and thereafter. Sub-clause (iv) of Rule 2 (c), mandates that unmarried brothers dependent on the deceased Government servant, "if the deceased Government servant was unmarried" would fall within the definition of the expression "family". Petitioner is unmarried but as per his case, his brother/deceased employee was married having a wife and three sons. In other words, the deceased employee was not unmarried i.e. not having a family, but, otherwise.

8. Learned counsel for the petitioner submits that the expression "unmarried" brothers/sisters of the deceased "unmarried" Government servant in sub-clause (iv) is manifestly arbitrary, accordingly, violative of Article 14 of the Constitution of India.

9. It is submitted that unmarried brother can be dependent upon the married Government servant apart from his family i.e. wife and children. In this backdrop, it is submitted that sub-clause (iv) of Rule 2(c) is manifestly arbitrary while imposing the condition that "unmarried" brother cannot be dependent upon a married deceased employee.

10. The learned Standing Counsel for the State submits that a married Government servant has a separate and distinct family and the unmarried brothers/sisters cannot be said to be dependent upon of the married government servant. His first obligation is towards his own family. In the facts of the case petitioner has other brothers and parents. Petitioner is dependent upon them. The writ petition lacks merit.

11. Rival submissions fall for consideration.

12. The question that arises for consideration is as to whether the impugned Rule i.e. sub-clause (iv) of Rule 2(c) is manifestly arbitrary/unreasonable to render it violative of Article 14 of the Constitution of India.

13. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who challenges it to show that it is ultra vires/invalid. It is also well recognized that subordinate legislation can be challenged under any of the following grounds:

"(a) Lack of legislative competence to make the sub-ordinate legislation.

(b) Violation of Fundamental Rights guaranteed under the Constitution of India.

(d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the Court might well say that the legislature never intended to give authority to make such rules)."

(Refer: State of T.N. vs. P. Krishnamurthy⁴ & Cellular Operators Association of India and others vs Telecom Regulatory Authority Of India and others⁵)

14. One of the tests for challenging the constitutionality of subordinate legislation is that the subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available to challenge plenary legislation. **(Refer: Indian Express Newspapers (Bombay) (P) Ltd. vs. Union of India⁶)**

15. In **Shayara Bano Versus Union of India and others⁷**, Justice Rohinton Fali Nariman, upon examining the precedents, was of the opinion that there is no rational distinction between two types of legislation i.e. subordinate legislation and plenary legislation when it is challenged under Article 14. Para 101 reads thus:

"101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would

apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

16. That takes us to consider the test of 'manifest arbitrariness'. It is well explained in **Khoday Distilleries Ltd. and others vs. State of Karnataka and others**⁸, which reads thus:

"13. . . . The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In the case of *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* [(1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. **A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary" . . . In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But**

subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."
(emphasis supplied)

17. Also in **Sharma Transport vs. Government of A.P. and others**⁹, the Supreme Court held as follows:

"25. . . . The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. **In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone. . . ."**

(emphasis supplied)

18. In the backdrop of the aforementioned proposition of law, the rule making authority included brothers/sisters of the deceased Government servant in the definition of family provided they were unmarried and at the same time the Government servant was also unmarried. In other words, if the Government Servant is married then he has a dependent wife/children who are primarily his responsibility. The expression 'unmarried' in the impugned Rule appears to have been incorporated with a purpose that a married Government servant would have a family of his own, therefore, in the opinion of the rule making authority the unmarried

brothers and sisters cannot be said to be dependent on the married Government servant in the sense that dependency of wife/children is primarily to the exclusion of brothers/sisters of the Government Servant. The married brothers/sisters certainly would have independent family from that of the Government servant.

19. The Court cannot sit in appeal over the judgment and wisdom of the employer in not including unmarried brothers and sisters within the definition of family of a married Government servant. Neither, the Court under Article 226 of the Constitution would have any role in determining as to which family member should be included/excluded from the definition of family for the purpose of compassionate appointment. The Court cannot suggest the manner in which the rule making authority should structure or restructure the definition of family. The learned counsel for the petitioner is unable to show as to how exclusion of unmarried brothers/sisters from the definition of family of married Government servant is manifestly arbitrary.

20. In the given facts, it is not in dispute that the petitioner is having brothers, as well as, his parents. Further, the deceased employee has left behind his wife and three minor children. In the circumstances, it cannot be said having regard to the definition of family that petitioner was dependent upon the deceased government servant. There is a distinction between someone being dependent and the other person receiving financial assistance. Petitioner was aged about 25 years at the death of the Government servant and presently aged about 29 years. Petitioner may have been receiving financial assistance intermittently but that would not

make him dependent on his brother, having regard to the fact that the deceased Government servant has a family of his own.

21. The impugned Rule may appear to be arbitrary by excluding the unmarried brothers/sisters from the definition of family of a married Government servant but that is not sufficient to make the Rule manifestly arbitrary so as to declare the Rule arbitrary under Article 14. The Rule is neither irrational, and/or, without adequate determining the principle or capricious to exclude unmarried brothers/sisters. Neither the impugned Rule is unreasonable in the sense of not being reasonable or rational. Merely alleging that the Rule is arbitrary would not be a sufficient ground to bring it within the embargo of Article 14 of the Constitution of India. The subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution i.e. not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will of the authority alone. The impugned Rule cannot be held to be manifestly arbitrary merely for the reason that it is not of universal application to the siblings of the Government servant but only confined to unmarried Government servant and unmarried brothers/sisters.

22. **Mohd Ikram** (supra) while observing "there is no embargo that the deceased Government servant should be an unmarried person is on misreading of sub-clause (iv) of Rule 2(c). In the facts arising therein, the deceased/Government servant was a married person, therefore, the unmarried brother of the deceased Government servant stands excluded from

the definition of family. The decision, in **Mohd Ikram** (supra), is per incuriam, accordingly overruled.

23. Having regard to the discussions hereinabove, the writ petition being devoid of merit is, accordingly, **dismissed**. The impugned Rule would not fall within the embargo of Article 14 of Constitution of India.

24. The dismissal of the writ petition, however, would not preclude the respondent-wife of the deceased Government servant from making an application for compassionate appointment. In case such an application is made, the same shall be considered by the competent authority on merit.

25. No cost.

(2023) 5 ILRA 1587
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.04.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 6062 of 2023

Prabhat Kumar Tiwari **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri Seemat Singh

Counsel for the Respondents:
C.S.C.

Civil Law - Service Matter - Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service (Second Amendment) Rules, 2016 - Rule 10

provides 'Age-10. A candidate for direct recruitment must have attained the age of 21 years and must not have attained the age of 28 years on the first day of July of a calendar year in which vacancies for direct recruitment are advertised'. Petitioner challenged the validity of Rule 10. Petitioner, was born on 01 July, consequently attained the age of 28 years and one day on the cutoff date; hence, he was hit by Rule 10. Held: Petitioner was unable to show how the amendment in the Rules of 2016 makes Rule 10 manifestly arbitrary, merely because the rule-making authority does not want a candidate for the post of Sub-Inspector who has attained the age of 28 years on the cutoff date to be considered eligible for the post. (Para 24)

Dismissed. (E-5)

List of Cases cited:

1. State of T.N. Vs P. Krishnamurthy, (2006) 4 SCC 517
2. Cellular Operators Association of India & ors. Vs Telecom Regulatory Authority of India & ors., (2016) 7 SCC 703
3. Indian Express Newspapers (Bombay) (P) Ltd. Vs U.O.I., (1985) 1 SCC 641
4. Khoday Distilleries Ltd. & ors. Vs State of Karnataka & ors., (1996) 10 SCC 304
5. Sharma Transport Vs Government of A.P. & ors., (2002) 2 SCC 188
6. U.O.I. Vs Pushpa Rani & ors., (2019) 9 SCC 242
7. Chandigarh Administration Vs Usha Kheterpal Waie & ors., (2011) 9 SCC 645
8. Maharashtra Public Service Commission Vs Sandeep Shriram Warade, (2019) 6 SCC 362
9. Punjab National Bank Vs Anit Kumar Das, 2020 SCC Online SC 897

10. Zahoor Ahmad Rather Vs Seikh Imtiyaz Ahmad, (2019) 2 SCC 404

11. Sanjay Kumar Manjul Vs Chairman, UPSC, (2006) 8 SCC 42

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri Seemant Singh, learned counsel for the petitioner and learned Standing Counsel for the State-respondent.

2. Petitioner applied for the post of Sub-Inspector (Civil Police) and other equivalent post pursuant to Direct Recruitment 2020-21 initiated vide Notification dated 25 February 2021, by the second respondent, Uttar Pradesh Police Recruitment and Promotion Board, Lucknow (for short "Board").

3. By the instant petition, petitioner is challenging the validity of Rule 10 of Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service (Second Amendment) Rules, 2016 (for short "Rules 2016").

4. Rule 10 provides for eligibility in respect of age. The Rule as initially enacted reads thus:

*"Age-10. A candidate for direct recruitment must have attained the age of 21 years and **must not have attained the age of more than 28 years on the first day of July of a calendar year in which vacancies for direct recruitment are advertised:***

Provided....."

5. The Rule subsequently came to be amended in following terms. The amended Rule reads thus:

*"Age-10. A candidate for direct recruitment must have attained the age of 21 years and **must not have attained the age of 28 years on the first day of July of a calendar year in which vacancies for direct recruitment are advertised:***

Provided....."

6. Petitioner is aggrieved that as per Rule 10 of Rules 2016, a candidate must not have attained the age of 28 years on the first day of July of a calendar year. In other words, the candidate must be aged less than 28 years i.e. the candidate attaining the age of 28 years on 30 June at 12.00 P.M. becomes ineligible as he would cross 28 years on first day of July of the calendar year. As per the earlier Rule it was mandated that the candidate must not have attained the age of more than 28 years on the first day of July of the calendar year, meaning thereby, the candidate who has attained 28 years of age on first day of July was eligible. In other words, the Rule under challenge mandates that the candidate must be below 28 years of age as on first July of the calendar year. The petitioner, herein, was born on 01 July, consequently, attained the age of 28 years and one day on the cut of date i.e. he had attained the age of 28 years, hence, hit by Rule 10.

7. The afore extracted Rule is under challenge.

8. In this backdrop, it is submitted that the Rule 10 is manifestly arbitrary and is liable to be declared ultra vires of Articles 14 and 16 of the Constitution of India.

9. Rival submissions fall for consideration.

10. The question that arises is as to whether the impugned Rule is manifestly

arbitrary/unreasonable to render it violative of Article 14 of the Constitution of India.

11. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who challenges it to show that it is ultra vires/invalid. It is also well recognized that subordinate legislation can be challenged under any of the following grounds:

"(a) Lack of legislative competence to make the sub-ordinate legislation.

(b) Violation of Fundamental Rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

*(f) **Manifest arbitrariness/unreasonableness (to an extent where the***

Court might well say that the legislature never intended to give authority to make such rules)."

(Refer: State of T.N. vs. P. Krishnamurthy¹ & Cellular Operators Association of India and others vs Telecom Regulatory Authority Of India and others²)

12. One of the tests for challenging the constitutionality of subordinate legislation is that the subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available to challenge plenary legislation. **(Refer: Indian Express Newspapers (Bombay) (P) Ltd. vs. Union of India³)**

13. That takes us to consider the test of 'manifest arbitrariness'. It is well explained in **Khoday Distilleries Ltd. and others vs. State of Karnataka and others⁴**, which reads thus:

*"13. . . . The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In the case of Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [(1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. **A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary"** . . . In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in*

conformity with the statute or that it offends Article 14 of the Constitution."
(emphasis supplied)

14. Also in **Sharma Transport vs. Government of A.P. and others**⁵, the Supreme Court held as follows:

"25. . . . The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. **In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone. . . .**"

(emphasis supplied)

15. It is well settled that the power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any Constitution or statutory provision or is patently arbitrary or is vitiated due to mala fides. It is settled legal position that matters relating to creation and abolition of posts formation or structuring and restructuring of cadres, prescribing mode of recruitment and qualifications, criteria of selection, evaluation of candidates/employees falls within the exclusive domain of the employer.

16. In **Union of India vs. Pushpa Rani and others**⁶, it was held that Court and Tribunals can neither prescribe the

qualifications nor sit in appeal over the judgment of the employer laying down the criteria and methodology of recruitment and selection. Paragraph 37 reads thus:

"3.....What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. **The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The Court has no role in determining the methodology of recruitment or laying down the criteria of selection.** It is also not open to the Court to make comparative evaluation of the merit of the candidates. **The Court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration."**

(emphasis supplied)

17. Similarly, in **Chandigarh Administration vs. Usha Kheterpal Waie and others**⁷, Supreme Court, in paragraph 22, observed thus:

"22. It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. The courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the authority concerned so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post

and are not violative of any provision of the Constitution, statute and rules. [See J. Rangaswamy vs. Govt. of A.P. (1990) 1 SCC 288 and P.U. Joshi vs. Accountant General (2003) 2 SCC 632]. In the absence of any rules, under Article 309 or statute, the appellant had the power to appoint under its general power of administration and prescribe such eligibility criteria as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of Ph.D. is unreasonable."

18. It is settled principle of law that the employer is at liberty to legislate and provide the conditions of recruitment and selection, including, age. The Court would not substitute the discretion of the employer until it is shown that the Rule itself is inherently arbitrary to be violative of Article 14. No such ground has been raised while challenging the constitutional validity of Rule 10 of Rules 2016.

19. Accordingly, the employer has the sole discretion to prescribe qualification, age and decide the mode of recruitment. The Court under the garb of judicial review would not substitute the Rule making authority to decide what is best suited for the employer in the recruitment process. Having regard to the nature of duty, the selected candidates have to perform, it is always open to the employer to provide the upper age limit. Mere reduction of the age by one day would not render the Rule 10 manifestly arbitrary to make it contrary to the Constitution.

20. In **Maharashtra Public Service Commission vs. Sandeep Shriram Warade**⁸, the Court observed as under:

"9. The essential qualifications for appointment to a post are for the

employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. In no case can the Court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."

21. In **Punjab National Bank vs. Anit Kumar Das**⁹, the Court observed as under:

"21. it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the Courts to consider and assess. A greater latitude is permitted by the Courts for the employer to prescribe qualifications for any post. There is a rationale behind it. Qualifications are prescribed keeping in view the need and interest of an Institution or an Industry or an establishment as the case may be. The Courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications....."

22. Similarly, in **Zahoor Ahmad Rather vs. Seikh Imtiyaz Ahmad**¹⁰, Supreme Court made the following observation:

"27. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision making. The state as a public employer may well take into account social

perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily"

23. Supreme Court similarly in **Sanjay Kumar Manjul vs. Chairman, UPSC¹¹**, observed as under:

"25. The statutory authority is entitled to frame statutory rules laying down terms and conditions of service as also the qualifications essential for holding a particular post. It is only the authority concerned who can take ultimate decision therefore.

27. It is well settled that the superior courts while exercising their jurisdiction under articles 226 or 32 of the Constitution of India ordinarily do not direct an employer to prescribe a qualification for holding a particular post."

(emphasis supplied)

24. On specific query, learned counsel for the petitioner is unable to show as to how the amendment in the Rules 2016 makes Rule 10 manifestly arbitrary merely for the reason that the Rule making authority does not want a candidate for the post of Sub-Inspector who has attained the age of 28 years on the cut of date to be considered eligible for the post.

25. Having regard to the discussions hereinabove, the writ petition being devoid of merit is, accordingly, **dismissed**.

(2023) 5 ILRA 1592
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.04.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 6089 of 2023

Satya Narain Dubey ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Kushwaha

Counsel for the Respondents:
A.S.G.I.

Civil Law - Service Matter - Railway Servants (Discipline & Appeal) Rules, 1968 - Rule 14(1) - Where any penalty is imposed on a Railway servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit. Issue: Whether the disciplinary authority is required to pass a reasoned and speaking order under Rule 14(1) of the Rules, 1968? Held: The requirement of the Rule mandates the disciplinary authority to 'consider the circumstances' of the case, i.e., the trial court judgment leading to the conviction of the officer. The conduct/role which led to the conviction of the officer on a criminal charge has to be considered. The disciplinary authority is not required to enter into the merits/evidence of the trial proceedings. *The Rule does not mandate the authority to pass a reasoned and speaking order.* The disciplinary authority is not required to sit in appeal on the findings returned by the trial court convicting the government servant. In the instant case, the order of punishment imposed by the disciplinary authority categorically records that the explanation of the petitioner was considered and that the charge against the petitioner in the trial was duly proved. The Court held that it was sufficient compliance with Rule 14(1) of the Rules, 1968. (Para 16, 17)

Dismissed. (E-5)

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard learned counsel for the petitioner - applicant and learned counsel for the Union of India / Railway Department.

2. The present writ petition is directed against the judgment and order dated 28.03.2022, passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad (for short, "Tribunal"), in Original Application No.330 /1393 of 2011, (Satya Narayan Dubey versus Union of India and others).

3. The services of the petitioner came to be terminated pursuant to Rule 14(1) of the Railway Servants (Discipline & Appeal) Rules, 1968, (for short "Rules, 1968"), on being convicted by the learned trial Court under Sections 409 & 477-A IPC and 13(2) & 13(1) of the Prevention of Corruption Act to undergo 7 years, 2 years and 5 years of rigorous imprisonment besides imposition of fine.

4. Petitioner has since been bailed out by the Appellate Court. The learned Tribunal was of the view that none of the orders passed either by the disciplinary authority, appellate authority or the revisional authority qualify as reasoned and speaking order, but having regard to the fact that the petitioner being convicted by the trial Court and the penalty imposed thereof upon him is sustainable.

5. Relevant portion of paragraph nos.5 and 6 of the impugned order is extracted:-

"5. No doubt we are of the firm view that none of the three orders i.e. the

order of the disciplinary authority, the appellate authority and the revisionary authority would qualify as reasoned and speaking orders, we have also to take cognizance of the fact that the applicant has been convicted by the competent Criminal Court, and even through the orders suffer from legal infirmity, the root cause of the penalty of removal from service sustains. Learned counsel for the applicant submits that the applicant has preferred an appeal against his conviction, which is still pending.

6. In the light of the peculiar facts and circumstance of the case it would not be appropriate to award any relief to the applicant even though he may have been removed from service by way of cryptic and non speaking order. Therefore, since no relief is possible at this juncture, this OA stands disposed. The applicant would be at liberty to revive the same in case he manages an adequate and appropriate relief in his criminal appeal."

6. Petitioner after being released on bail, appeared before the authority and submitted a copy of the order of the trial Court, pursuant thereof, a show cause notice dated 01.11.2007, came to be issued calling upon the petitioner to file objection / representation to the proposed penalty of removal from service. Pursuant thereof, petitioner appeared and filed his objection dated 08.11.2007, wherein, a cryptic reply was given that he is not satisfied with the judgment and order passed by the CBI Court. Further, it is stated that he has filed an appeal which has been admitted, consequently, prayed that his case for reinstatement be considered sympathetically.

7. The disciplinary authority vide order dated 18.12.2007, rejected the

representation / explanation furnished by the petitioner after carefully considering the explanation and was of the opinion that the charge in the criminal trial against the delinquent employee was duly proved. Accordingly, punishment of removal came to be imposed. The petitioner filed an appeal followed by revision, the same came to be dismissed.

8. In this backdrop, it is submitted that the learned Tribunal returned a finding that the impugned orders imposing punishment upon the petitioner do not qualify as reasoned and speaking order, therefore, the matter should have been remitted to the disciplinary authority to pass a fresh order in terms of the Rule 14 (i) of the Rules, 1968, which mandates that disciplinary authority may consider the circumstance of the case and make such order thereon.

9. The short question that arises for consideration is as to whether disciplinary authority is required to pass a reasoned and speaking order under Rule 14(i) of Rules, 1968.

10. The services of the petitioner came to terminated under Rule 14 (i) of CCS (CCA) Rules, 1968 (for short "Rules, 1968")

Rule 14 of the Rules, 1968, is extracted:-

"14. Special procedure in certain cases

Notwithstanding anything contained in Rules 9 to 13:

(i) where any penalty is imposed on a Railway servant on the ground of

conduct which has led to his conviction on a criminal charge; or

(ii)

(iii)

The disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit :

[Provided that the Railway servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case falling under Clause (i).]

Provided further that the Commission shall be consulted, where such consultation is necessary, before any orders are made in any case under this rule.] "

11. When the disciplinary authority provides the reason behind his decision, the decision is treated as an reasoned decision. Speaking order or reasoned order is considered the third pillar of natural justice. Speaking orders are essential for judicial review. Circumstances of the case is a piece of evidence that indicates the probability or improbability of an event (such as crime).

12. Admittedly, petitioner came to be convicted in a corruption case, on a complaint made by the Railways, while petitioner was the Section Engineer. In matters pertaining to corruption there is not much for the disciplinary authority to consider the circumstances of the case as a detailed finding of fact along-with the evidence in support thereof was considered by the trial Court in its judgment and order passed against the petitioner in criminal case under Indian Penal Code and Prevention of Corruption Act.

13. It is not the case of the petitioner that he came to be convicted for offences under the Indian Penal Code alone. In that event the disciplinary authority was bound to consider the circumstances, role and the conduct of the officer in commission of the offence. For instance, as to whether the role of the delinquent employee in commission of the offence, was only of exhortation and no more, the disciplinary authority in that event would consider the circumstance of the case while proposing to impose penalty upon the officer. In a case of direct role in commission of the crime the departmental punishment would be severe.

14. Cases of corruption stand on different footing there is not much for the disciplinary authority to consider the circumstances of the case involving the delinquent employee. The involvement of the petitioner in the commission of the offence of corruption is direct being the main kingpin.

15. We do not find merit in the submission of the learned counsel for the petitioner that a reasoned and speaking order should have been passed by the disciplinary authority.

16. Rule 14 in the case of conviction of the government servant is required to consider the "circumstances of case' and make such orders thereon. The Rule does not mandate the authority to pass a reasoned and speaking order. The disciplinary authority is not required to sit in appeal on the findings returned by the trial court convicting the government servant.

17. The impugned order of punishment imposed by the disciplinary authority categorically records that the

explanation of the petitioner was considered and the charge against the petitioner in the trial was duly proved. That is sufficient compliance of Rule 14 (i) of Rules 1968. The learned Tribunal misread the Rule 14 (i), requiring a reasoned and speaking order, which is not mandated under Rule 14 (i). The requirement of the Rule mandates that the disciplinary authority to "consider the circumstances" of the case i.e. trial Court judgement leading to the conviction of the officer. The conduct / role which has led to the conviction of the officer on a criminal charge has to be considered. The disciplinary authority is not required to enter into the merit / evidence of the trial proceedings. It is not the case of the petitioner that his role in the act of corruption, during the discharge of his duty and responsibility, was secondary and not primary.

18. We do not find any merit in the petition. The writ petition being devoid of merit, is accordingly, dismissed.

19. No cost.

(2023) 5 ILRA 1595
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.05.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 21096 of 2018

Vijay Pal & Ors. ...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:s
Sri Shyamal Narain, Sri Ravi Prakash Bhatt

Counsel for the Respondents:

Sri Vivek Kumar Rai, Sri Manish Pandey, Sri
Rajnish Kumar Rai

Hon'ble Rajendra Kumar-IV, J.)

Civil Law - Service Matter - Appointment - Rejection of Appointment - On the basis of expert opinion, the candidature of the petitioners was rejected with the remarks 'handwriting/thumb impression mismatch.' The decision of the Railways was based on the expert opinion alone, without affording an opportunity to the petitioners or confronting them with the material/opinion, i.e., the opinion of the Government Examiner for Questionable Documents (GEQD). **Held -** Had the petitioners been afforded an opportunity, they could, in their defense, have obtained an opinion of another expert to confront the Railways. The impugned order of cancellation of the candidature of the petitioners could not have been sustained solely on the opinion of the handwriting expert, which was obtained behind the back of the petitioners, without confronting them with the incriminating material and without being supported by any other evidence. The respondents' action was not in conformity with the principles of natural justice. The respondents were directed to appoint the petitioners to Group-D posts forthwith. (Para 25, 33, 34, 36)

Allowed. (E-5)

List of Cases cited:

1. Rajesh Kumar Vs U.O.I.& ors., 2014 (10) ADJ 672
2. Ran Vijay Singh & ors. Vs U.O.I. & ors., Writ A No. 2813 of 2017
3. U.O.I.& ors. Vs Ran Vijay Singh & ors., Special Appeal No. 1045 of 2018, decided on 8 May 2019
4. Bhupendra Singh Vs U.O.I.& ors., Writ A No. 35333 of 2016, decided on 30.10.2018

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

1. Heard Shri Shyamal Narain, assisted by Shri Ravi Prakash Bhatt, learned counsel for the petitioners and Shri Manish Pandey, learned counsel appearing for the respondent.

2. Petitioner/original applicants, herein, are challenging the judgment and order dated 1 May 2018, passed by the Central Administrative Tribunal Allahabad Bench, Allahabad (for short 'Tribunal'), whereby, their candidature for appointment on Group-D post has been rejected.

3. Railway Recruitment Cell, North Central Railway, Allahabad (for short 'RRC'), invited applications from eligible candidates for recruitment to Group-D posts, i.e., Khalasi, Helper, Trackman, Peon, Parcel Porter, Safaiwala, etc. under North Central Railway, vide advertisement No. 01/2013, dated 27 July, 2013.

4. Petitioners appeared for the written test and were declared successful. The select list was published on the official website of R.R.C. on 15 December 2015. Thereafter, petitioners appeared for the Physical Examination Test (for short 'P.E.T'), held between 10 March 2015 to 14 March 2015, finally, 2609 candidates, including the petitioners came to be declared successful in the P.E.T. Thereafter, all the candidates, including, petitioners were called for verification of the documents and medical examination. The select list published on the website on 15 December 2015, was accompanied by a note running in fourteen paragraphs. The paragraph relevant for the purposes of this case is extracted:

"During various stages of scrutiny and Document Verification 339

candidates found indulged in impersonation. It is roved following extant procedure that these candidates did not appeared inn the written examination but some one else appeared in place of these candidates or handwriting/thumb impression of these candidates did not match in various documents. Hence apart from cancellation of candidature of the 339 candidates they are being debarred from all Railways examination through out Indian Railways as well as criminal case may also be registered against them on case to case basis."

5. The candidature of the petitioners was rejected with the remarks 'handwriting/thumb impression mismatch'.

6. Aggrieved, petitioners approached the Tribunal by filing original application, being O.A. No. 1789 of 2015, Vijay Pal and others versus Union of India and others, which came to be dismissed by the impugned order dated 1 May 2018.

7. During pendency of the original application, an interim order dated 31 December 2015, was granted by the Tribunal directing the respondents to keep 23 Group-D posts vacant. The operative portion of the order is extracted:

"Having heard learned counsel for both sides, it appears that the grounds for rejection are stigmatic and therefore some opportunity ought to have been given to the applicants before rejecting their candidature by the respondents. Therefore, prima facie, a case for interim protection is made out. Accordingly, the respondents are directed to keep 23 posts vacant till the next date.

If the facts are otherwise, the respondents are at liberty to file stay vacation application."

8. During pendency of the original application, petitioners came to be issued memorandum dated 23 January 2016, stating therein, that though the candidature of the petitioners was already cancelled, however, petitioners were called upon by the respondents to show cause as to why they may not be debarred from all future R.R.C./R.R.B. examinations, further, why criminal case may not be instituted against them for indulging in malpractice to procure Government job by fraud and misrepresentation.

9. The notice alleged that the petitioners had resorted to impersonation, further, it was alleged that there was mismatch in the handwriting, and/or, thumb impression of the candidates. In other words, allegation against the petitioners was that they have resorted, by securing the services of someone else, in the written test on their behalf. The allegation levelled in the two memorandums of the same date is extracted:

"I. As confirmed by the Government Examiner of Questioned Documents, Hand writing on the Application Form and that on answer sheet (OMR)/verification sheets are of different person (s). It has been established that the candidate did not appear himself in the written examination or PET examination and rather somebody else appeared in the same on his behalf, which is a case of impersonation, a malpractice and an offence.

II. As you are aware bio-metrics attendance were obtained during each phase of examination. It is to bring into your notice that your thumb impression during document verification did not match with written and PET examination. It

means someone else had appeared in written and PET examination impersonating your candidature.”

10. Petitioners filed their objections to the show cause notice/memorandum denying the allegations of impersonation or mismatch in handwriting, and/or, thumb impression. The respondent-authority vide order dated 31 March 2016, rejected the objection stating that the reply submitted by the petitioners were not found satisfactory. Consequently, petitioners were debarred from taking future R.R.B./R.R.C. examinations for life.

11. Aggrieved, petitioners through an amendment application challenged the memorandum dated 22 January 2016 and the debarment order dated 31 March 2016.

12. The learned Tribunal, after exchange of pleadings and hearing the counsels for the respective parties, by the impugned order, partly allowed the original application of the petitioners. The impugned orders to the extent debarring the petitioners from future R.R.B./R.R.C. examinations for life was set aside. The decision of the respondents, however, cancelling the candidature of the petitioners was not interfered with.

13. The operative portion of the impugned order reads thus:

“24. In the circumstances, following the decision taken in the case of Santosh Kumar Tiwari (*supra*) to this case, we also come to the conclusion that from the facts and circumstances of the case based on the materials on record and as discussed in para 22, the respondents have not been able to establish the allegation of impersonation against the applicants, since

the allegation comprised of only mismatch of thumb impression or handwriting, without any mismatch of the signature of the applicants. In case of impersonation the mismatch in signature would have been detected also. **The mismatch of signature is not reported or detected for any of the applicants in this case. However, there is violation of the instructions of the examination as per the advertisement No. 1/2023, for which there is mismatch of handwriting or mismatch of thumb impression for the applicants and these mismatches have not been explained satisfactorily as the explanation in one applicant's explanation/reply at Annexure A-10 of the OA reveals.** In fact, there are such violations as mentioned in the Suppl. Affidavit filed by the applicants. Further, no specific reason has been indicated in the show cause notice or impugned order in support of the allegation of impersonation against any of the applicants. Hence, taking into accounts the facts of the case, we consider the cancellation of the candidature of the applicants for the advertisement No. 1/2013 to be just and proper. But the decision of the respondents to debar some of the applicants for all examinations of RRCs/RRBs is not at all justified based on the materials on record. Accordingly, the impugned orders dated 31.03.2016, debarring the applicants from all examinations of RRCs/RRBs is set aside and quashed. However, we uphold the decision/orders of the respondent No. 2 to cancel the candidature of the applicants for the examination pertaining to the advertisement No. 1/2013. Respondent No. 2 is directed to modify the penal action against the applicants accordingly. The interim orders in the case to keep 23 posts vacant in OA No. 1789/2015 and one post vacant in OA No. 73/2016 are vacated and if some of the applicants have appeared in

subsequent examinations provisionally by virtue of the interim orders, their candidature shall be considered by the respondent No. 2 as per the rules applicable for the said examination in view of the quashing of the punishment of debarment from all examinations of RRCs/RRBs as per this order.

25. *For the OA No. 73/2016, the allegation against the applicant is for mismatch of handwriting as verified by the GEQD like the case of the applicant No. 1 in the OA No. 1789/2015. The reply furnished to the show cause notice and enclosed at Annexure SA-2 of the Supplementary Affidavit filed by the applicant, does not give any convincing explanation for mismatch of handwriting. Hence, the finding as at para 24 will also be applicable for the OA No. 73/2016.*

26. *Before we part with the case, we notice that there appears to be no Rule or Regulation laying down the procedure to be followed by the RRC/RRB, in situations where there are discrepancies for a candidate like mismatch of handwriting or thumb impression or signature etc. or allegation of impersonation in the examination, as no such Rule/Regulation has been produced before us in this case. The respondents may consider to put in place an appropriate Rule/Regulation to deal with such situations in a just and fair manner as per the provision of law.”*

14. The coordinate Bench of this Court, on filing of the writ petition by the petitioners, passed an interim order dated 1 October 2018, staying the impugned order of the Tribunal until further orders and directed the respondents to keep 23 posts vacant and that would abide by the outcome of the writ petition. The

operative portion of the interim order is extracted:

“Having regard to the facts and circumstances of the case, until further orders, the impugned order dated 01.05.2018 passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad in O.A. No. 1789/2015 shall remain stayed and the respondents are directed to keep 23 posts vacant.”

15. Learned counsel for the respondents, on specific query, admits that the respondent-Railways have not filed writ petition challenging the order of the learned Tribunal, insofar as, the impugned order recorded a categorical finding with regard to impersonation that ‘... the respondents have not been able to establish the allegation of impersonation against the applicants, since the allegation comprised of only mismatch of thumb impression or handwriting without any mismatch of the signature of the applicants. In case of impersonation, the mismatch in signature would have been detected also. The mismatch of signature is not reported or detected for any of the applicants in this case...’

16. In the aforementioned backdrop, the learned counsel appearing for the petitioner submits that insofar as the allegation of impersonation levelled against the petitioners was held unworthy of belief by the learned Tribunal, rather, the allegation of impersonation was specifically rejected. The finding to that effect has attained finality as the same has not been challenged by the respondents.

17. It is, therefore, urged that after returning a categorical finding with regard to impersonation being unbelievable,

Tribunal committed an error in upholding the decision of the respondents to cancel the candidature of the petitioners at the examination. In other words, it is submitted that the petitioners had appeared for the examination and are entitled to appointment. In the circumstances, the question of mismatch of handwriting/thumb impression would not arise.

18. It is further submitted that the categorical finding recorded by the Tribunal that ‘... the respondents have not been able to establish the allegation of impersonation against the applicants...’ is contradictory for the reason that mismatch of handwriting, or, thumb impression, is possible in the event of impersonation.

19. It is further urged that it can safely be said that all the petitioners stand totally exonerated of the main charge of impersonation which was the substance and basis of the show cause notice/memorandum issued to them. It is further submitted that the candidature of the petitioners came to be cancelled prior to the issue of show cause notice/memorandum, accordingly, there is an element of pre-determination of mind of the respondent-Railways against the petitioners. The memorandum was confined to debarment from all future examinations for resorting to impersonation.

20. In the counter affidavit filed by the respondent, it is not being disputed that the petitioners herein were not confronted with the expert opinion or of the opinion of the Government Examiner for Questionable Documents (GEQD). It is admitted that on the allegations based on the opinion of the expert, memorandum was served upon the petitioners to show cause with regard to

their debarment and with not regarding the cancellation of their candidature in the examination. In other words, insofar as, cancellation of the candidature of the petitioners, was final as the memorandum was confined with their future debarment in RRB/RRC examinations. It is further stated that after considering the reply of the petitioners, the candidates came to be debarred. The candidature of the petitioners was cancelled due to the acts of irregularities/omissions noted in the impugned order. It is, however, not denied that material relied upon in non-suiting the petitioners, i.e., the expert opinion was not supplied to the petitioners, nor, filed before this Court or the Tribunal. In other words, the orders of cancellation of candidature came to be passed behind the back of the petitioners while cancelling their candidature, thereafter, upon notice, petitioners were debarred for all future RRB examinations.

21. It is not the case of the respondent-Railways that the show cause notice/memorandum was supported by any material, including, the opinion of the handwriting expert. Opinion of handwriting expert was not supplied in support of the memorandum to justify the allegation of mismatch of handwriting/thumb impression on the application form or on the subsequent papers pertaining to Written Examination/P.E.T. undertaken by the petitioners. The entire exercise was undertaken by the Railways behind the back of the petitioners.

22. The question that requires consideration is as to whether the respondents were justified on the available materials on record to hold petitioners guilty of impersonation, and/or, mismatch of handwriting/thumb impression on various documents.

23. In **Rajesh Kumar vs. Union of India and others¹**, this Court observed that handwriting expert opinion is at best an opinion, which is not conclusive proof of mismatch of handwriting or impersonation. Expert opinion has been considered to be of very weak nature, which requires corroboration from other material facts pertaining to the allegation.

24. This Court held as follows:

“Evidence of an expert is only an opinion. Expert evidence is only a piece of evidence and external evidence. It has to be considered along with other pieces of evidence. Which would be the main evidence and with is the corroborative one depends upon the facts of each case. An expert’s opinion is admissible to furnish the Court a scientific opinion which is likely to be outside the experience and knowledge of a Judge. This kind of testimony, however, has been considered to be of very weak nature and expert is usually required to speak, not to facts, but to opinions. It is quite often surprising to see with what facility, and to what extent, their views would be made to correspond with the wishes and interests of the parties who call them.”

25. The decision of the respondent is based on the expert opinion alone to establish guilt of impersonation, and/or, mismatch of handwriting/thumb impression without affording opportunity or confronting the petitioners with the material/opinion. Had it been so, the petitioners in their defence could also have obtained an opinion of the expert to confront the Railways. The impugned order of cancellation of the candidature of the petitioners could not have been sustained on the opinion of handwriting expert.

26. In **Ran Vijay Singh and others vs. Union of India and others²**, this Court in similar facts set aside the cancellation of the candidature and their debarment for three years from appearing in any examination of the Commission on the strength of an expert opinion.

“23. In the facts of the present case, despite allegation made in the notice dated 5.8.2015 about thumb impression, signatures and handwriting having not tallied, the respondents have confined their conclusion to the opinion of the handwriting expert. Such opinion cannot be construed as being conclusive.

24. In the present case not only the petitioners have been denied appointment but they are also debarred from appearing in any examination conducted by the Commission for three years. Such order of Commission is clearly stigmatic in nature. The order under challenge carries civil consequences also. Such order cannot be sustained merely on the strength of handwriting report, nature of which remains that of an opinion, and cannot be construed as conclusive.

25. The report of CFSL based upon handwriting expert’s opinion, moreover, has not been furnished to the petitioners. Petitioners consequently had no opportunity to controvert it.”

27. The decision rendered in Ran Vijay Singh (supra), was carried intra court appeal in Union of India and others vs. Ran Vijay Singh and others³, Division Bench observed as follows:

“At this juncture, we would also like to state that it is not the case of the

appellant-respondents that the process of selection suffers from mass-irregularity, but of unfair practices adopted by certain individuals.

Looking to this background also, we are of the considered opinion that while cancelling examination of the respondent-petitioners and further debarring him for three consecutive examinations the appellant should have supplied a copy of the opinion given by the handwriting expert. Non-supply of that is in violation of principles of natural justice.”

28. The aforementioned authorities came to be followed by the Division Bench in **Bhupendra Singh vs. Union of India and another**⁴, the relevant part of the order is extracted:

*“In both Ran Vijay Singh and Tulasi Ram Prajapati, the learned Judge found that the candidature of the petitioners could not have been unilaterally annulled without granting them an opportunity to rebut the findings recorded by the expert. These principles are clearly attracted to the facts of the present case. The submission of the learned Standing Counsel that the order is not stigmatic and there is no violation of Article 311 of the Constitution do not merit consideration since principles of natural justice would clearly apply in all situations where a person is visited with serious civil consequences. **Once the name of the petitioner stood included in the select list, his removal from the same on the allegation of impersonation must necessarily have been preceded by the issuance of a notice or at least an opportunity of hearing to the petitioner to establish that the adverse material which***

was relied upon by the respondents was not liable to be accepted. It is well settled that the opinion of an expert is not conclusive and remains just that, namely, an opinion.”

29. The respondents in the given facts of the case at hand were expected to confront the petitioners with the material relied upon against them, particularly, when the petitioners were being debarred from appearing in any further examination conducted by the RRB/RRC and their candidature was cancelled for the examination on mismatch of handwriting/thumb impression.

30. The opinion of the expert was required to have been viewed and considered with other materials available on record. The learned Tribunal has discarded the theory of impersonation setup by the respondent-Railways, then in that event, mismatch of handwriting/thumb impression of the petitioners becomes unsustainable, unless supported by any other material or evidence that petitioners have not appeared in the examination or have not filled the application form in their handwriting.

31. The respondent-Railways, in their counter affidavit, have not denied that at all stages of the examination, i.e., Written Test and P.E.T., thumb impression and signatures of the candidates was taken and the entire process was video-graphed. In this backdrop, it cannot be said that though the petitioners had appeared for the examination, yet at the same time, there was mismatch in handwriting/thumb impression.

32. It is not the case of the respondents that the petitioners, herein, had

not carried the relevant documents, including, identity card to the examination centre or had not participated in the P.E.T./Medical Examination.

33. In the circumstances, it cannot be said in absence of any other material available with the Railways, that it is a case of mismatch in handwriting/thumb impression. The inference of the Railways is based on an opinion without being supported by any other material, i.e., the petitioners had not appeared at different stages of the selection process.

34. In service jurisprudence, though Evidence Act is not applicable, the charge is not required to be proved beyond reasonable doubt, but on the principle of preponderance of probability, based on some material evidence against the petitioners. It is not a case of disciplinary proceedings, neither, it is a case set up by the Railways, that there was large scale irregularities in the examination process, only few candidates have been picked-up and their selections cancelled merely on an opinion obtained behind the back of the petitioners without confronting the petitioners with the incriminating material.

35. The respondent's action otherwise is not in conformity with the principles of natural justice, accordingly, the impugned order dated 1 May 2018, being stigmatic cannot be sustained.

36. Accordingly, the writ petition is **allowed**. Respondents are directed to appoint the petitioners on Group-D post forthwith.

37. It is clarified that no other ground or point was pressed by the counsels for the respective parties.

38. No cost.

(2023) 5 ILRA 1603
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.04.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 29840 of 2010
And
Writ-A No. 18844 of 2010

Madan Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhaqwati Prasad, Sri Alok Kumar Yadav

Counsel for the Respondents:
C.S.C.

**Service Law -Tubewell Mechanic -
Tubewell Mechanic Service Rules, 1951 -
Under Rule 9(B) of the 1951 Rules, the
minimum experience required for an ITI
holder is only 2 years. In the instant case
as per the advertisement notification, the
minimum qualification prescribed for
seeking appointment to the post of
Tubewell Mechanic was ITI with 5 years
of experience. Petitioner, an ITI certificate
holder, submitted an experience
certificate of 7 years and 4 months, but it
was later discovered that only 3 years and
4 months of this experience were after
obtaining the ITI certificate. Petitioner's
selection was cancelled. The petitioner
challenged the cancellation, on the ground
that under the Tubewell Mechanic Service
Rules, 1951, only 2 years of experience
after ITI is required and not 5 years, and
that a government circular cannot change
the rules. Court held that the petitioner
had accepted the terms and conditions as
mentioned in the advertisement
notification and could not now challenge
them after being found ineligible. (Para
19, 20, 21, 22)**

Dismissed. (E-5)

List of Cases cited:

The Director of Teacher's Training Research Education & anr. Vs O.M. Jessymol

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

1. With the consent of learned counsels for both the parties, these two petitions shall be heard together and disposed of with a common order.

2. Heard Sri Alok Kumar Yadav, learned counsel for the petitioner and Sri Satyendra Kumar Tripathi, learned Standing Counsel for the State-respondent nos.1 to 3.

3. Writ A No.29840 of 2010 has been filed seeking the following relief:-

"A. Issue a writ, order or direction, in the nature of certiorari, quashing the impugned dismissal order dated 31.03.2010 passed by the Respondent no.3 (Annexure No.21).

B. Issue a writ, order or direction, in the nature of mandamus directing the Respondents No.2 and 3 to allow the petitioner to work as Nalkoop Mistry, Nalkoop Anurakshan Khand, Bhadohi under Nalkoop Mandal of respondent No.2 and Division of respondent No.3.

E. Issue a writ, order or direction in the nature of mandamus declaring Paragraph-Ga of office memorandum dated 09.09.2008 issued by Chief Engineer as ultra-vires to Rule 9-Kha of the Service Rules."

4. Writ A No.18844 of 2010 has been filed seeking the following relief:-

a) Issue a writ, order or direction, in the nature of certiorari, quashing the impugned dismissal order dated 25.03.2010 passed by the Respondent no.2 (Annexure No.20).

B. Issue a writ, order or direction, in the nature of mandamus directing the Respondents No.2 and 3 not to interfere in the functioning of the petitioner as Nalkoop Mistry, Nalkoop Anurakshan Khand, Bhadohi under Nalkoop Mandal of respondent No.2 and Division of respondent No.3.

5. It is the case of the petitioner that he being ITI certificate holder applied for the post of Tubewell Mechanic in pursuance of the advertisement notification wherein minimum prescribed qualification for seeking appointment over the post of Tubewell Mechanic was mentioned as ITI and having 5 years of experience from the specified institutions as mentioned in the notification itself. The petitioner submitted the experience certificate of 7 years and 4 months for seeking appointment under the eligible candidate in pursuance of the eligibility criteria as prescribed under the advertisement notification. The petitioner was selected and joined on the said post on 29.05.2009.

6. On the complaint as well as writ petition preferred by the respondent no.4, the discrepancy and irregularity while conducting appointment is specifically in favour of the petitioner has been highlighted wherein it has been mentioned that the petitioner has submitted the experience certificate on 16.09.2008 is not as per prescribed in the advertisement notification.

7. After re-scrutiny of the experience certificate as submitted by the petitioner, it

has been revealed that the experience after ITI as obtained by the petitioner was only for 3 years and 4 months and before completion of ITI, it was 4 years.

8. The competent authority being the head of selection procedure decided vide order dated 25.03.2010 that experience as obtained by the petitioner before the ITI cannot be given any credence and as such the experience obtained by the petitioner after ITI is less than the prescribed experience in the advertisement notification dated 16.9.2008 and as such, the selection of the petitioner has been cancelled even after putting him in the final select list which culminated into joining in the services and rendered for few months. The precise ground for challenging the determination as drawn while passing the order dated 25.03.2010 as well as order dated 31.03.2010 that the experience as mentioned in the rules pertaining to the Tubewell Mechanic as mentioned in the Tubewell Mechanic Service Rules, 1951 wherein the minimum experience required for ITI holder is only minimum 2 years as prescribed under Rule 9(B) and as such, the rules framed under the powers extracted from the Article 309 of the Constitution of India cannot be substituted or supplemented by the office memorandum/Government Order and as such in pursuance of the Rule 9(B) of the 1951 Rules, the petitioner was having requisite qualification along with the experience as required for the post of Tubewell Mechanic and as such, the order dated 31.03.2010 passed by the respondent no.3 is contrary to the rules and the same is liable to be set aside.

9. Per contra, learned Standing Counsel vehemently opposed the prayer as made in the petition on the ground that the

petitioner never challenged the terms and conditions as defined in the advertisement notification dated 16.09.2008 wherein the minimum experience required for ITI holder was 5 years for seeking appointment over the post of Tubewell Mechanic, rather the petitioner participated in the same by way of producing experience certificate of 7 years and 4 months which was legally ignored by the competent authority since the experience of four years as mentioned by the petitioner, was before obtaining the certificate of ITI and as such, the same cannot be counted for the purposes of seeking appointment for the post of Tubewell Mechanic wherein the minimum qualification is ITI, the experience as obtained by the petitioner after holding the certificate of ITI can only be counted for seeking appointment over the said post.

10. It is the admitted case of the petitioner that the experience after having the minimum qualification as required under the advertisement notification was only three years and four months and as such, the same was not meeting the minimum experience as required through notification dated 16.09.2008 and as such, the selection of the petitioner was rightly cancelled by the competent authority.

11. After hearing the rival submissions as extended by the learned counsels, the only point is available for determining by this Court that whether the minimum experience as required for the post of Tubewell Mechanic notified vide advertisement notification dated 16.09.2008 was to be held justified mentioned in the notification in pursuance of the circular issued on 09.09.2008 through which the prescribed length of experience has been extended or the minimum experience mentioned mentioned

in the 1951 Rules may be taken into consideration by the competent authorities?

12. While substantiating the arguments as raised by learned counsel for the petitioner, it has been argued that the specific rules framed in shape of the 1951 Rules, any of the rules and provisions cannot be interfered with, altered, modified or determined contrary to the same by mere issuing a Government Order/circular by any authority of the State-respondents. The entire experience has to be carried out by the competent body who framed the rules itself.

13. In reply to the contentions and legal arguments as raised by the learned counsel for the petitioner, again the learned Standing Counsel vehemently argued that if the petitioner was aggrieved with the amending rules, he should have challenged the same at the time when he was intended to seek appointment over the post of Tubewell Mechanic wherein the prescribed minimum eligibility was ITI with 5 years of experience, it is the petitioner who applied for the same and after accepting all the minimum qualifications as required through advertisement notification and as such after cancelling the selection of the petitioner, the cause of action does not survive in his favour for challenging the circular through which the Rules have been modified or explained or clarified through the circular dated 09.09.2008. There is a much force in the arguments as raised by the learned counsel for the petitioner that the rules cannot be modified by mere issuing a circular or Government Order but at the same time, it is admitted case of the petitioner that he has never challenged any of the required eligibility criteria as mentioned in the advertisement notification dated 16.09.2008 whereas being the

eligible candidate under the prescribed eligibility criteria mentioned in the notification, he submitted his claim through an application along with requisite minimum experience certificate by way of submitting experience certificate of 7 years and 4 months, it is also admitted by the learned counsel for the petitioner that the experience after ITI was only for 3 years and 4 months.

14. Once, the petitioner submitted his application along with experience certificate, it clearly demonstrates that the entire terms and conditions mentioned in the advertisement notification was duly accepted by the petitioner, it is not the case of the petitioner that without accepting the minimum experience length as mentioned in the notification, he submitted his claim for seeking appointment over the post of Tubewell Mechanic and as such, after being declared not suitable for the post of Tubewell Mechanic on the ground of minimum experience as required through the advertisement notification, the legal ground available with the petitioner that the minimum experience as mentioned in the rules cannot be altered by way of issuing office memorandum/circular/order which held the orders impugned the petition as illegal.

15. The petitioner once accepted the terms and conditions as mentioned in the advertisement notification, he will not be permitted to take any ground whatsoever is available once he has been declared unsuccessful on the ground of re-scrutiny of the mandatory documents which were required to be submitted at the time of seeking appointment over the post of Tubewell Mechanic wherein it has been found that the experience certificate as submitted by the petitioner was

considerably less in nature as mentioned in the notification which was 5 years and experience certificate submitted by the petitioner was only 3 years and 4 months.

16. In support of the stand taken up by the petitioner he has placed reliance on the judgement passed by Hon'ble the Apex Court in the case of **The Director of Teacher's Training Research Education and another Vs. O.M. Jessymol**².

17. In the aforementioned Civil Appeal, the epigenes of the case starts from the challenge initiated by the teacher who obtained the Teacher's Training Certificate from the State of Nagaland and obtained less than 50% marks and as such, the appellant was treated ineligible for appointment as Secondary Grade Teacher at the time issuing the notification of advertisement for the post of teacher, the requisite 50% marks obtained in the Teachers' Training Certificate was mentioned but the same was silent in the rules whereupon the determination has been made by Hon'ble the Apex Court that once the position of requirement of minimum marks is silent in the rules, the same cannot be mentioned in the advertisement notification issued for appointment over the post of teachers.

18. In the present case, for requirement of minimum experience as mentioned in the rules is only 2 years but while issuing the advertisement notification for the same post mentioned in the advertisement notification was minimum experience of 5 years. The analogy and the ratio of the said judgement is clearly applicable in the instant matter but the case is slightly different with the matter which has already been decided by Hon'ble the Apex Court.

19. In the instant matter, the petitioner by way of accepting all the terms and conditions and requirements mentioned in the advertisement notification submitted his application for seeking appointment for the post of Tubewell Mechanic along with experience certificate of 7 years and 4 months which was letter on found that the experience actually obtained by the petitioner after holding the certificates of ITI was only 3 years and 4 months which is admitted to the petitioner.

20. In the matter as referred by learned counsel for the petitioner which has been decided by Hon'ble the Apex Court, the aspirants/candidates applied for the post of teachers were not holding the 50% marks in the Teachers' Training Certificate as mentioned in the advertisement notification but the same was not available in the rules and once she applied by way of disclosing the fact that she is not having 50% marks in the Teacher's Training Certificate and her candidature was rejected at the initial level itself then only the entire controversy has been raised and the same has been duly decided by Hon'ble the Apex Court.

21. In the instant matter, the petitioner knowingly each and everything submitted by way of adducing the experience certificate of 7 years and 4 months which clearly shows that the petitioner accepted the terms and conditions for acquiring the minimum experience of 5 years as mentioned in the advertisement notification.

22. In view of the abovementioned facts and circumstances and lengthy discussions upon the factual position, legal provisions as well as the dictum of the judgement of Hon'ble the Apex Court in the

aforesaid case, both the petitions stand dismissed.

(2023) 5 ILRA 1608
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.04.2023

BEFORE

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

Application U/S 482. No. 12717 of 2023

Neelam **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Sri Shashi Prakash Misra, Sri Jai Prakash Singh

Counsel for the Opposite Parties:

G.A., Sri Pramod Kumar Pandey

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 363, 366 and 120-B , The Protection of Children from Sexual Offences Act, 2012 - Section 2(d), 16/17 - proceedings under Section 376 I.P.C. and POCSO Act, cannot be quashed on the basis of a compromise between the accused and the victim. (Para - 10)

(B) Criminal Law - adjudication of cases involving gender related crimes - courts should not suggest or entertain any notions (or encourage any steps) towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction. (Para - 8)

Compromise application filed - signed by applicant, prosecutrix, first informant, and prosecutrix's mother and father - case against applicant - conspired with - to cause prosecutrix

to elope with a Class X student - application states - prosecutrix, informant, and husband do not want to pursue prosecution further - prosecutrix and her parents moved an application seeking to compromise. **(Para - 2,3)**

HELD:- No good grounds to quash ongoing trial proceedings based on the provided facts. **(Para - 11)**

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

List of Cases cited:

1. Aparna Bhat & ors. Vs St. of M.P. & anr., 2021 SCC OnLine SC 230
2. Pravin Kumar Singh & ors. Vs St. of U.P. Thru. Prin. Secy. Home Deptt. & anr., 2023 SCC OnLine All 131
3. Nardeep Singh Cheema @ Navdeep Singh Cheema Vs St. of Punj. & ors., CRM-M-2270-2020
4. Om Prakash Vs St. of U.P. & anr., 2023 SCC OnLine All 93

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

1. This application has been filed seeking to quash the proceedings of Special Sessions Trial No. 71 of 2018 (arising out of Case Crime No. 1888 of 2017 (State v. Neelam and others) under Sections 363, 366 and 120-B I.P.C. and Section 16/17 of the Protection of Children from Sexual Offences Act, 2012, Police Station - Bakhira, District - Sant Kabir Nagar, pending before the Court of the Additional Sessions Judge/Special Judge (POCSO Act), Sant Kabir Nagar.

2. The submission of the learned Counsel for the applicant is that a compromise application dated 13.12.2023 has been filed, signed by the applicant, the prosecutrix, as also the first informant and

her husband, that is to say, the mother and father of the prosecutrix. The case against the applicant is that she along with one Aman, conspired to cause the prosecutrix to elope with one Amiullah. The prosecutrix at the time when she eloped, was aged fifteen years and a student of Class X, reading in the local inter-college. It is true that a compromise application has been filed, which is signed by the informant, the prosecutrix, the prosecutrix's father and also by the applicant, where it is said that the prosecutrix, the informant and her husband do not want to pursue the prosecution any further. The prosecutrix's testimony during trial was recorded, where she testified as P.W. 2 on 10.05.2019. The relevant part of her testimony reads:

"अमिउल्लाह मुझे लेकर मुंबई गया वहाँ अमिउल्लाह मुझको लेकर एक जगह गया था और रात में मेरे साथ मेरी इच्छा के विरुद्ध बलात्कार किया और धमकी दिया किसी से कहोगी तो तुम्हारे भाई की हत्या कर देंगे। बलात्कार वाली बात मैंने डर के कारण महिला सिपाही को नहीं बताया था। अमन मुंबई में मिला था बस स्टेशन से "अमिउल्लाह के साथ कमरे पर ले गया। मुझे भागने में नीलम और अमन की साजिस थी।"

3. Now, much after that testimony, the prosecutrix and her parents have moved an application seeking to compromise on 13.12.2022.

4. Heard Mr. Jai Prakash Singh, Advocate holding brief of Mr. Shashi Prakash Misra, learned Counsel for the applicant, Mr. Pramod Kumar Pandey, learned Counsel appearing on behalf of opposite party no. 2 and Mr. Shashi Shekhar Tiwari, learned A.G.A. on behalf of the State.

5. The case under the Protection of Children from Sexual Offences Act, 2012

(for short, 'the Act of 2012') is not a private dispute or an offence of a kind that may be so limited to the interest of the informant and the accused, that the State may not have much to say about. To the contrary, the Act of 2012 is a special statute, which has been enacted with objects and reasons that read:

"STATEMENT OF OBJECTS AND REASONS

Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Further, article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the Study on Child Abuse: India 2007' conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children

are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences. and provision for establishment of Special Courts for speedy trial of such offences.

5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation.

6. The notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives."

6. The enacting clause of the Act reads as follows:

"An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial

of such offences and for matters connected therewith or incidental thereto.

WHEREAS clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

AND WHEREAS the State Parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent-

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials;

AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

Be it enacted by Parliament in the Sixty-third Year of the Republic of India as follows:-"

7. It is evident that the Act of 2012, is a special statute designed to suppress a particularly pernicious mischief in society, and that is, the engagement of children in sexual activities and their exploitation. A child is defined under Section 2(d) of the Act of 2012, as any person below the age of eighteen years. The collective conscience of the society and the legislative mandate whereby it has been translated into a law, are firm in their resolve to suppress sexual exploitation of children or their involvement in such activities. This being the purpose of the Act of 2012 and the object of its enactment, it ill lies in the mouth of the informant, or even the victim, to come up with a plea that they intend to compromise the prosecution. The prosecution is at the behest of the State and the informant or the prosecutrix have no say in it at all. Otherwise too, the prosecutrix was a minor at the time when the incident happened and it is not open to her to make small of an offence against society, merely because she was the victim of it.

8. This question has engaged the attention of the Supreme Court in **Aparna Bhat and others v. State of Madhya Pradesh and another, 2021 SCC OnLine SC 230**, where the following directions

have been issued by their Lordships of the Supreme Court:

"44. Having regard to the foregoing discussion, it is hereby directed that henceforth:

(a) Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused;

(b) Where circumstances exist for the court to believe that there might be a potential threat of harassment of the victim, or upon apprehension expressed, after calling for reports from the police, the nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim;

(c) In all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days;

(d) Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and must strictly be in accordance with the requirements of the Cr. PC. In other words, discussion about the dress, behavior, or past ?conduct? or ?morals? of the prosecutrix, should not enter the verdict granting bail;

(e) The courts while adjudicating cases involving gender related crimes, should not suggest or entertain any notions (or encourage any steps) towards

compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction;

(f) Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and

(g) Judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court."

(Emphasis by Court)

9. This Court had occasions to consider in **Pravin Kumar Singh and others v. State of U.P. Thru. Prin. Secy. Home Deptt. and another, 2023 SCC OnLine All 131**, the issue whether prosecutions under the Act of 2012 can be quashed on an application under Section 482 Cr.P.C founded on a compromise. In **Pravin Kumar Singh (supra)** it was held by Hon'ble Ajai Kumar Srivastava-I, J. thus:

"14. So far as the question of quashing of criminal proceeding of S. T. No.20 of 2014 "State vs. Pravin Kumar Singh and others" arising out of Case Crime No.345 of 2013, under Sections 376, 363, 366, 504, 506 I.P.C. and 3/4 POCSO Act, is concerned, Hon'ble Supreme Court in Narinder Singh and others vs. State of Punjab and another reported in (2014) 6 SCC 466, has specifically held that the matter under Section 376 I.P.C. is also such an offence, which, though committed in respect of a particular victim, cannot be termed to be a private dispute between the parties. It has serious adverse societal effect. Therefore,

any proceeding on the basis of alleged compromise of the accused vis-a-vis the victim cannot be quashed. Hon'ble Apex Court in State of Madhya Pradesh vs. Madanlal reported in (2015) 7 SCC 681 while repelling the acquittal on the basis of compromise in the matter pertaining to Sections 376 read with 511 I.P.C., has placed reliance upon principles laid down by three-Judge Bench in Shimbhu vs. State of Haryana reported in (2014) 13 SCC 318."

10. It has been held by the Punjab and Haryana High Court in similar terms in **Nardeep Singh Cheema @ Navdeep Singh Cheema v. State of Punjab and others**, CRM-M-2270-2020, decided on 07.09.2022. I also had occasion to consider this issue in **Om Prakash v. State of U.P. and another, 2023 SCC OnLine All 93**, where it was held that the proceedings under Section 376 I.P.C. and POCSO Act, cannot be quashed on the basis of a compromise between the accused and the victim.

11. On the conspectus of above facts, I do not find any good ground to quash proceedings of the ongoing trial.

12. This application is, accordingly, **rejected.**

(2023) 5 ILRA 1612

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 7730 of 2016

**Dr. Ashok Kumar Tomar
Versus
State of U.P. & Ors.**

**...Petitioner
...Respondents**

Counsel for the Petitioner:

Sri Siddharth Khare, Sri Ashok Khare

Counsel for the Respondents:

C.S.C.

(A) Civil Law – Constitution of India, 1950 - Article - 226 – Payment of Gratuity Act, 1972 – Sections 1(3)(c) & 2(e) - Writ

Petition – for quashing impugned orders by which authorities are denying Gratuity – petitioner was appointed as lecturer in an aided educational institution – thereafter, he applied and appointed as Principal – when he reached age of 50 years in 2009, he opted for voluntary retirement after completing 27 years, 9 months of service – all the voluntary retirement dues was accepted by the authorities and paid accept Gratuity – Petitioner filed PG Case before the Controlling Authority under PG Act, 1972 – allowed – St. Govt. challenged in appeal – appeal allowed – petitioner challenged the appellate court order including denied order of authorities – court finds that, in view of Amending Act, No. 47 of 2009 it cannot be said that the petitioner would fall under the exceptional or exclusion clause of the definition of 'employee' – and government order or regulation – 11 would not restrain a teacher from seeking voluntary retirement at the age of 58 year or prior thereto - held, petitioner is fully covered by the definition of employee so as to entitle him to get gratuity – writ petition allowed – directions issued for payment of gratuity with @ 9% interest per annum.

Writ Petition Allowed. (E-11)

List of Cases cited:

1. Birla Institute of Technology Vs St. of Jharkhand & ors. (2019 vol. 4 SCC 513),
2. Ahmedabad Private Primary Teachers' Assc. Vs Administrative Officer (2004 vol. 1 SCC 755),
3. Independent Schools' Federation of India Vs U.O.I. & ors. (2022 SCC Online SC 1113),

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Siddharth Khare, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The petitioner was appointed on the post of lecturer in 1982 in an aided educational institution. Thereafter, pursuant to the process issued for appointment on the post of Principal, the petitioner applied and was appointed on the post of Principal on 23.10.2002.

3. The date of birth of the petitioner being 5.11.1959, when he reached age of 50 years in 2009, he opted for voluntary retirement after completing the length of service of 27 years, 9 months and 28 days. The voluntary retirement of the petitioner was accepted by the authorities.

4. While the retirement dues of the petitioner were not being paid, petitioner filed Writ-A No.58376 of 2010, which was disposed of by this Court vide order dated 22.9.2010, whereby the Joint Director of Education, Saharanpur Region Saharanpur was directed to consider the grievance of the petitioner with regard to non-payment of his dues. Pursuant to the order dated 22.9.2010, passed by this Court, the Joint Director of Education, Saharanpur, passed an order dated 9.12.2010, whereby the payment of pension to the petitioner was granted, however the gratuity was refused. Thereafter, the petitioner filed P.G. Case No.2 of 2012 before the Controlling Authority under the Payment of Gratuity Act, 1972 (herein after referred to as 'the Act, 1972'). The said authority vide order dated 6.9.2013 directed the respondents to pay a sum of Rs.6,46,041, as the amount of gratuity to the petitioner.

5. Challenging the order dated 6.9.2013, the State filed Writ-C No.5108 of 2014, which was dismissed by this Court vide order dated 27.1.2014 on the ground of availability of alternative remedy by filing statutory appeal.

6. Thereafter, the respondents filed P.G.A. Appeal No.2 of 2014 before the appellate authority under the Act, 1972, which has been allowed by the impugned order dated 3.12.2015.

7. This petition was filed in the year 2016 and during the pendency of the writ petition, an affidavit was filed on behalf of respondents annexing therewith another order dated 11.9.2020, whereby the Deputy Director of Education (Intermediate), Saharanpur Division Saharanpur again denied gratuity to the petitioner by placing reliance upon Government Order dated 29.8.1981. The petitioner by means of an amendment application challenged the order dated 11.9.2020. The amendment application was allowed and, therefore, the said order is also under challenge.

8. Shri Siddharth Khare, learned counsel for the petitioner, submits that the order impugned is based upon wrongful interpretation of Section 2 (e) of the 1972 Act and authority has taken a wrong view that the petitioner falls within the exclusion clause of the definition 'employee', as he is an employee of the State Government. Shri Khare further submits that another ground taken for denying the gratuity to the petitioner is applicability of Government Order dated 29.8.1981, which, in fact, does not apply in the case of the petitioner. He further submits that even the subsequent order dated 11.9.2020 is based upon same proposition of the applicability of the Government Order dated 29.8.1981.

9. Shri Khare has referred to the definition of 'employee' as contained under Section 2 (e) of the Act, 1972, which reads as follows:

"(e) "employee" means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity."

10. He further submits that as per Section 1 (3)(c) of the Act, the provisions of the Act shall be applicable to such other establishments as the Central Government may by notification specify in this behalf. Shri Khare has placed reliance upon the notification F.No. S-42013/1/95-SS dated 3.4.1997, which reads as follows:

"F.No. S-42013/1/95-SS dated April 3, 1997.--In exercise of the powers conferred by clause (c) of sub-section (3) of Section 1 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specifies the educational institution in which ten or more persons are employed or were employed on any day preceding 12 months as a class of establishments to which the said Act shall apply with effect from the date of publication of this notification:

Provided that nothing contained in this notification shall affect the

operation of the notification of the Ministry of Labour, S.O. No.239, dated 8th January, 1982 (See above)."

11. He, therefore, submits that since educational institutions employing 10 or more persons are covered by the notification issued in exercise of powers under Section 1 (3)(c) of the Act, 1972, the ground taken for rejecting the claim of the petitioner by placing reliance upon Section 2 (e) becomes unsustainable. Shri Khare further points out that, later on, in the year 2009, the definition of 'employee', as contained in Section 2 (e) of the Act, 1972 was amended by Act No.47 of 2009 **with retrospective effect from 3.4.1997**, in the light of the aforesaid notification dated 3.4.1997.

12. In this regard, he has placed reliance upon the decision of Supreme Court in ***Birla Institute of Technology vs. State of Jharkhand and others***, (2019) 4 SCC 513, wherein the Supreme Court dealt with a contrary decision taken in the case of ***Ahmedabad Private Primary Teachers' Assn. vs. Administrative Officer***, (2004) 1 SCC 755. However, taking into consideration the retrospective effect of amendment made by amending Act No.47 of 2009, the Supreme Court held that reliance could not be placed upon the decision of Ahmedabad Private Primary Teachers' Assn. (supra). The Supreme Court also observed that though the constitutional validity of amending Act No.47 of 2009 was challenged before the Supreme Court in a writ petition, mere pendency of writ petition would not affect the constitutionality of the amending Act nor would it affect the rights of the parties concerned, unless the statute is declared ultra vires.

13. Shri Khare further argues that insofar as the constitutional validity of

amending Act No.47 of 2009 is concerned, the same has been upheld by the Supreme Court in its subsequent decision dated 29.8.2022 passed in the case of ***Independent Schools' Federation of India (Regd.) vs. Union of India and another***, 2022 SCC OnLine SC 1113.

14. Shri Khare has further placed reliance upon a decision of this Court in the Case of ***Sarnam Singh vs. Smt.Pushpa Devi and others*** [1986 UPLBEC 348], in which this Court has held that Committee of Management of an educational institution is not an agency or instrumentality of the State Government nor does a teacher hold a post under the Government.

15. In view of the above, the contention of learned counsel for the petitioner is that the first ground taken in the order impugned that the petitioner would fall in the exceptional clause of Section 2 (e) of the Act, 1972 and, therefore, not entitled to get payment of gratuity, becomes unsustainable.

16. Insofar as the second ground contained in the order impugned that is applicability of the Government Order dated 29.8.1991 is concerned, Shri Khare Submits that the said Government Order deals with a situation where the teacher concerned gives an option for retirement at the age of 58 years. He, therefore, submits that the Government Order has no application in the case of the petitioner nor does it affect those matters where a Principal or a Teacher opts for voluntary retirement at any age.

17. Respondents have filed counter affidavit in which a stand has been taken that the retirement age of the teachers has been extended from 60 years to 62 years

and since the petitioner opted for 60 years as age of retirement in place of 58 years, he would not be entitled for gratuity.

18. Learned Standing Counsel has vehemently argued that petitioner is estopped from claiming payment of gratuity as despite giving an option of retirement at the age of 60 years, he took voluntary retirement at the age of 50 years. Learned Standing Counsel, with reference to paragraph-17 of the counter affidavit, has argued that the petitioner could not abandon the services prior to 60 years.

19. After hearing learned counsel for the parties, I find that in view of amending Act No.47 of 2009, which came into force retrospectively on 3.4.1997 and in view of the judgment of Supreme Court in Birla Institute of Technology (supra) and Independent Schools' Federation of India (supra), it cannot be said that the petitioner would fall under the exceptional or exclusion clause of the definition 'employee'. I find that petitioner is fully covered by the definition of employee so as to entitle him to get gratuity. Insofar as the applicability of Government Order dated 29.8.1981 is concerned, I do not find that it is a restriction in claiming voluntary retirement by a teacher concerned. The said Government Order only provides for submitting option for retirement either at the age of 58 years or 60 years and has nothing to do with the aspect of voluntary retirement. I further find from perusal of the said Government Order that it is accompanied by Regulations, Clause-4 whereof reads as follows:

"४. इस नियमावली की विज्ञप्ति की तिथि के उपरांत नियुक्ति अध्यापकों द्वारा

स्थायीकरण की तिथि के दो वर्षों के अंदर ५८ वर्ष के आयु पर सेवानिवृत्त होने के पक्ष में अपना विकल्प न देने पर यह नियमावली उस पर लागू नहीं होगी . विकल्प का एक बार प्रयोग कर लेने पर वह अंतिम समझा जायेगा."

20. A perusal of aforesaid Clause-4 shows that the regulations will not apply for those teachers, who did not give option for retirement at the age of 58 years. Regulation-11 deals with voluntary retirement aspect and I do not find anything, which would restrain a teacher from seeking voluntary retirement at the age of 58 years or prior thereto.

21. From overall interpretation of the Government Order and regulations forming part thereof, I find that the reasons assigned for denying gratuity in both the orders impugned on this score are unsustainable.

22. Consequently, the writ petition is **allowed**. The impugned orders dated 3.12.2015 and 11.9.2020 are hereby quashed by issuing a Writ of **Certiorari**.

23. A Writ of **Mandamus** is issued to the respondents 3, 4 and 6 to compute the amount of gratuity payable to the petitioner after hearing the petitioner and release the same in his favour within a period of **two months** from the date of production of certified copy of this order. The petitioner shall also be entitled for interest @ 9% per annum on the amount of gratuity from the date of his retirement till the date of actual payment. This amount shall be in addition to the amount of pension, which the petitioner is already getting.

(2023) 5 ILRA 1617
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

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

Writ-A No. 59655 of 2011

Mohd. Ishaq **...Petitioner**
Versus
A.D.J. / Spl. Judge (S.C./S.T. Act), Jhansi
& Anr. **...Respondents**

Counsel for the Petitioner:

Sri Arvind Srivastava

Counsel for the Respondents:

Sri Arvind Srivastava, Sri Atul Dayal, Sri Pushkar Srivastava

Civil Law-The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972-Rule 18(2) - Provisions of Rule 18 are directory and not mandatory. (Para 23-26)

The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 -Sec 21(1) (a)-No perversity about the findings on the question of bona fide need-The various shops that have been referred to by the tenant as ones available to the landlord, either do not belong to the landlord or are not available-In a case where the tenant does not search for alternative accommodation after landlord initiates proceedings for release, the answer to the issue of comparative hardship invariably ought to be against the tenant-A tenant holding for rented premises a long period of time on an absurdly low rent, ought certainly to be held disentitled, *vis-à-vis* the landlord, when determining the issue of comparative hardship. (Para 41, 43 & 44)

Petition dismissed. (E-15)

List of Cases cited:

1. Heera Lal Vs IXth A.D.J., Kanpur & ors., (2005) 61 ALR 488 (All)
2. Ammal Chandra Dutt Vs Second A.D.J. & ors., (1989) 1 SCC 1
3. Sarju Prasad Vs VIIIth A.D.J., Faizabad & ors., 2007 (2) AWC 1068 (L.B.)
4. Arvind Kumar Mishra Vs Jitendra Kumar Gupta & ors., 2016 (1) A.R.C. 634.
5. Sheo Shanker Das Vs Special Judge & ors, 2006 (3) ALJ (NOC) 467 (All)
6. Ashok Kumar & ors.Vs Sita Ram, (2001) 4 SCC 478

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

1. This is a tenant's writ petition arising out of a judgment and order passed by Mr. Vigyanram Mishra, the then Additional District Judge/ Special Judge, SC/ST Act, Jhansi in Rent Control Appeal No.6 of 2009, allowing the appeal, setting aside the judgment and order dated 07.05.2009 made by the Prescribed Authority and granting the landlord's application for release under Section 21(1)(a) of U.P. Act No.13 of 1972.

2. An application for release was made on behalf of Kailash Babu Agrawal seeking release of Shop No.13, situate at Mohalla Nanjhai Bazar, Jhansi against the tenant, Mohd. Ishaq on the ground of his bona fide need. The application was made under Section 21(1)(a) of U.P. Act No.13 of 1972 (for short, 'the Act') with a case that Shop No.13, Nanjhai Bazar, Jhansi (for short, 'the demised shop') was purchased by Kailash Babu Agrawal (hereinafter referred to as 'the landlord') on 11.01.1993 for the purpose of his own need. It is the landlord's case that he neither has a house to live or a shop to carry on business of his own. The

demised shop, that is in the tenancy occupation of Mohd. Ishaq (hereinafter referred to as 'the tenant') is bona fide required by the landlord for the purpose of his residence as well as setting up his shop to earn his livelihood. Once the demised shop became available to the landlord, he would get it redone according to his requirement, where on the ground floor, he would carry on a shop for earning his livelihood, and, on the first floor, set up his living quarters. For the time being, the landlord lives in House No.207, Daru Bhaundela, Jhansi, which is a small house. It has 5-6 rooms, whereas the landlord's family has 20 members. The landlord has in his possession a room of 10x10 feet, wherein he lives with his wife, a daughter 14 years old and a son aged 10 years, all with much difficulty.

3. The landlord's mother is sharp tempered and on account of shortage of space, there are frequent quarrels between his wife and mother. Then there is the landlord's brother, Ramesh Chandra, whose sons have grown up and the elder son has got married in the year 2000. The landlord's mother is under the influence of his elder brother and insisting that the landlord may move away to another house. He has no shop of his own to earn his livelihood. For sometime past, he would work at Ramesh Chandra's shop. Ramesh Chandra has now asked him not to sit on his shop, rendering the landlord jobless. The relationship between the two brothers has become embittered on this account. The demised shop is dimensioned 12x60 feet, which is sufficient space for residential purpose. The tenant fabricates steel almirahs at home and utilizes the demised shop for the purpose of selling them. He is retaining possession of the demised shop in order to extort premium from the landlord to vacate.

4. Pending the proceeding for release, through an amendment application, an amendment was sought to the effect that the landlord's children have grown up. His daughter is reading in B.Com. whereas his elder son reads in Intermediate College. Both the children need a separate room for their studies, a fact that has accentuated the landlord's bona fide need for the demised shop. It is on these grounds that release of the demised shop was prayed.

5. The tenant, Mohd. Ishaq put in a written statement denying the landlord's case generally. It was averred that the release application has been made without basis in order to trouble the tenant on incorrect facts and to exert unlawful pressure upon him. It is the tenant's case that ever since the landlord had purchased the demised shop, he has been litigating with the tenant. It is pleaded that P.A. Case No. 26 of 1993 was instituted on 11.03.1993 on false premises under Section 21(1)(b) of the Act with a case that the demised shop was in a dilapidated condition, which was required by the landlord after reconstruction.

6. The said application was dismissed by the Prescribed Authority vide judgment and order dated 07.09.1996. An appeal from the said order being Rent Control Appeal No.27 of 1996 was dismissed by the District Judge of Jhansi by his judgment and order dated 07.07.2000. Subsequently, the landlord instituted P.A. Case No.95 of 1994 on 19.08.1994 under Section 21(1)(a) of the Act, on the same grounds as those urged in the present application. The Prescribed Authority rejected that application by a judgment and order dated 29.01.1998. Against the said order of the Prescribed Authority, the landlord carried an appeal to the District Judge, which was dismissed on 11.05.2001.

7. It is the tenant's case that on whatever grounds the earlier release application giving rise P.A. Case No.95 of 1994 was instituted and decided against the landlord inter partes, the present application has been brought on the same grounds. Therefore, findings in the earlier judgment bar the present proceedings as *res judicata*. It is denied that the landlord ever purchased the demised shop for his need. To the contrary, the landlord is a member of a Joint Hindu Family and all of them are engaged in the trade of gold and silver, besides being into the business of money lending. The landlord is a powerful man and a property dealer, who buys properties to augment his income. The proceedings for release are brought against the tenant to exert undue pressure upon him. The landlord and his brothers are members of a joint family.

8. It is pleaded that the landlord has purchased a shop in the name of his wife, Meena Agrawal, bearing No. 98, Jawahar Chowk, Jhansi on 22.11.2001. In addition, he has purchased another shop in the name of Manju Agrawal, wife of Sanjay Agrawal bearing Shop No.190, Bada Bazar, Chaudharyana on 2nd of May, 2004 from its previous owner, Smt. Vimla Devi. It is said further on that the landlord has also purchased another shop in the name of Sanjay Agrawal, bearing No. 22, Jawahar Chowk, Jhansi, wherein Ram Bihari and others were tenants. A case was filed against the tenants in occupation of the said shop, seeking their eviction. Once the said tenants vacated under pressure, that shop was sold off.

9. It is the further case of the tenant that apart from the demised shop vis-a-vis Shop No.14, Nanjhai Bazar, that was purchased by the landlord's elder brother,

Sanjay Agrawal on 11.01.1994, a suit was instituted against the tenant, Irshad Khan being S.C.C. Suit No.123 of 1994 for eviction and decreed on 23.09.1995. Irshad Khan's revision was dismissed by this Court and possession of the shop under reference delivered to Sanjay Agrawal. The shop thus vacated is lying vacant and locked for the past three years. Apart from these properties, the landlord along with his family lives in a palatial three storeyed house, bearing No.207, Daru Bhaundela, Jhansi, which is equipped with all modern amenities. This house has a number of portions and has about 20-25 large size rooms. In addition, there are two verandahs, a store, kitchen and a number of lavatories and bathrooms.

10. The landlord and his brothers own a two storeyed market in the Jhansi main market area called Mitra Market, constructed in the year 1990. The shops in the said market owned by the landlord and his brothers are let out on rent. The landlord carries on business under the name and style of K.B. Jewellers, apart from of money lending. Apart from the said business in the family, there are other business under the name and style of Ram Sewak Ramesh Chandra Kamaraya Jewellers and M.K. Jewellers. The landlord's family own other firms too, all engaged in the trade of gold and silver. One of his family members carries on business under the name and style of Bulian Refinery, where silver and gold is purified and silver coins minted in the factory.

11. The landlord and his brothers own a building by the name of Naveen Unit School in Mohalla Nai Basti, Jhansi. All members of the landlord's family, men and women are educated and competent, who stay together cordially. There is no dearth

of space with them. There is also a plea to the effect on behalf of the tenant that the landlord and his wife have never fought the landlord's mother who is a simple and straightforward woman. The landlord's case that his house at Daru Bhaundela, Jhansi is a small house with 5-6 rooms and his family comprise a total of 20 souls, where the landlord has a solitary room of 10x10 feet for himself rests on incorrect facts. The landlord and his brother, Ramesh Chandra and others have got vacated a big shop of theirs bearing Shop No.164 from one Idrish and combining with it an adjoining shop, they have built a shopping complex, wherein all the brothers own separate shops.

12. The landlord has purchased through a registered sale deed in the Sharda Hills Colony, a newly built house, which has a number of big rooms, a verandah, a kitchen and a bathroom. Earlier as well the landlord and his brothers, Sanjay Agrawal and Ramesh Chandra had purchased in the names of their wives, Meena Agrawal, Manju Agrawal and Mamta Agrawal a valuable plot of land, located on the Jhansi-Gwalior Road on 21.05.2008, all of which they are in possession. The landlord also owns, in addition to the houses and shops earlier mentioned, House Nos.212, 213, Daru Bhaundela, Jhansi, that are big residential premises. The tenant occupies the upper floor of Shop No.13, premises Nos.13 and 14 at the rate of Rs.32.50 per month. In the said shop, the tenant manufactures steel almirahs, boxes, trunks, book shalves, packing cases etc. and also repairs the same. He stores raw materials. The demised shop is the only one that the tenant has, where he and his five sons work together. This place provides them their sole source of livelihood.

13. The tenant's house, bearing No. 233, Mukuriana, Jhansi is a house located in a constructed bylane, where there are no shops or market. That house of the tenants has six rooms, wherein he lives along with 39 members of family. In those premises, he does not fabricate steel almirah nor can he do that. The demised shop is essential to support the tenant and his family's source of livelihood. In the event, it is released, the tenant would face great hardship. The tenant's business has garnered goodwill. The landlord has no need for the demised shop. In the event, the release application were refused, the landlord would not suffer any hardship. The release application deserves to be rejected.

14. The landlord supported his case by his own affidavit, bearing paper No.25A, besides an affidavit of Ramesh Chandra Agrawal, paper No. 26A and another affidavit of Sanjay Agrawal, paper No.27A. The tenant for his evidence put in his own affidavit, paper No.30A, an affidavit of Manmohan Srivastava, paper No.31A and an affidavit of Anis, paper No. 32A. The landlord filed his rejoinder affidavit, bearing paper No.53A. An additional affidavit on behalf of the landlord was filed, being his own, paper No.69A. The tenant filed an affidavit, paper No.75A. Two other affidavits were filed on behalf of the landlord, bearing paper No.81A and 99A. The tenant filed along with a list, bearing paper No.33C, fourteen documents. Through another list, 76C, four documents were filed. A single document was filed through list 94C, followed by two others through list 102C, another seven through list 108C and a single document through list 116C.

15. The Prescribed Authority, who heard the landlord's application for release,

held against him both on the issues of *bona fide* need and comparative hardship. The landlord's application was rejected by the Prescribed Authority vide his judgment and order dated 07.05.2009. The landlord questioned the Prescribed Authority's judgment through an appeal under Section 22 of the Act, carried to the District Judge of Jhansi. The appeal was numbered on the file of the learned District Judge sitting as the Appellate Authority under the Act, as Rent Control Appeal No.6 of 2009. The landlord's appeal came up for determination before the Additional District Judge/Special Judge, SC/ST Act, Jhansi on 22.09.2011. The learned Additional District Judge reversed the judgment of the Prescribed Authority, allowed the landlord's appeal, granting the application for release and ordering the tenant's eviction.

16. Aggrieved, the tenant has preferred this writ petition under Article 226 of the Constitution.

17. Heard Mr. Arvind Srivastava, learned Counsel for the tenant and Mr. Arvind Srivastava, learned Counsel appearing for the landlord.

18. During the pendency of the writ petition, the tenant passed away and his heirs LRs, who are five in number have been brought on record as petitioner Nos.1/1 to 1/5. Therefore, all further mention of the tenant bears reference to each of the five heirs of the original tenant, who have inherited the joint tenancy.

19. The foremost submission on behalf of the tenant is that the present release application is not maintainable because it has been moved within two months and ten days of rejection of the earlier release application made on the

same grounds by the landlord. The submission of the learned Counsel for the tenant is that the present application is barred by Rule 18(2) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 (for short, 'the Rules'). It is also submitted that, even otherwise, the circumstances have not changed since the rejection of the last application under Section 21(1)(a) of the Act, so as to entitle the landlord to maintain the present application.

20. The short summary of events on this point canvassed on behalf of the tenant is that the first release application was made by the landlord on 15.03.1993, bearing Case No. 26 of 1993. It was moved under Section 21(1)(b) of the Act. This application was rejected vide order dated 09.07.1996. The appeal filed from the said order was dismissed on 07.07.2000, and a writ petition preferred challenging the appellate order was dismissed by this Court on 14.03.2012. The second application seeking release on the ground of bona fide under Section 21(1)(a) of the Act was made on 19.08.1994, which was numbered on the file of the Prescribed Authority as Case No.95 of 1994. This application came to be dismissed by the Prescribed Authority vide order dated 29.01.1998. An appeal from this order was carried to the Appellate Authority, being Rent Control Appeal No.9 of 1998, which was dismissed vide judgment and order dated 11.05.2001. A writ petition was preferred challenging the appellate order, being Writ Petition No.30896 of 2001, which was dismissed vide order dated 27.04.2010.

21. The learned Counsel for the tenant reckons the period of presentation of the present application under Section 21(1)(a) of the Act from the date of the appellate

order, that is to say, 11.05.2001 passed in the proceedings arising from the release application, moved in the second instance. It is on that basis that the learned Counsel for the tenant submits that the present application was made within two months and ten days of rejection of the second application for release. He, therefore, urges that the application is clearly barred by the provisions of sub-Rule (2) of Rule 18 of the Rules, apart from submitting that there is no material change in the circumstances inter se the landlord and the tenant about their bona fide need and comparative hardship.

22. The learned Counsel for the landlord on the other hand says that the present application is not at all barred because the period of one year envisaged under Rule 18(2) of the Rules has to be reckoned from the date of rejection of the application by the Prescribed Authority, and not dismissal of the appeal carried from the original order. He submits that even otherwise Rule 18 is directory; not mandatory. There is, thus, no bar, according to the learned Counsel for the landlord, preventing the Authorities in exercising their jurisdiction under the Act and entertaining a subsequent release application. It is also argued that the circumstances have materially changed, on account of which the judgment rendered in the earlier application would not bind parties about the issues of bona fide need and comparative hardship.

23. The Appellate Authority has repelled the tenant's contention on this score disagreeing with the Prescribed Authority and held that a second application would be maintainable, unhindered by Rule 18 of the Rules within one year of the rejection of the earlier

release application, and not dismissal of the appeal from the order passed in the earlier application. The Appellate Authority has also held in tune with the submissions advanced on behalf of the landlord that the provisions of Rule 18 are directory and not mandatory.

24. Upon hearing learned Counsel for the parties, this Court finds that the bar envisaged under Rule 18(2) of the Rules, even if it were to be strictly enforced, is not to be reckoned from the date of the judgment in appeal, but the date of rejection of the earlier application by the Prescribed Authority. This principle was laid down by this Court in **Heera Lal v. IXth Additional District Judge, Kanpur and others, (2005) 61 ALR 488 (All)**, also indicating the reason why the period of one year has to be reckoned from the date of rejection of the earlier application by the Prescribed Authority; not the Appellate Authority. In Heera Lal (supra), it has been held:

"5. Secondly, period of one year will be counted from the decision of the Prescribed Authority. If appeal filed against the said decision is dismissed, the period of one year provided under the aforesaid Rule will not be counted from the date of dismissal of appeal. The reason behind the above Rule is that within a year position of the need does not substantially change. However, after one year it may change. Before the prescribed authority the position of need as prevailing until final decision of the release may be brought on record as of right. However, during pendency of appeal subsequent developments cannot be brought on record as of right. The Appellate Court simply said that as earlier release application had been rejected against the respondent No. 3 Babu

Singh hence it would be deemed that landlord had no bona fide need. The view of the Appellate Court was utterly erroneous in law."

25. The issue, whether the bar under Rule 18(2) of the Rules is directory or mandatory, fell for consideration in **Ammal Chandra Dutt (supra)** **Ammal Chandra Dutt v. Second Additional District Judge and others, (1989) 1 SCC 1**. In **Ammal Chandra Dutt (supra)**, it was held by their Lordships of the Supreme Court:

"9. We may now set out the reasons as to why the prescription in Rule 18(1) should be construed as only directory and not mandatory. In the first place, the rule envisages two kinds of situations, one of them where the second application is made within an interval of six months from the date on which final orders were passed in the previous application and the other where the second application is made beyond an interval of six months, which may even go up to several years, as in this case where the interval was over five years, but within six months of the Act coming into force. Surely, the legislature would not have intended that the interval factor in the two sets of situations should be visited with the same consequences by adopting a rigid and inflexible application of the prescriptive guideline given in Rule 18(1). The second factor is that even if the interval factor is the sole criterion for the application of the formula contained in Rule 18(1), the legislature could not have intended that even where drastic changes had taken place subsequent to the disposal of the earlier application, the Prescribed Authority should shut his eyes to the realities of the situation and blindly and mechanically apply the formula in Rule

18(1) and reject the second application. To cite a few examples it may be that after the disposal of the first application, the landlord had been rendered houseless due to the house occupied by him falling down due to decay or heavy rains or being destroyed by fire. Could anyone say that irrespective of the changes that have taken place, the findings rendered in the previous application would have the force of relevancy till the period of six months fixed under the rule has expired? It is, therefore, manifest that the rule of presumption enunciated in Rule 18(1) is only to serve as a guideline to be followed by the Prescribed Authority if he finds the circumstances to remain unchanged and the finding rendered in the earlier application to have relevance even with reference to the facts set out in the second application. The rule is intended to avoid multiplicity of proceedings as the very heading given to the rule would make it clear. It will therefore be inequitable and unrealistic to construe Rule 18(1) as containing an inexorable legal prescription for rejecting a second application filed within the prescribed time limit solely on the basis of the findings rendered in the earlier application."

26. It is these decision, which have been relied upon by the Appellate Authority to repel the tenant's contentions, and in our opinion rightly so. The bar under Rule 18(2) of the Rules would not apply in this case, because the earlier application, that is to say, the second application preceding the instant application for release was rejected by the Prescribed Authority on 29.01.1998, whereas the present application was moved on 23.07.2001. Therefore, the instant application was well beyond the period of one year from the rejection of the second application for release by the Prescribed

Authority. The contention raised on behalf of the landlord that the period of one year under Rule 18(2) has to be reckoned from the date of the appellate order passed in the second application for release, that is to say, on 11.05.2001, cannot be countenanced. Even otherwise, the Rule has been held to be directory and would not work as a bar in the sense understood in law to affect maintainability.

27. What is of substance is whether the circumstances of the parties have changed since the rejection of the earlier release application. In the opinion of this Court, like the Appellate Court, they have. The landlord's daughter has entered the B.Com. Course, whereas the son reached his intermediate grade. The landlord on evidence has also been found to be without a shop of his own, though he has residential accommodation to take care of that part of his need. These circumstances are change enough to entitle the landlord to renew his prayer for release of the demised shop, post rejection of his previous application. The finding of the Appellate Authority cannot be faulted on this score at all.

28. It is argued on behalf of the tenant that there is no bona fide need established by the landlord, entitling him release of the demised shop. It is pointed out that in Paragraph Nos.8 and 9 of the objections/ written statement filed in response to the release application, it has been pleaded that the landlord, his brothers and mother are living jointly. The landlord has recently purchased a shop, bearing No.98, situate in Mohalla Jawahar Chowk, Jhansi on 22.11.2001. He has also purchased a Shop No.190 on 25.05.2004 in the name of Smt. Manju Agrawal wife of his brother Sanjay Agrawal. The said facts are asserted in Paragraph No.10 of the written statement.

29. It is pointed out on behalf of the tenant that it was brought to the notice of the Authorities below that the landlord has a number of accommodations, to wit, Shop No.14, Premises No.207, where he is living, a shopping complex in the name of Mitra Market, firms, namely, M/s. Ram Sewak Ramesh Chandra, K.B. Jewellers, Kamaria Jewellers and M.K. Jewellers. He also has a residential house purchased through a sale deed dated 01.08.2008 at the Sharda Hills, Nai Basti and other properties. It is urged that it was taking into account the availability of all these accommodations that the Prescribed Authority rightly rejected the landlord's application for release.

30. It is contended on behalf of the tenant by the learned Counsel that in the appeal preferred, the landlord did not challenge these findings recorded by the Prescribed Authority. It is further argued that Shop No.190, purchased in the name of the landlord's brother's wife, Smt. Manju Agrawal was sold off by the landlord on 24.02.2011. This shop was available to the landlord for doing business, but he has chosen not to do so, and instead, sold it off. This, according to the learned Counsel for the tenant, is for the reason that he never needed the aforesaid shop as he is well settled in business. Likewise, he has no bona fide need for the demised shop.

31. In addition, it is submitted that the landlord has purchased a residential house on 01.08.2008 in the Sharda Hills Colony out of his own resources garnered from the business that he does in premises No.164, Sarrafa Bazar, Jhansi. In this connection, he has drawn the Court's attention to the sale deed at Page No.226 of the paper-book. Again, according to the learned Counsel for the tenant, the landlord has purchased

another house in Om Shanti Nagar. To substantiate the said fact, apart from referring to the findings of the Authorities below, the learned Counsel has drawn the Court's attention to a photostat copy of the sale deed annexed as Annexure No.19 to the paper-book. It is urged that on the question of bona fide need, the affidavits of Ishaq, Manmohan Srivastava and Anis Khan, annexed as Annexure Nos.21, 22 and 23 to the writ petition, had not been considered by the Appellate Authority. It is, thus, submitted that the Appellate Authority in recording its finding on the question of bona fide need had ignored from consideration material evidence on record.

32. It is next submitted that the Appellate Authority in answering the issue of bona fide need has also committed an error apparent on the face of record. It is submitted in substantiation that the Prescribed Authority has recorded findings to the effect that the landlord's family was living happily together as a joint family, and also that the landlord has a number of accommodations together with his family available to him, both for residential purpose and the purpose of doing business. He does not need the demised shop. According to the learned Counsel for the tenant, since this finding recorded by the Prescribed Authority for the reasons given by the said Authority has not at all been considered by the Appellate Authority, the impugned judgment is vitiated by error apparent.

33. The learned Counsel for the landlord, on the other hand, has supported the findings recorded by the Appellate Authority and submitted that all the various accommodations, pointed out by the tenants to be available to the landlord, have been considered before holding in favour of

the landlord on the issue of bona fide need. The landlord's bona fide need has been accepted for the purpose of business alone. It is urged that the Appellate Authority has not ignored from consideration any evidence or committed an error apparent, so as to merit interference by this Court with a pure finding of fact in the exercise of jurisdiction under Article 226 of the Constitution.

34. This Court has carefully considered the submissions advanced by the learned Counsel for parties and perused the impugned judgment and the record. The judgment of the Prescribed Authority has also been looked into.

35. This Court finds that the landlord's submissions that the Appellate Authority has ignored from consideration material evidence or committed an error apparent in record findings on the issue of bona fide need are far from sustainable. The Appellate Authority has considered the residential accommodation available to the landlord in House No.207, Daru Bhaundela and the case of parties about the space therein, where the landlord resides with his three other brothers and their families. The Appellate Authority has not accepted the landlord's case that the said house has 5-6 rooms nor that of the tenant that it has 20-25 big rooms, besides bathrooms and other facilities. The Appellate Authority has considered the Amin's report, paper No.85-C and returned a finding that this house has a ground floor, first floor and second floor, comprising of a total of 10 rooms. The Appellate Authority has then considered the number of family members in the landlord's nuclear family and that of his three brothers, all of whom are said to live in House No. 207, Daru Bhaundela as a joint family.

36. It has been held that according to the ration cards on record, the landlord's brother, Ramesh Chandra has a family of seven, the landlord a family of four, Mahesh Chandra a family of five, Ajay Kumar a family of four and Sanjay Agrawal again a family of four. The Appellate Authority has taken note of the fact that the landlord's mother has passed away pending proceedings. The landlord and his brothers together comprise 25 members. The other residential accommodations considered are the four houses, bearing Nos.33, 210, 212 and 213, Daru Bhaundela, another house bearing No.22, Nanjhai Bazar and the two houses purchased at Sharda Hills Colony and Om Shanti Nagar. The Appellate Authority has recorded a finding that apart from House No.207, the landlord has houses located at Premises Nos.212, 213, Daru Bhaundela and has also purchased two houses pending appeal, one at Om Shanti Nagar and the other at Sharda Hills Colony, Nai Basti. The former has been noted to have an area of 162 square meters and the latter an area 54.03 square meters. The Appellate Authority has also recorded a finding based on the ration cards of the landlord's family that his brother Mahesh Chandra lives at Premises No.213, Daru Bhaundela, whereas Ajay Kumar resides in Premises No.33 and Sanjay Kumar in 210. It has been held that the landlord's brothers live in House Nos.33, 210, 212, 213, Daru Bhaundela. The Appellate Authority has returned a finding that the landlord has no bona fide need so far as his residential requirement goes. Here, the Appellate Authority for its own and very detailed reasons is in agreement with the Prescribed Authority.

37. So far as accommodation for housing the landlord's business is

concerned, the Appellate Authority has very meticulously scrutinized all properties said to be available to the landlord for the purpose about their title, utility and suitability. There is mention of a certain land purchased in the names of Meena Agrawal, Manju Agrawal and Mamta Agrawal, wives of the landlord and two of his brothers, jointly on 21.05.2008. This land is located on the Gwalior Road. The Appellate Authority has opined that the land is agricultural as evident from the document bearing paper No.95-C. It has no built up area and is suitable for agriculture. The Appellate Authority has held that ownership of this kind of land is irrelevant to judge the landlord's need for the demised shop. The said finding is beyond exception in our opinion. There is then reference to a certain Shop No.14, Nanjhai Bazar, Jhansi abutting the demised shop, which has been purchased by the landlord's brother Sanjay Agrawal on 11.01.1994. A suit against the sitting tenant in the shop, one Irshad, is noted to have been instituted, being S.C.C. Suit No.123 of 1994. This suit was decreed on 23.09.1995 and a revision from the decree dismissed. About the aforesaid shop, it is commented that it belongs to Sanjay Agrawal; not the landlord.

38. There is then a reference to a Shop No.190, Bada Bazar, Chaudhariyana, standing in the name of Manju Agrawal wife of Sanjay Agrawal, that was purchased on 25.05.2005 through a sale deed of that date. This shop too had a tenant by the name Wasiurrahman, against whom P.A. Case No.13 of 2005 was instituted, seeking release. The release application was allowed on 16.04.2010. Similarly, Sanjay Agrawal purchased premises bearing No.72, Jawahar Chowk, Jhansi and against the sitting tenant in the said premises

instituted S.C.C. Suit No.39 of 1992. The said suit was compromised with the tenant in revision.

39. It has been remarked that if any of these shops bearing No.14, Nanjhai Bazar, Jhansi, Shop No.190, Bada Bazar, Chaudhariyana, or Shop No.72, Jawahar Chowk, Jhansi, have been purchased and got vacated by Sanjay Agrawal or his wife, it is of no relevance to the landlord's need for the demised shop. This is so because none of these shops belong to the joint family or the landlord. These belong to the landlord's brother, Sanjay Agrawal or his wife. Doing a meticulous analysis of all properties said to be available, it has been held that the landlord has no premises available to him for the purpose of his business.

40. The Appellate Authority has recorded findings in meticulous detail, after analyzing evidence on record about the availability of business accommodation to the landlord. In Paragraph Nos.8 and 10 of the judgment, the Appellate Authority has recorded the following findings:

"8- विपक्षी ने सायल के स्वामित्व के मकान सं0-22 नझाई बाजार झॉसी भी बताया जो तिर्माजिला है और जिसके प्रथमतः पर 15 दूकानें हैं कहा, प्रलेख 80 सी के आधार पर 22 नझाई बाजार के स्वामी महेशचन्द्र अग्रवाल एवं अजय अग्रवाल सायल के भाई हैं, स्वीकार किया जावेगा। न तो यह संयुक्त परिवार की सम्पत्ति है और न ही यह सायल की है तथा 210 डरू भोंडेली एवं 213 डरू भोंडेली सायल के पिता रामसेवक के स्वामित्व के मकानात हैं यह प्रलेख 78 व 79 सी पंचसाला की नकल से स्पष्ट होता है। इन दोनों ही मकानों में किरायेदार क्रमशः रमेशचन्द्र तिवारी एवं रामदास गुप्ता हैं जो सायल के कब्जे में नहीं हैं तथा भवन सं0-33 डरू भोंडेली कैलाशबाबू, महेश, काशीप्रसाद एवं अजय के स्वामित्व के हैं प्रलेख 77 सी से स्पष्ट होता है इनमें से कोई जगह सायल के कारोबार के लिए उपलब्ध नहीं है।"

"10..... उपरोक्त विवेचना से मैं इस निष्कर्ष पर पहुँचता हूँ कि सायल/ किरायेदार के पास एक पैत्रिक मकान सं0-207 डरू भोंडेली में है उसका स्वयं का मकान ओमशांतिनगर एवं शारदाहिल्स कालौनी नईबस्ती झॉसी में है जिसे दौरान मुकदमा सायल ने खरीदा है। सायल की संयुक्त हिन्दू परिवार की सम्पत्ति की दूकान नं0- 190 बड़ाबाजार, 72 जवाहर चौक झॉसी, एवं दूकान नं0-14 नझाई बाजार न होकर तनहा संजय अग्रवाल की है सायल एवं उसके भाइयों का मित्र मार्केट या नवीन यूनिट स्कूल नईबस्ती में स्वामित्व की कोई जगह नहीं है तथा 164 सराफा बाजार झॉसी तथा 238, 239, 240 सराफा बाजार सायल के बड़े भाई रमेश अग्रवाल की है जिससे कोई सरोकार व वास्ता सायल का नहीं है इन दूकानों में सायल का कोई हक व हिस्सा नहीं है सायल के पिता के नाम मकान नं० 210, 213 डरू भोंडेली है जिसमें कारोबार के लिए कोई जगह नहीं है तथा इनमें किरायेदारान रमेशचन्द्र तिवारी एवं रामदास गुप्ता रहते हैं जो खाली स्थिति में नहीं हैं। निर्मुक्ति प्रार्थनापत्र के कथन कि विवादित दूकान रिलीज होने पर वह इसका निर्माण कराकर रिहायश एवं कारोबार के लिए बनवा लेगा। इसमें से रिहायश की आवश्यकता सायल की पूर्ण हो चुकी है। कारोबार के लिए कोई जगह न होने से विवादित दूकान सायल के कारोबार के लिए निर्मुक्त की जाने योग्य है।"

41. There is no such perversity about the findings of the Appellate Authority on the question of bona fide need of the landlord to establish his business as may impel this Court to interfere with those findings. The various shops that have been referred to by the tenant as ones available to the landlord, either do not belong to the landlord or are not available. These are not in the ownership of the joint Hindu family or the landlord's ownership.

42. So far as the shopping complex in the Mitra Market or the Naveen Unit School, Nai Basti is concerned, the finding of the Appellate Authority is that there is no such accommodation available either with the landlord or his brothers. It is a non-existent accommodation.

43. Now, turning to the finding about comparative hardship, one factor that the

Appellate Authority has taken into account is the fact that there is no evidence to show that the tenant has made efforts during the period of 40 years that he has been in occupation of the demised shop to search for alternative accommodation. Indeed, there is no evidence about it. The proposition is well settled that in a case where the tenant does not search for alternative accommodation, particularly, after the landlord initiates proceedings for release against him, the answer to the issue of comparative hardship invariably ought to be against the tenant. In this regard, reference may be made to the decisions in **Sarju Prasad v. VIIIth Additional District Judge, Faizabad and others, 2007 (2) AWC 1068 (L.B.) and Arvind Kumar Mishra v. Jitendra Kumar Gupta and others, 2016 (1) A.R.C. 634.**

44. There is again another factor that has weighed with the Appellate Authority in deciding the question of comparative hardship against the tenant. It is the fact that the tenant has been in occupation of the demised shop for 40 years on a paltry rent of Rs.32.50. The Appellate Authority has placed reliance in this regard in **Sheo Shanker Das v. Special Judge & Ors, 2006 (3) ALJ (NOC) 467 (All)**. This Court thinks that a tenant holding for a long period of time on an absurdly low rent, ought certainly to be held disentitled, vis-a-vis the landlord, when determining the issue of comparative hardship. After all comparative hardship, though a statutory requirement under Section 21(1)(a) of the Act, is nevertheless a principle built on equity. The equity is if the tenant would suffer greater hardship by the grant of the release application than that which the landlord would suffer by its refusal. A tenant who holds on to a rented premises for a very long period of time, on a

ridiculously low rent, virtually does something ex-proprietary. To him, no benefit of any equity or a statutory rule founded on equity ought to be extended.

45. Apart from the aforesaid issues, it is a consistent principle that in the exercise of our writ jurisdiction, this Court ought not to readily interfere with findings of fact recorded by the Authorities of fact functioning under the statute. Here, the findings about bona fide need involved require determination based on sifting of evidence and conclusions drawn that conform to the law. The Appellate Authority has done both satisfactorily. There is no perversity about the Appellate Authority's judgment. Even if the Appellate Authority has taken a different view of the evidence than the one by the Prescribed Authority, it is entitled to do that as a Court of first appeal. No exception can be taken to it. There is no finding of consequence recorded by the Prescribed Authority, which may not have been reversed by the Appellate Authority. The principle that this Court ought not to interfere with a pure finding of fact recorded by the statutory Authorities under the Act is eloquently expressed in **Ashok Kumar and others v. Sita Ram, (2001) 4 SCC 478**, where it has been held:

"17. The question that remains to be considered is whether the High Court in exercise of writ jurisdiction was justified in setting aside the order of the Appellate Authority. The order passed by the Appellate Authority did not suffer from any serious illegality, nor can it be said to have taken a view of the matter which no reasonable person was likely to take. In that view of the matter there was no justification for the High Court to interfere with the order in exercise of its writ

jurisdiction. In a matter like the present case where order passed by the statutory authority vested with power to act quasi-judicially is challenged before the High Court, the role of the Court is supervisory and corrective. In exercise of such jurisdiction the High Court is not expected to interfere with the final order passed by the Statutory Authority unless the order suffers from manifest error and if it is allowed to stand it would amount to perpetuation of grave injustice. The Court should bear in mind that it is not acting as yet another appellate court in the matter. We are constrained to observe that in the present case the High Court has failed to keep the salutary principles in mind while deciding the case."

46. In this view of the matter, in our considered opinion, no case for interference with the impugned judgment passed by the Appellate Authority is made out.

47. In the result, this writ petition **fails** and is **dismissed**.

48. The interim order, already granted, is hereby vacated.

49. There shall be no order as to costs.

(2023) 5 ILRA 1629
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.03.2023

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ A No. 11593 of 2021
 with
 other cases

Ved Prakash Mittal & Ors. ...Petitioners
Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Sri Satyendra Singh, Sri Anil Kumar Bajpai

Counsel for the Respondents:

C.S.C., Sriprakash Singh

Service Law-The formula and procedure for computation of pension as given in the Government Orders dated 18.07.2017 modifying the earlier decision for Government employees who retired before 01.01.2006 shall be applicable to the petitioners as well as the Concordance Tables issued from time to time for determination of their pension/ family pension including the ones appended to the Government Order dated 04.09.2017. The Government Order dated 01.05.2018 also shall apply to the petitioners-Retrospective operation of revised pension with effect from 01.01.2016 and arrears to be paid, nothing on record to show that question of payment of arrears with effect from 01.01.2016 to 24.02.2021 was deliberated upon seriously-It is evident from the fact that information in prepared formats continued to be collected by the Administrative Department even after issuance of the impugned office memo. It is therefore directed that the Respondent No.1 shall collect all necessary information and also determine the availability of finances and issue appropriate orders within a period of three months from the date a copy of this order is produced before it, taking into account also the observations made by this Court hereinabove-(Para 79)

Petition partly allowed. (E-15)

List of Cases cited:

1. Praveen Kumar Agarwal Vs St.of U.P. & ors.(2011) ILR 1 Allahabad 21
2. (Shakuntala Singh Vs St.of UP & ors.) 2019 (11) ADJ 495
3. Subrata Sen Vs U.O.I.& ors.2021 (8) SCC 71

4. D.S. Nakara Vs U.O.I.1983 (1) SCC 305
5. Indian ex-Services League Vs U.O.I.1991 (2) SCC 104
6. Krishena Kumar Vs U.O.I.1990 (4) SCC 207
7. Subrata Sen another Vs U.O.I.& ors.2001(8) SCC 71
8. All India Reserve Bank Retired Officers Association Vs U.O.I.AIR 1992 Supreme Court 767
9. Indian Ex-Servicemen's Movement Vs U.O.I.& ors., 2022 (7) SCC 323
10. B.J. Akkara Vs U.O.I.(2006) 11 SCC 709

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

1. All of the above seven Writ Petitions have been filed by retired members U.P. Development Authorities Centralized Services or their dependent family members. They were holding various posts for example Chief Architect and Town Planner, Chief Town Planners, Chief Engineers, Executive Engineers and Assistant Engineers in different Development Authorities and had retired before 01.01.2016. Some of the writ petitions which were filed in 2019 and 2020 were filed mainly with a prayer to revise the pension of the petitioners in accordance with the recommendation of the Seventh Pay Commission and strictly in accordance with the Government Order dated 23.12.2016 read with Government Orders dated 18.07.2017 and 04.09.2017 which were issued for State Government employees. Some petitioners were also praying for grant of 20% additional pension to them as they had attained the age of eighty years. Pleadings were complete between the parties and matters were ripe for final hearing but in the meantime the

State Government issued Office Memo dated 24.02.2021, which made admissible revised pension to the petitioners in accordance with the Seventh Pay Commission's recommendations but with effect from the date of issuance of such order i.e. prospectively. Such Office Memo has been challenged in later Writ Petitions of 2021 as it provides that the formula given in Government Order dated 23.12.2016 will be followed while calculating revised pension/family pension only notionally, and actual benefits of revised pension shall be given with effect from 24.02.2021 meaning thereby that the arrears of more than five years have been denied. The impugned Office Memo also denies the benefit of modified formula and method for calculation of pension and family pension as provided in Government Orders dated 18.07.2017 read with Government Order dated 04.09.2017, saying that they were meant only for retired Government Servants and their dependents.

2. The facts that are common to all of the writ petitions are that after recommendations of the Seventh Central Pay Commission, the State Government constituted the Pay Committee 2016, to implement the Recommendations of the Seventh Central Pay Commission in the State of Uttar Pradesh. The Pay Committee 2016 presented its recommendations/report before the State Government with regard to the implementation of the Seventh Pay Commission upon different classes and categories of employees/retirees of various departments including the Housing and Urban Planning Department and Local Bodies, statutory institutions, public sector enterprises and autonomous bodies like Development Authorities. The State Cabinet accepted the recommendations of the Pay Committee 2016 with regard to

revised pay, Dearness Allowance/Relief as well as pension/family pension and other post retirement benefits for Urban Local Bodies, Zila Panchayats, Jal Sansthan and Development Authorities. Consequently, a Government Resolution (Sankalp) dated 16.12.2016 was issued which was published in the Gazette. Clause 1 of such Resolution provided that the recommendations of the Pay Committee with regard to the revision of salaries of employees of Development Authorities in revised Pay Matrix (provided by the Seventh Pay Commission) were accepted. Clause 5 of the said Resolution provided that pension of retirees of Development Authorities who had earlier been getting same pension as Government servants shall be revised in an identical manner to State Government pensioners. It further provided that the financial implications/burden in adopting the recommendations of the Seventh Pay Commission for Local Bodies, Zila Panchayats, Development Authorities etc., would be borne by such institutions. No transfer of funds other than funds which are already being given by the State Government to such authorities, would be made available for additional financial burden cast by such adoption. With regard to Development Authorities the recommendations would be admissible only on the condition that financial burden caused by such acceptance would not be borne by the State Government. The responsibility to deposit in time the installments regarding loans extended by the financial institutions giving credit to such Development Authorities would be discharged regularly and the increase in establishment cost due to grant of benefits admissible under the Seventh Central Pay Commission's recommendations shall be borne by such Development Authorities.

3. The State Government issued Government Order No.39 dated 23.12.2016 for Government employees who retired before 01.01.2016, providing therein that pension and family pension of such persons who retired or died prior to 01.01.2016 shall be as per the Report of the Pay Committee 2008 i.e. the Committee constituted for implementation of the recommendations of the Sixth Central Pay Commission, and will be revised by multiplying factor of 2.57 with pension/family pension which they were getting prior to 2016. The said Government Order also provided that pensioners who attained the age of 80 years shall be paid 20% additional pension. Arrears on revision of pension shall also be paid with effect from 01.01.2016.

4. A similar Government Order No.38 dated 23.12.2016 was issued for Government Employees who retired after 01.01.2016. It also provided that 50% of the last drawn basic salary would be given as pension. The ceiling limit of maximum amount of Gratuity was raised to 20 lakhs from 10 lakhs as provided under the recommendations of the Sixth Central Pay Commission.

5. Thereafter, the State Government in order to maintain homogeneity between Pre-2016 and post-2016 retired Government employees, issued another Government Order dated 18.07.2017 modifying the formula/ method for revision of pension/family pension for such Government employees providing therein that apart from the method of multiplying the existing pension by 2.57 points as provided in the Government Order No. 39 dated 23.12.2016, the calculation for revision of pension/family pension would also be done by notional pay fixation,

under each intervening Pay Commission's recommendations, based on the formula for revision of pay, and the amount which is higher shall be the revised pension/family pension. Clause 11 of the said Government Order provided for payment of arrears as a result of such upward revision with effect from 01.01.2016. The State Government thereafter issued an order on 04.09.2017 providing calculation method and Concordance Tables for revised pension/family pension for its employees in accordance with the method/principle provided in the Government Order dated 18.07.2017.

6. However, the formula given in such Government Orders were not applied for calculating Pension/revised pension of members of the Centralized Services of Development Authorities. The Government made it clear that separate orders shall be issued by the Department of Housing and Urban Planning. After five years of such implementation of the Seventh Central Pay Commission's recommendations with respect to salary and pension of Government employees, the impugned Office Memo has been issued on 24.02.2021. The said Office Memo provided that the formula set out in Government Order dated 23.12.2016 would be followed while calculating revised pension/revised family pension, but actual benefits of such revision would be given only from the date of issuance of the Office Memo that is with effect from 24.02.2021, denying the arrears of more than five years. The said Office Memo also denied the benefits of modified formula and method for calculating pension as provided in the Government Orders dated 18.07.2017 read with Government Order dated 04.09.2017 as applicable to State Government employees.

7. On the other hand, the recommendations of the Seventh Pay Commission with regard to revision of salaries and other allowances except Dearness Allowance was duly implemented with effect from 01.01.2016 in Development Authorities by a Government Order dated 04.01.2017, and the employees of Development Authorities who retired after the revision of salary with effect from 01.01.2016 by the Government Order dated 04.01.2017 are getting pension at the rates prescribed by the Government Order dated 04.09.2017 (that is 50% of the basic salary at the time of retirement). One exemplar of Pension Payment Order with regard to one of such employees, *Ratan Kumar Nigam*, who retired on 31.08.2017 from the post of Assistant Engineer from Prayagraj Development Authority with last drawn basic salary of Rs.1,02,500/- (revised in the Seventh Pay Commission as per Government Order dated 04.01.2017) being granted Rs.51,250/- i.e. 50% of his last drawn basic salary, has been filed as an Annexure 12 to the Writ Petition No. 11593 of 2025.

8. It has been argued by Sri Satyendra Singh, learned counsel for the petitioners that the Development Authorities in the State of U.P. have been created under the provisions of the UP Urban Planning and Development Act 1973 (hereinafter referred to as the "Act of 1973"). After creation of Development Authorities, the State Government had issued Government Orders dated 17.03.1983 and 29.09.1983 providing therein that until model retirement benefit Rules are framed by the State Government under Section 56(2) of the Act of 1973, the employees of Development Authorities would be entitled for pension/family pension in accordance with Uttar Pradesh Palika Centralized

Services Retirement Benefit Rules 1981 (hereinafter referred to as "the Palika Rules of 1981"). The Palika Rules of 1981 provided pension and family pension at par with State Government employees.

9. Subsequently, the State Government notified the U.P. Development Authority Centralized Services Rules 1985 (hereinafter referred to as the Service Rules of 1985) and instead of framing retirement benefit Rules or Regulations for such Centralized Services, the State Government issued an order on 05.04.1999 providing therein that since no decision had yet been taken for payment of pension to employees of Centralized Services, they are not entitled for payment of pension/family pension and such pension was consequently stopped.

10. The Government Order dated 05.04.1999 was challenged in several writ petitions before this Court both at Lucknow and Allahabad and this Court in Writ petition No. 556 (S/B) 2009 **Praveen Kumar Agarwal Vs. State of U.P. and others**, decided on 20.11.2010 reported in (2011) ILR 1 Allahabad 21; allowed such writ petitions and quashed the Government Order dated 05.04.1999 and consequential Government Order dated 09.11.2004 by which pension/ Family pension was stopped with consequential benefits. This Court recorded a finding that the two Government Orders dated 05.04.1999 and 09.11.2004 had been issued in contravention of statutory provisions as contained in Section 24 of the Act of 1973 which provided that a Development Authority shall constitute for the benefit of its officers and other employees a Pension or Provident Fund. Rule 34(2) provides that all employees of Development Authorities retired in accordance with the said Rules

would be entitled to retiring pension and/other retirement benefits. Rule 37(2) provided that in regard to matters not covered by the Rules or by special orders, the members of service shall be governed by the Rules, regulations and orders applicable generally to U.P. Government Servants serving in connection with the affairs of the State. The Court observed that the action of the State Government in denying pension only because pension regulations had not been framed by it, was a completely arbitrary decision and liable to be quashed. The Court issued a mandamus directing the respondents to ensure payment of regular pension including arrears to the writ petitioners and other similarly situated employees, in accordance with the Rules applicable to the State Government employees.

11. In pursuance to the directions issued by this Court, the State Government after nearly four decades of creation of Development Authorities, ultimately notified the U.P. Development Authorities Centralized Services Retirement Benefit Rules 2011 (hereinafter referred to as the "Retirement Benefit Rules of 2011"). The said Rules provided for pension and other retirement benefits to members of Centralized Services of Development Authorities, who were appointed before 01.04.2005. Later, the cut-off date was modified by an order dated 22.12.2011 providing that such pension and retirement benefits would also be available to employees who retired prior to the commencement of the Rules on 11.11.2011.

12. Part VI of the Retirement Benefit Rules 2011 provides for establishment of U.P. Development Authorities Centralized Services Pension Fund, a consolidated and common pension fund under the control of

the Finance Controller, Lucknow Development Authority, and also provides the procedure for disbursement of pension/family pension by the Vice-Chairman of Development Authority concerned subject to approval of the Finance Controller, LDA.

13. The pension of all such petitioners who had retired prior to 01.01.2006 was revised as per the Sixth Pay Commission's recommendations with effect from 01.01.2006 on the basis of Government Order No.1515 dated 08.12.2008 meant for State Government employees, in pursuance of observations made by the Division Bench in the case of *Praveen Kumar Agarwal and others* (supra) and the State Government did not issue any separate Government Orders from the Department of Housing and Urban Planning for revision of pension of retirees of Centralized Services as per the Sixth Pay Commission's recommendations, other than the Government Order dated 08.12.2008 issued for State Government employees. Even while issuing the Government Resolution (Sankalp) dated 16.12.2016, it was provided that Pension/family pension of employees of Development Authorities who were getting same benefits as State Government pensioners shall be revised identically with that of State Government employees. Thereafter, Government Orders Nos. 38 and 39 dated 23.12.2016 were issued for State Government employees providing therein arrears of revised pension/family pension to be paid with effect from 01.01.2016. Such Government Orders were followed by two others dated 18.07.2017 and 04.09.2017, providing for revised pension/family pension after taking into account notional pay fixation for each pay revision, based on the formula as provided

"Concordance Tables" enclosed along with the said Office Memorandum. Such upward revision in pension and family pension was to be determined by the Head of the Department/Head of Office, without requirement of any application by the pensioners/family pensioners. Clause 5 of the Government Order dated 04.09.2017 provides payment of arrears of revised pension/family pension with effect from 01.01.2016 to State Government employees. Another Government Order has also been issued on 01.05.2018 clarifying that pension of pre-2016 retirees shall in no case be less than 50% of their notional pay in the Pay Matrix as determined by the Seventh Pay Commission, even if the retiree had rendered less than qualifying service required for full pension.

14. It has been argued by the learned counsel for the petitioners that Rule 4 of the Retirement Benefit Rules 2011 provides for calculation of pension of retirees of Development Authorities on the same formula and in accordance with the same procedure as is applicable to State Government employees. Similar provision has been made with regard to Gratuity under Rule 5. Rule 7 of the said Rules of 2011 provide that family pension to family members of deceased employees shall be regulated by relevant Rules applicable to Government servants serving in connection with the affairs of the State. As such members of Centralized Services of Development Authorities are entitled to pension, family pension and Gratuity at par with State Government employees and for the purpose of calculation/revision of such benefits the same procedure and formula shall be used, i.e. the same Concordance Tables shall be used as are applicable to State Government employees from time to time.

15. It has also been argued on the basis of judgement rendered by this Court in Writ A No.54211 of 2016 (*Shakuntala Singh versus State of UP and others*) reported in **2019 (11) ADJ 495**; that the Retirement Benefit Rules of 2011, by reference, adopted the same formula and procedure pertaining to pension/family pension as applicable to employees of the State Government and, therefore, subsequent Government Orders pertaining to post retirement benefits in respect of Government servants become automatically applicable and are enforceable upon the employees of Development Authorities by operation of law, from the date of their issuance. The Court had also observed that Finance Controller, LDA, who was in-charge of the Consolidated Pension Fund, had admitted that the requisite amount was available in such Pension Fund constituted under Rule 16 of the Retirement Pension Benefit Rules 2011, therefore, Development Authorities could immediately, without any approval from the State Government, implement the Government Orders revising pension/family pension of their employees pursuant to implementation of the Seventh Pay Commission Recommendations. The Court, therefore, observed that the Government Order dated 08.12.2008 and subsequent clarification the Government Orders and Concordance Tables enclosed therewith, dealing with computation and revision of pension/family pension and other benefits on adoption of the recommendations of the Sixth Pay Commission recommendations would apply in totality and without modification upon employees of the Centralized Services of such Development Authorities.

16. It has been argued that after the observations made by this Court in

Shakuntala Singh (supra), the Government Orders dated 23.12.2016, 18.07.2017 and 04.09.2017 and 01.05.2018, become applicable upon the petitioners in their totality from the date of their issuance including for payment of arrears with effect from 01.01.2016 consequent to such Revision, and therefore the date of applicability as mentioned in the impugned Office Memo dated 24.02.2021 is liable to be set aside.

17. It has been argued for the petitioners that apart from non-payment of arrears of revised pension/family pension with effect from 01.01.2016 i.e. arrears for more than five years, the impugned Office Memorandum dated 24.02.2021 is causing huge monetary loss to the petitioners every month by not implementing the formula provided in the Government Orders dated 18.07.2017 and 04.09.2017 and 01.05.2018. The learned counsel for the petitioners has drawn attention of this Court to paragraph-54 of Writ Petition No.11593 of 2021, wherein an illustration of monthly loss being caused to petitioner no.1- *Ved Prakash Mittal* has been given in a Tabular form. *Ved Prakash Mittal* retired on 31.10.2003 and last drawn salary was Rs.20,000/-. Basic pension as per the Fifth Pay Commission's recommendations was calculated at Rs.7273/-. Basic pension as per the Sixth Pay Commission's recommendations was calculated at Rs.17,855/-. When the Government Order dated 26.12.2016 alone is applied and the existing basic pension is multiplied by 2.57, it comes to Rs.45,887/-. However, if basic pension is revised as per Government Order dated 18.07.2017 read with Government Order dated 04.09.2017, as per the Concordance Tables, the pension payable comes to around Rs.69,550/-. The difference per month is of Rs.23,663/-. In

paragraph-55 of the writ petition, it has further been submitted that the State Government revises Dearness Relief every six months. Since the Dearness Relief at the time of filing of the writ petition was 28% on the amount of basic pension, the loss of the petitioner will keep increasing as and when the rate of dearness relief is enhanced by the State Government.

18. It has been argued that the recommendations of the Seventh Pay Commission with regard to salaries has been duly implemented for employees of Centralized Services of Development Authorities with effect from 01.01.2016 by Government Order dated 04.01.2017. Therefore, employees who retired after revision of salary with effect from 01.01.2016, are getting pension at the rates prescribed by Government Order dated 04.09.2017, that is, 50% of the Basic Salary at the time of retirement. One employee *Ratan Kumar Nigam* retired on 31.08.2017 and he is getting pension at 50% of the last drawn basic salary.

19. It has been argued that two separate classes have been created within one homogeneous class of employees belonging to Centralized Services of Development Authorities by giving benefits of the Seventh Pay Commission to those who retired after 01.01.2016 and refusing it to those who retired prior to it. Not only this, the giving of benefit of revised pension, without arrears and only with effect from the date of issuance of Office Memorandum dated 24.02.2021 amounts to hostile discrimination because other employees of Local Bodies such as Zila Panchayats have been given the benefit of the Resolution (Sankalp) dated 16.12.2016 and the Department of Panchayati Raj has issued a Government Order dated

16.02.2018 implementing the aforesaid Government Orders dated 23.12.2016, 18.07.2017 and 04.09.2017, in their totality without any modification. On the other hand, the Department of Housing and Urban Planning has issued the impugned Office Memorandum dated 24.02.2021 which not only denies the benefit of enhanced pension as provided by the aforesaid three Government Orders, but also disallows the payment of arrears of revised pension with effect from 01.01.2016.

20. It has been argued for the petitioners that since the respondents have kept the revision of pension/family pension of the petitioners pending for more than five years from the commencement of the Seventh Pay Commission's recommendations ignoring the mandatory provisions of the Statutory Rules 2011 and the observations made by this Court in the case of *Praveen Kumar Agarwal* and *Shakuntala Singh* (supra), the petitioners are entitled for interest at the rate of 12% per annum on the delayed settlement of the revised pension/family pension with effect from the date it became payable i.e., with effect from 01.01.2016.

21. Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri Pradeep Kumar Tripathi, Standing Counsel, appearing on behalf of the State respondents has argued that the retirement benefits of the petitioners are governed by the Retirement Benefit Rules 2011. The provisions of Rule 4, related to pension and Rule 5 related to death-cum-retirement Gratuity, and Rule 7 related to family pension provide the same to be calculated according to the procedure and formula applicable to employees of the State Government. However, Rule 15 of the said

Rules also provides that the decision of the State Government in case of dispute or difficulty arising regarding interpretation of any provisions of the Rules would be final and conclusive and that matters not covered by the Rules shall be governed by such orders as the State Government may deem proper to issue.

22. It has further been argued for the Respondents that no doubt the pension of employees of Development Authorities is being paid from the Fund of the Development Authority itself and the State Government is not bearing the burden of payment to such employees, it is within the jurisdiction of the State Government to decide the date of implementation of the recommendations of the Seventh Pay Commission and that of the Pay Committee, 2016.

23. It has been argued for the Respondents that the employees of Development Authorities are not Government servants. A Development Authority is a body Corporate and an autonomous institution. Hence, the Government Orders issued with respect to Government servants are not automatically applicable upon employees of Development Authorities, and they are made applicable taking into account the financial conditions of the Development Authority concerned. The Government Order dated 23.12.2016 was issued by the Finance Department of Government of U.P. specifically providing that it will not be applicable upon employees of Local Bodies and Public Sector Undertakings and Development Authorities and other autonomous institutions. Government Orders dated 18.07.2017 and 04.09.2017 also clearly provided that they will not be applicable on employees of various

institutions including the High Court, Statutory Corporations, Basic Schools, aided Educational Institutions, Autonomous Bodies including Development Authorities which depend upon their own financial resources. For Development Authorities, separate Government Orders were issued by the Administrative Department applying the recommendations of the Pay Committee and, therefore, the monetary benefits given in such orders cannot be the same as applicable to State Government servants. The Administrative Department makes applicable the Government Orders taking into account the financial condition of the Authorities to bear the financial burden. Though some of the Development Authorities indicated their consent for extending the benefit of Seventh Pay Commission recommendations to their employees with effect of the date they became applicable to State Government servants, the State Government after considering the financial conditions of all Development Authorities and other ancillary factors which affect the financial resources of such Development Authorities, issued the Office Memorandum dated 24.02.2021 in exercise of its powers under the Retirement Benefit Rules of 2011.

24. Sri M.C. Chaturvedi has also referred to the Counter Affidavit filed by the State Respondents which also reiterated that the Government employees are different from employees of Development Authorities and, therefore, Government Orders issued with respect to State Government Servants are not applicable automatically upon employees of autonomous institutions like Development Authorities. The monetary benefits available to State Government employees cannot be automatically made available to employees of Development Authorities as

their financial conditions are different. Though the State Government in principle adopted the recommendations of the Pay Committee 2016 with regard to employees of urban Local Bodies, Zila Panchayats, Jal Sansthan and Development Authorities by its Resolution dated 16.12.2016 it was on the condition that the benefit of such recommendations would be made available to such employees only if the financial burden does not fall upon the State Government. The State Government would not transfer any funds. Moreover, the Development Authorities would have to discharge their responsibilities towards loans/advances made to them by different financial credit institutions. The additional establishment costs would have to be borne by such Development Authorities out of their own funds. The Government Order Nos. 38 and 39 dated 23.12.2016 issued by the Finance Department are with regard to pension, Gratuity and other payments admissible to Government employees and specifically provide that they will not be applicable upon employees of Local Bodies and Public Sector Undertakings and autonomous institutions. The Government Orders dated 18.07.2017 and 04.09.2017 provide for calculation of the amount of pension, Gratuity and family pension of employees of Development Authorities in accordance with the Formula and procedure prescribed for State Government employees but they do not provide for payment of the same amount as per to State Government employees.

25. The learned counsel for the respondent argued that the petitioners want benefit of Government Orders issued for government employees. All such Government Orders on which reliance has been placed by the petitioners and the benefit of which the petitioners want this

Court to extend to them, clearly say that they shall not be applicable to employees of autonomous institutions, local bodies, statutory corporations et cetera. The relevant exclusionary clauses have not been challenged by the petitioners.

26. It has also been argued for the Respondents that the date of applicability of Pay Commissions recommendations with respect to pension and other retirement benefits has not been given in Rule 4 or Rule 5 of the Retirement Benefit Rules. Only the formula and procedure to be adopted for determination of such pension and retirement benefits was to be the same as that of State Government employees. The Administrative department therefore was required to issue separate orders deciding the date of applicability of Pay Committee's recommendations. In this case, the respondent no.1 has decided that the Pay Committee's recommendations will be applicable to pensioners of Development Authorities notionally with effect from 01.01.2016 and actual benefits would accrue with effect from the date of issuance of the Government Order in this regard, that is, with effect from 24.02.2021. The Government has taken a conscious decision to deny arrears looking into the financial condition of the Development Authorities. The record produced before this Court would show that not all of the Development Authorities are in profit. Most of them are running in losses. The financial capacity to give pensionary benefits with retrospective effect was doubtful and therefore the Government decided on giving benefits of the Seventh Pay Commission's recommendations only prospectively. There is no doubt regarding complete administrative control of the State Government over the administration of Development Authorities. Rule 37 of the

Rules of 2011 refers to the final authority to decide a dispute or settle a doubt being with the State Government.

27. The learned counsel for the State Respondents has placed reliance upon reports/charts with regard to financial conditions and resources of Development Authorities filed as Annexure CA-6 to the Counter Affidavit filed in Writ Petition No.11593 of 2021. Sri M.C. Chaturvedi has read out CA-6 which is a letter dated 17.06.2021 sent by the Director Awas Bandhu, Uttar Pradesh, Lucknow, to the Under Secretary of Housing and Urban Planning Department with reference to the Government's letter dated 01.03.2021. It refers to information given in Form Nos. 7 to 10 and Form Nos. 11 to 13, being examined and comments being sent through letter dated 03.03.2021 written by him. It refers to a meeting held by the Principal Secretary Housing and Urban Planning on 11.06.2021 where a direction was issued for examination of information given in prescribed Form nos. 1 to 6 by the Awas Bandhu, and for a report to be submitted thereafter to the Government. Consequently, the report desired by the Principal Secretary in his meeting dated 11.06.2021 was being enclosed for consideration of the Government. The enclosure to the letter is in the form of a tabular chart containing information regarding income and expenditure of 33 Development Authorities and U.P. Awas Vikas Parishad for the year 2018-19, 2019-20 and 2020-21. It sums up such information by saying that for Raebareli, Aligarh, Bareilly, Muzaffarnagar, Gorakhpur, Rampur, Agra, Chitrakoot, Ghaziabad, Saharanpur and Prayagraj Development Authorities, the expenditure has been more than the income for the past three years. It has been argued that out of

33 Development Authorities, at least 11 Development Authorities were spending more than they earned. However, on a consideration of the income of all the Development Authorities for the past two years, it has been found that such income has increased by more than 8% for the financial year 2020-21. The Director, Awas Bandhu, further says that despite the COVID-19 pandemic prevailing in the nation, the Development Authorities have made commendable efforts and their income has increased by more than 8% from the past financial year.

Sri M.C. Chaturvedi has tried to distinguish the judgement rendered in the case of *Shakuntala Singh* (supra) by saying that the prayer of the writ petition was for quashing of Clause 6 of the Government Order dated 05.07.2016 in so far as it denied payment of arrears of revised pension with effect from 01.01.2006 to employees of Centralize Services. The petitioner had further prayed for providing the benefit of the said Government Order dated 05.07.2016 and also the Government Order dated 21.01.2016 which were with regard to the grant of benefit of the Sixth Pay Commission's recommendations. The Court had specifically considered the argument that the matter relating to providing the benefits of the Seventh Pay Commission was pending consideration of the State Government. The calculation of the pension of the husband of Smt. *Shakuntala Singh* had been made by the Development Authority not in accordance with the formula applicable to State Government employees and, therefore, the Court had directed calculation of pension and consequently family pension in accordance with the formula for computation applicable to Government employees by observing that the

Administrative Department had not issued any orders independently providing for a different method of calculation of pension/family pension. The Government Order dated 18.07.2017 by which the earlier Government Order dated 23.12.2016 was modified and clarified that it would not be applicable to autonomous institutions was not considered by the Court in the case of *Shakuntala Singh*. Therefore, it has been argued that the reliance placed upon the judgement rendered in *Shakuntala Singh* by the petitioners is misconceived and liable to be rejected.

28. Sri Satyendra Singh and counsel for the petitioners in Rejoinder has submitted that the Office Memorandum dated 24.02.2021 was issued without application of mind to the financial conditions of Development Authorities whose pensioners were proposed to be given revised rates of pension as per the recommendations of the Pay Committee 2016. The counsel for the petitioners has referred to the paragraph No. 28 of the Counter Affidavit filed in Writ Petition No. 11593 of 2021 and Counter Affidavits filed in earlier writ petition of Narain Ji Gopal in December, 2021. It has been argued that no material as referred to in paragraph 28 and Annexure CA-6 of the counter affidavit filed in *Ved Prakash Mittal*, has been referred to at all in the Counter Affidavits filed in earlier writ petition. The learned counsel for the petitioner has taken this Court through CA-6 filed in Writ Petition No. 11593 of 2021 to show that it was only in pursuance of a letter issued on 01.03.2021 and correspondence undertaken after the meeting held on 11.06.2021 that the letter dated 17.06.2021 was written by the Director U.P. Awas Bandhu. The learned counsel for the petitioner has pointed out from point nos. 2 and 3 of the

enclosure to the said letter that the last three years average of Balance Sheet of various Development Authorities was taken into account and only 11 such Development Authorities had shown a deficit in the Balance Sheets and even with the difficulties faced during the COVID-19 pandemic the sum total of the Balance Sheets of all the Developments Authorities for the past two years showed profit of more than 8% over and above their earlier income. The learned counsel for the petitioner has tried to impress upon this Court that without there being any relevant material on record, the decision dated 24.02.2021 was taken. Later on, documents were filed along with the Counter Affidavit with regard to income and Balance Sheets of various Development Authorities as an afterthought. Such an explanation given ex-post facto cannot be taken into account.

29. It has also been argued that the Supreme Court has in several judgments held that mere financial constraints cannot be a ground for discrimination between members of the same pension scheme. No two classes of Pensioners can be created on the basis of the date of retirement.

30. It has also been argued that the Joint Secretary Government of U.P. sent letter dated 28.08.2017 to the Vice-Chairman of Development Authorities calling for the recommendations/opinion regarding implementation of the Pay Committee 2016 recommendations regard to revision of pension. In response to the aforesaid letter, all the Development Authorities have duly informed the State Government that they have no objection in extending the benefit of revised pension to the retirees and that they are financially capable to extend the benefit of revised pension in accordance with the Seventh

Pay Commission's recommendations. Copies of such a recommendation letters of 19 Development Authorities have been filed as Annexure to the Rejoinder Affidavit filed in the case of *Ved Prakash Mittal*. Even the Finance Controller, Lucknow Development Authority who is the custodian of the Common Pension Fund constituted under Rule 16 of the Retirement Benefit Rules, 2011 sent several letters requesting permission/direction with regard to implementation of the Seventh Pay Commission recommendations on pre-2016 retirees of Development Authorities but the respondent no.1 kept the matter pending for more than five years and ultimately issued the impugned Office Memorandum on 24.02.2021 denying benefit of arrears.

31. It had been argued that the State Government does not even provide monetary support to Development Authorities to meet their establishment costs or to give pension to the retirees. The Development Authorities are willing and financially capable of paying pension uniformly to the pensioners irrespective of the date of retirement, but the State Government has arbitrarily decided otherwise.

32. This Court, therefore, by its order dated 19.09.2022 directed the counsel for the State respondents to place before this Court the record relating to the decision taken by the Government for making applicable the Seventh Pay Commission's recommendations relating to pension and other retirement benefits of the Development Authorities. The record relating to the decision of the Government for giving such benefits prospectively was produced before this Court and several pages from the notings on the file for example page nos.164 to 167 and Page

nos.172 to 176 respectively of file no. 06E/2016 Awas-5 had been read out in their entirety by the counsel for the respondents. This Court directed the respondents to place photocopies of relevant pages of the record along with their written submissions.

33. The Learned counsel appearing for the State Respondents while referring to the records produced before the Court of File No.06E/2016 has pointed out the Hon'ble Chief Minister's query with regard to financial liability on payment of pension as per the Seventh Pay Commission's recommendation. The administrative department had pointed out that Rs.33.30 crores would be required if upward revision in pension and other retirement dues is given with retrospective effect. There were a total of 405 pensioners in Centralized Services. The Hon'ble Chief Minister had asked a specific query with regard to the trend of income and expenditure for the past three years. Such query was answered at page 164 by saying that for the past three years the trend has been positive, i.e., the income generated by the Development Authorities was more than their expenditure. However, this was only for a few of the Development Authorities but not all of them. The administrative department had expressed an apprehension that applying Government Order dated 23.12.2016 with retrospective effect on employees of Development Authorities would also lead to grant of full pension on completion of 20 years of service, and also additional pension on reaching the age of 80 years and above. It also pointed out the liability of paying Gratuity to the extent of Rs.20 lakhs in case of fulfilment of such 20 years of service. The administrative department had suggested creation of a Corpus Fund of Rs.500 crores but had not

suggested as to how contributions from various Development Authorities were to be ensured in such Corpus Fund. It also suggested that by means of a Government Order dated 29.12.2020, a provision has been made for deposit of Rs.35.5 crores annually as contributions to the Pension fund by various Development Authorities but such contributions have not been paid in their entirety by such Authorities. Sri M.C. Chaturvedi has pointed out from the record that reminders have been sent repeatedly to various Development Authorities to deposit their share of contributions, the last such reminder being sent in August 2022. It was also pointed out that such contributions of Rs.35.50 crores were only to bear the additional expenditure for the financial year 2020-21 upto 2023-24. The approval granted by the Chief Minister on 04.02.2021 was with respect to financial liability to be created on grant of pensionary benefits prospectively as per the Seventh Pay Commission's recommendations. No approval was granted for retrospective operation of upward revision in the absence of calculation of arrears.

34. It has been argued by Sri M.C. Chaturvedi that the noting put up on the file by the administrative department was misleading and even all of the twenty Development Authorities which had shown their income as being more than their expenditure were not actually running in profit and had therefore not deposited contributions to the pension fund.

35. Sri Satyendra Singh has placed reliance upon judgement rendered by the Supreme Court in ***Subrata Sen versus Union of India and others* 2021 (8) SCC 71**; (paragraph 6 to 10, 13 to 17 thereof).

36. Before this Court enters into the merits of the rival contentions, it would be appropriate to consider the statutory provisions relevant for decision in the controversy. The Development Authorities are created under Section 4 of the U.P. Urban Planning and Development Act 1973. Section 5 of the Act of 1973 provides that the Secretary and Chief Accounts Officer of the Authority may be appointed by the State Government who shall exercise such powers and perform such duties as may be prescribed by the regulations or delegated to them by the Authority or its Vice-Chairman. Subject to such control and restriction as may be determined by general or special orders of the State Government, the Authority may then appoint such number of other officers and employees as may be necessary for the efficient performance of its functions and may determine their designations and grades. The Secretary and Chief Accounts Officers and their employees of the Authority would be entitled to receive from the funds of the Authority such salaries and allowances and shall be governed by other conditions of service as may be determined by regulations made in that behalf.

37. It is evident from a perusal of such provisions that a Development Authority may appoint Officers and employees but such employees would be entitled to receive salary and allowances only from the fund of the Authority. The conditions of service may be governed by regulations made in this behalf. Section 5-A confers power upon the State Government by notification to create one or more Centralized Services for such posts, other than posts mentioned in sub-section (4) of Section 59 common to all Development Authorities. The incumbents on such posts are transferable from one Development

Authority to another Development Authority. The State Government may prescribe the manner and conditions of recruitment to, and the terms and conditions of service of persons appointed to such service. A provision was made for absorption of a person already serving on a post included in such service immediately before such creation or on deputation in the Centralized Service unless he opts otherwise. The State Government was authorized also to transfer any person holding any post in a Development Authority Centralized Service from the one Development Authority to another.

38. Under Chapter VII of the Act of 1973, Section 24 provided for Pension and Provident Funds, which would be created by the Authority for the benefit of its whole time members and officers and other employees but subject to such conditions as the State Government may specify. If a Provident Fund is constituted by a Development Authority, the State Government may make applicable the Provident Fund Act 1925 upon such Provident Fund also.

39. Section 56 confers power upon the Development Authorities to make Regulations with the previous approval of the State Government for the administration of the affairs of the Authority including salaries allowances conditions of service of its employees.

40. The State Government in exercise of its powers under Section 5-A notified the U.P. Development Authorities Centralized Service Rules 1985. Rule 31 provides for leave, leave allowances, officiating pay, fee and honorarium as admissible to Government servants of like status under the Financial Handbook Volume II, Part 2

to 4. It provides for the cadre and strength of service and also the age of superannuation and retiring pension under Rule 34. Rule 37 mandates that in any matter not covered by these Rules or by special orders, the members of service shall be governed by the Regulations and orders applicable generally to the Government servants of Uttar Pradesh.

41. After the decision of this Court in *Praveen Kumar Agarwal* (supra), the State Government framed the Retirement Benefit Rules of 2011. Part I of said Rules deals with pension and Gratuity. Rules 4 & 5 provide calculation of pension and Gratuity has to be done according to the procedure and formula applicable to employees of the State Government. Under Part III, family pension is provided for, and it is to be regulated by the relevant Rules applicable to U.P. Government servants. The State Government by an order dated 08.12.2008 had accepted the recommendations of the Sixth Central Pay commission and made it applicable to all its employees, who retired prior to 01.01.2006. The State Government Order also provided therein a Tabular chart, which dealt with computation of pension/revised pension. The Finance Department published a Resolution (Sankalp) dated 07.02.2009, accepting the recommendations of the Sixth Pay Commission and made it applicable on all Local Bodies including Development Authorities. It further clarified that the State Government shall not be responsible to provide funds to meet the expenses which had to be borne by the respective Local Bodies/Development Authorities. The Tabular Chart / Concordance Table appended to the Government Order dated 08.12.2008 was, however, not followed for determination of pension of employees of the Development Authorities who had

retired prior to 01.01.2006. The State Government, thereafter, issued two other Government Orders dated 19.07.2010 and 07.11.2014, along with a Concordance Table showing the revised pay structure and corresponding minimum pensions and family pensions. Another Government Order was issued on 21.01.2016 clarifying that family pension shall not be less than the 30% of the basic pension. These Government Orders were also not followed in computing the pension and family pension of retirees of Development Authorities.

42. One retired Chief Engineer's widow approached this Court in Writ Petition No.54211 of 2016: *Shakuntala Singh versus State of U.P. and others*. This Court observed after considering the Act of 1973 and the Retirement Benefit Rules of 2011, that under Section 24 of the Act and Rules 4 and 7 of the Rules of 2011, all Rules/orders made applicable to the employees of the State Government and formula for computation of pension and family pension thereunder, would apply by reference to the employees of Development Authorities. Such Rules are in the nature of a legislative exercise, which cannot be superseded by any Government Orders/Resolution. The Court considered in paragraphs 43 and 44, the concept of Legislation by incorporation and Legislation by reference, and observed that there is a distinction between the two in as much as *"in the latter case the amendments made in the earlier legislation would be applicable to the referring legislation. Applying the principle in the instant case the Retirement Benefit Rules 2011, make applicable all Government Orders, in so far as it relates to pension/family pension by reference. The subsequent amendments thereto would therefore also apply."*

43. The Court observed in paragraph 44 thus: -

"44. The Supreme Court in Bajaya v Gopikabai 1978 (2) SCC 542; explained the distinction between legislation by reference and incorporation.

"- Legislation by referential incorporation falls in two categories, (a) where a statute by specific reference incorporates the provisions of another statute as at the time of adoption; and (b) where a statute incorporates by general reference the law concerning a particular subject, as a genus. In case of (a) the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. But in the category (b) it shall be presumed that the legislative intent was to include all the subsequent amendments also made from time to time. The generic law on the subject adopted by general reference. - -" (Refer: Western Coalfields Ltd Vs. Special Area Development Authority, Korba 1982 SCC 125)"

44. This Court in the judgement rendered in *Shakuntala Singh* had categorically held that Retirement Benefit Rules of 2011 are legislative in nature and, therefore, binding upon the Development Authorities uniformly and even upon the State Government. The Retirement Benefit Rules 2011 do not prohibit the Development Authorities from implementing Government Orders without approval of the State Government. Rather, the said Rules mandate that the Government Orders pertaining to pension/family pension, issued in respect of Government servants become applicable and enforceable upon employees of Development Authorities by operation of law. No further act of approval is required

at the end of the State Government. Office Memorandum dated 24.02.2021 has been issued by the respondent no.1 in complete violation of the provisions of the Retirement Benefit Rules 2011 and circumventing the judgment rendered by this Court in *Shakuntala Singh* (supra).

45. The Coordinate Bench also made reference to judgement rendered in the case of *State of U.P. Vs. Shivashray Singh and State of U.P. versus Preetam Singh and others* 2014 (15) SCC 774; and other judgements relating to U.P. Awas Vikas Parishad, where the relevant Government Orders as well as statutory scheme i.e., U.P. Civil Service Regulations, Pension Rules, U.P. Retirement Benefit Rules 1961. New Family Pension Scheme 1965, and all orders of the Finance Department in relation to pension/family pension/ Gratuity as are applicable to employees of the State Government were held as automatically incorporated by reference. It was held that except for the Government Order dated 08.12.2008 there was no other Government Order regulating the grant of financial benefits under the Sixth Pay Commission Report or payment of pension and gratuity to the employees of the State Government. This Government Order was, therefore, held to apply in its entirety to the employees of the Awas Vikas Parishad by virtue of the statutory Regulations of 2009 which provided that employees of the Parishad are entitled to payment of pension/family pension and gratuity as is admissible to officers and employees of the State Government.

46. In *Shakuntala Singh* (supra), the Coordinate Bench of this Court rejected the argument made by the State Respondents that the petitioner was not entitled to claim benefit of pension as per the Government

Order dated 08.12.2008, which was applicable to State pensioners and was not binding upon the Development Authorities. The Government Order dated 08.12.2008 had been further modified by Government Orders dated 19.07.2010, 14.07.2014 and 27.01.2016, which had not yet been made applicable to employees of Development Authorities for the purpose of payment of pension and other benefits.

47. It observed that the respondents had admitted that there was no alternate formula for computation of pension/family pension, other than that provided by the State Government Orders. In terms of the Retirement Benefit Rules of 2011, it was not open for the respondents to adopt a formula other than that applicable to State Government servants. Moreover, the Development Authorities had conveyed to the State Government that they had the financial capacity to bear the expenses of enhanced pension/revise family pension recommended by the Seventh Pay Commission for the employees for employees who had retired before 01.01.2016.

48. The Coordinate Bench went a step further and framed an ancillary question as to whether the Development Authorities were bound to take approval of the State Government before implementing the recommendations of the respective Pay Commissions made applicable to the Government servants through various Government Orders. The Court observed that Development Authorities are autonomous bodies having separate fund. The salaries, pension and other emoluments of their employees are funded by the Development Authorities from their own resources. The State Government does not fund the Development Authorities. The

Retirement Benefit Rules of 2011 does not provide for prior approval of the State Government to be taken by the Development Authorities for implementing Government Orders.

49. The Coordinate Bench placed reliance upon observation made by the Supreme Court in the case of *Preetam Singh* (supra) which provided that previous approval of the State Government to frame Regulations governing the conditions of service of its employees, including pension etc, was not required to be obtained by the Parishad.

It is relevant to note here that the judgement rendered in *Preetam Singh* was referred to a Larger Bench in State of U.P. versus *Virendra Kumar* Civil Appeal No.6622 of 2022 and judgement was rendered by the Supreme Court Larger Bench on 25.11.2022 reported in 2022 SCC Online Supreme Court 1628; were subject to a minor modification, the observations of the Division Bench in *Preetam Singh* were affirmed.

50. The Coordinate Bench in *Shakuntala Singh* observed that the Retirement Benefit Rules 2011 which govern the computation and payment of pension/family pension to employees and their dependents of Development Authorities nowhere prescribes prior approval to be obtained for Government Orders issued from time to time governing pension and family pension to be implemented. Since the Finance Controller of Lucknow Development Authority, who is the Custodian of Development Authorities Pension Fund constituted under Rule 16 of the Retirement Benefit Rules 2011 had expressed a willingness to implement the Government Orders revising

pension/family pension of Employees of Development Authorities, the Development Authorities can immediately and without any approval implement the Government Orders revising pension/family pension in favour of their retirees.

51. In *Shakuntala Singh* the Coordinate Bench also considered the question as to whether classification of pensioners made by the State Government on the basis of their date of retirement, was reasonable and whether it had any nexus with the object sought to be achieved. It referred to several Division Bench judgements of this Court and also judgement rendered by the Supreme Court including in *All Manipur Pensioners Association through its Secretary vs. State of Manipur* 2020 (14) SCC 625; where the Supreme Court had answered the question whether the State Government would be justified in creating two classes of pensioners, viz., pre-1996 retirees and post-1996 retirees, for the purpose of payment of revised pension, salary, on the ground of financial constraint. The Supreme Court rejected the cut-off date, as according to it such a classification had no nexus with the object and purpose of grant of benefit of revised pension. It observed: -

"- - - - in our view, such a classification has no nexus with the object and purpose of grant of benefit of revised pension. All the petty pensioners form one class, who are entitled to pension as per the pension Rules. Article 14 of the Constitution of India ensures to all equality before law and equal protection of laws. At this juncture, it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. It is true that Article 16 of the Constitution of India permits a valid

classification. However, a valid classification must be based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over the others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of factors differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. The test for valid classification may be summarized as a distinction based on the classification founded on an intelligible differential, which has a rational relationship with the object sought to be achieved - -."

52. Finally, the Coordinate Bench observed that it is not disputed by the respondents that the recommendations of the Sixth Pay Commission and the Seventh Pay Commission in respect of current employees of Development Authorities has been accepted by the State Government and implemented by the Development Authorities with effect from 01.01.2006 and 01.01.2016 respectively. However, retired employees were not being paid revised pension pursuant to the Government Orders issued from time to time. Revised pension is available for those employees who had retired after 01.01.2006 and 01.01.2016 respectively. However the pensioners who had retired earlier were being denied the benefit of revised pension/family pension on an artificial classification with regard to the date of implementation of such upward revision for the purposes of pension and family pension. *"...Such an artificial classification was not founded on any intelligible differentia so as to distinguish*

persons that are grouped together from others that were left out."

53. This Court has perused the relevant extract of the original record of File nos.06E/2016 of Awas Section 5. The file noting starts with page no.158 where the Administrative Department is considering the adoption of the Seventh Pay Commission's recommendations for retirement benefits as per the Finance Departments Government Order Nos.38 and 39 dated 23.12.2016. The proposal to adopt such Government Order would entail; (a) grant of pension and dearness allowance as per the Seventh Pay Commission; (b) minimum qualifying years of service for admission to pension being reduced from 20 years to 10 years; (c) admissibility of full pension being available on rendering 20 years of services instead of 33 years of service; (d) the ceiling limit for gratuity being raised from Rs.10 lakhs to Rs.20 lakhs on rendering such 20 years of service; (e) additional pension being given to old pensioners and family pension also being upwardly revised.

54. The Director, Awas Bandhu U.P., by his letter dated 08.10.2020 had indicated that there were 2578 pensioners currently in 29 Development Authorities who were being paid pension and other retirement benefits amounting to Rs.3,802.98 lakhs annually. In Case of adoption of the Seventh Pay Commission Recommendations such financial burden would be increased to Rs.4,898.89 lakhs. The additional burden annually would come to Rs.1,095.89 lakhs. The Finance Controller LDA by his letter dated 07.10.2020 had indicated that if pension and other retirement benefits are made admissible as per Seventh Pay

Commission's recommendations including Dearness Relief for pensioners of Centralized services, an amount of Rs.190.18 lakhs per month would be needed. The Finance Controller also in his earlier letter dated 15.09.2020 had informed of the amount of arrears of pension to be disbursed up to 31.03.2022. He informed that currently Rs.160.71 lakhs was being paid on a monthly basis for pension/Family pension. If the Pay Commission's recommendations are to be adopted with effect from 01.01.2016, then the arrears of pension/family pension upto 31.03.2022 would amount to Rs.5500/- lakhs. On the other hand, only Rs.750 lakhs was left in the Pension Fund Account maintained in IDBI bank. Only Rs.1000 lakhs per month as contribution to Pension Fund is expected to be made available by the various Development Authorities. Consequently, Rs.3550/- lakhs had to be arranged by increasing the monthly contribution of all Development Authorities to the Pension Fund. As a result of this correspondence from the Director, Awas Bandhu, and the Finance Controller, Lucknow Development Authority, a Government Order had been issued on 29.12.2020 directing payment of Rs.35.50/- crores additionally as pension contribution in the Fund by the various Development Authorities. But this was not sufficient and, therefore, a meeting would have to be arranged of all Development Authorities to determine the amount of contribution to the Pension Fund of each of them, and also for ensuring that the same is paid into the pension fund in time. In response to an earlier query made with regard to the consequences of grant of arrears as per the Seventh Pay Commission's recommendations, the Administrative Department had calculated an amount of Rs.190.18/- lakhs but this amount did not

take into account money needed for payment of arrears.

55. This Court has noticed that the Administrative Department in its noting had only dealt with financial liability/burden on payment of revised pension and other retirement dues prospectively as the Chart that has been prepared relates to the year 2020-21 upto 2023-24. For the said purpose alone a corpus fund of Rs.500 crores had been suggested to be created which would then be invested in such a manner as to realize Rs.30/- crores annually as interest thereon. However, no method has been suggested of how such Corpus Fund is to be created and what would be the specific contribution of each of the Development Authorities therein.

56. The Hon'ble Chief Minister had directed the Finance Department to also be consulted in the matter.

57. The Finance Department in its advice only stated that as per the Sankalp dated 16.12.2016 adopting the Pay Committees 2016 Report and the Government Orders nos. 38 and 39 dated 23.12.2016 issued in this regard, the additional requirement of fund by the Development Authorities would have to be arranged by them from their own resources and the State Government would not transfer any fund for the purpose of additional establishment costs incurred by them in this regard. It also advised that if the Government Orders dated 23.12.2016 are adopted as it is, it would lead to qualifying service for pension being reduced from 20 years to 10 years, and qualifying service for full pension being reduced from 33 years to 20 years. Moreover pension would be admissible at

the rate of 50% of the last basic salary drawn and would in no case be less than Rs.9000/- per month. Moreover, additional pension at the rate of 20% of the basic pension would become admissible to pensioners who are 80 years old, at the rate of 30% would be admissible to pensioners over 85 years old, and so on and so forth, and there would be hundred percent increase in basic pension for a pensioner who was hundred years or more. Such provisions were not applicable to pensioners of Development Authorities in the past or even in the present. Death-cum-retirement Gratuity would also be increased and the ceiling limit would now be Rs.20 lakhs instead of 10 lakhs on rendering full service of twenty years.

58. The Administrative Department also pointed out that the currently in service employees of Authorities have been granted the benefit of the Seventh Pay Commission's recommendations and there are several writ petitions pending in the High Court by pensioners and family pensioners seeking benefit of the Seventh Pay Commission's recommendations.

59. On said file noting, the Hon'ble Chief Minister had made a query on 27.10.2020 asking for details regarding the trend of income and expenditure of various Development Authorities for the past several years.

60. A format was prepared seeking information from various Development Authorities thereafter which was circulated. The information was collected from 29 Development Authorities, reference of which was made in the file noting at page 166 onwards. The Development Authorities had informed the Administrative Department that they were ready and

willing to bear the financial burden in revising pension and other retirement benefits as per the Seventh Pay Commission's recommendations.

Then onwards Hon'ble Chief Minister again put up a query on 05.01.2021 with regard to the trend of income and expenditure in the past years and additional fund that would be required to meet the liability.

61. All previous developments were summarized in the Administrative file noting starting from page 169 onwards in File No. 06E/2016. Information was given by only seven Development Authorities, out of which four had informed that their income was less than their expenditure in the past three years. Most of the Development Authorities had expressed their willingness to bear the additional financial burden as a result of upward revision of pension and other retirement benefits on adoption of the Seventh Pay Commission's recommendations in this regard.

62. The Administrative Department in its noting on the file in paragraph-16 onwards, however, refers only to the expected financial burden to be caused by adoption of the Seventh Pay Commission's recommendations regarding retirement benefits in the future with effect from to the Financial Year 2020-21 up to Financial Year 2023-24. There is no reference to financial burden to be cast on payment of arrears of revised pension with effect from 01.01.2016. Thereafter, all of a sudden in paragraph-18 of the said noting on the file at page-175, there is a suggestion that the Pay Commission's recommendations be accepted with effect from 01.01.2016 notionally with actual payment being made

with immediate effect. The relevant draft of the Office Memorandum was thereafter prepared which was got approved and issued as Government Order dated 24.02.2021.

63. In **D.S. Nakara versus Union of India, 1983 (1) SCC 305**; the Constitution Bench had to consider the question of a cut-off date found in the pension scheme which was uniformly applicable to all the Central government employees who had formed one class at the time of retirement and who were entitled to pension. The question was whether the amount of pension which was computed for them in the light of the available formula could have been further enhanced on the basis of a subsequent more beneficial formula and whether it could be denied only on the ground that they had retired prior to the date on which such enhanced computation of pension was made available to the pensioners. In the light of the aforesaid fact situation, it was observed that all employees were governed by the pension scheme and who had become eligible to earn pension at the time of the retirement formed one class. It was held that such a cut-off date for granting additional benefits to some of the pensioners in the same class of employees would not be countenanced on the touchstone of Article 14 of the Constitution of India. In *D.S. Nakara's* case admittedly all the Central Government servants were governed by the pension scheme and were eligible to draw pension on retirement. They therefore, formed one class.

64. The ratio of *Nakara's* case was distinguished by two later Constitution Bench decisions. In the case of **Indian ex-Services League versus Union of India, 1991 (2) SCC 104**; the Supreme Court

made the following observations in paragraph 12 of the report: -

"12. The liberalised pension scheme in the context of which the decision was rendered in Nakara provided for computation of pension according to a more liberal formula under which "average emoluments" were determined with reference to the last 10 months salary instead of 36 months salary provided earlier, wielding a higher average, coupled with a slab system and raising the ceiling limit for pension. This Court held that where the mode of computation of pension is liberalised from a specified date, its benefit must be given not merely to retirees subsequent to that date but also to other retirees irrespective of the date of retirement even though the earlier retirees would not be entitled to any arrears prior to the specified date on the basis of the revised computation made according to the liberalised formula. For the purpose of such a scheme all existing retirees irrespective of the date of their retirement, were held to constitute one class, any further division within that class being impermissible. According to that decision, the pension of all earlier retirees was to be re-computed as on the specified date in accordance with the liberalised formula of computation on the basis of the average emoluments of each retiree payable on his date of retirement. For this purpose there was no revision of the emoluments of the earlier retirees under the scheme. It was clearly stated that "if the pensioners form one class, their computation cannot be by different formula affording unequal treatment solely on the ground that some retired earlier and some retired later". This according to us is the decision in Nakara and no more. .."

(emphasis supplied)

65. In yet another Constitution Bench judgement of Supreme Court in the case of **Krishena Kumar versus Union of India, 1990 (4) SCC 207**; Nakara's case was distinguished by holding that:

"in Nakara's case the Court treated the pensioners only as a homogeneous class. It was never held that both the pension retirees and A provident fund retirees formed a homogeneous class, and that any further classification among them would be violative of Article 14. On the other hand, the Court clearly observed that it was not dealing with the problem of a fund.

It has to be kept in view that in the present case we are concerned with the pension fund and so far as the pension fund is concerned, Nakara's judgement by itself would not apply as is clearly mentioned in the very same judgement in paragraph 45....."

(emphasis supplied)

66. This Court has gone through the judgement rendered by the Supreme Court in the case of **Subrata Sen another versus Union of India and others 2001(8) SCC 71**; relied upon by the learned counsel for the petitioner. The Supreme Court placed reliance upon judgement rendered by it in *V. Kasturi versus Managing Director, State Bank of India, Bombay and another* 1998 (8) SCC 30; where referring to two categories of pensioners, the Supreme Court had observed that *"if the person retiring is eligible for pension at the time of his retirement and if he survives till the time of subsequent amendment of the relevant pension scheme, he would become eligible to get enhanced pension or would become eligible to get more pension as per the new formula of computation of pension subsequently brought into force.* He would

be entitled to get benefit of the amended pension provision from the date of such order as he would be a member of the very same class of pensioners when the additional benefit is being conferred on all of them. *In such a situation the additional benefit available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to that date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners who had survived by the time the scheme granting additional benefit to these pensioners came into force. However, if an employee at the time of his retirement is not eligible for retiring pension and stands outside the class of pensioners, and subsequently by amendment of the relevant pension Rules any beneficial umbrella of pension scheme is extended to cover a new class of pensioners and by then the erstwhile non-pensioner might have survived, then only if such extension of pension scheme to erstwhile pensioners is expressly made retrospective by the authorities promulgating such scheme; the erstwhile non-pensioner who has retired prior to the advent of such extended pension scheme can claim benefit of such a new extended pension scheme.* If such a new scheme is prospective only, the old retirees non-pensioners cannot get the benefit of such a scheme even if they survive such new scheme. They will remain outside its sweep- - -."

(emphasis supplied)

67. Reliance was also placed upon paragraph 45 of the judgement rendered in D.S. Nakara's case, which reads thus: -

"45. Let us clear one misconception. The pension scheme including the liberalized scheme available

to the Government employees is non-contributory in character. It was not pointed out that there is something like a pension fund - - - the payment of pension is a statutory liability undertaken by the Government and whatever becomes due and payable is budgeted for. One could have appreciated this line of reasoning where there is a contributory scheme and a pension fund from which alone pension is disbursed. That being not the case, there is no question of pensioners dividing the pension fund which, if more persons are admitted to the scheme, would pro rata affect the share."

(emphasis supplied)

68. Further, in *All India Reserve Bank Retired Officers Association versus Union of India*, AIR 1992 Supreme Court 767, the Supreme Court had highlighted the observations made in *D.S. Nakara's* case found in paragraph 46 to the following effect: -

"46. - - - the pension will have to be re-computed in the light of the formula enacted in the liberalised pension scheme and effective from the date the revised scheme comes into force. And beware, it is not a new scheme, it is only a revision of existing scheme. It is not a new retirement benefit. It is an upward revision of an existing benefit. If it was a wholly new concept, a new retirement benefit, one could have appreciated an argument that those who had already retired could not expect it."

69. The Court further observed: -

"- - - it must be realised that in the case of an employee governed by the contributory Provident fund scheme his relations with the employer come to an end

on his retirement and receipt of CPF amount, but in the case of an employee governed under the pension scheme his relations with the employer really undergo a change but do not snap altogether. That is the reason why this Court in *Nakara's* case drew a distinction between liberalisation of an existing benefit and introduction of a totally new scheme. In the case of Pensioners it is necessary to revise the pension periodically as a continuous fall in the rupee value and the rise in prices of essential commodities necessitates an adjustment of the pension amount but that is not the case of employees governed under the CPF scheme, since they had received the lump sum payment which they were at liberty to invest in a manner that would yield optimum returns which would take care of the inflationary trends. This distinction between those belonging to the pension scheme and those belonging to the CPF scheme has been rightly emphasised by this Court in *Krishena's* case".

(emphasis supplied)

70. This Court finds that the judgement rendered in *Subrata Sen* turned on different facts. In the said case the Union of India had taken over the Assam Oil Company of which the petitioners were employees. The payment of pension was liability of the employer as per the Rules and the liability was required to be discharged by the Union of India, in view of its taking over the Company. The rights of the employees were protected under Burma Oil Company (acquisition of shares of Oil India Ltd and of the undertakings in India of Assam Oil Co Ltd and the Burma Oil Company Ltd) Act 1981. The increase in pension could be met from the general revenues of the Central Government. Such is not the case with the petitioners. No such reserve of funds is available for pensioners

of Development Authorities. Most of the petitioners were absorbed from Nagar Palika services into the Centralized Services of the Development Authorities. The Act of 1973 and the Rules of 1985 governing their conditions of service provided for creation of a Provident Fund and a Pension Fund. Under the Retirement Benefit Rules of 2011 the Finance Controller of the Lucknow Development Authority was made responsible for the upkeep and maintenance of the pension fund. The petitioners were to get retirement benefits from the pension fund alone. The pension fund is created out of contributions made by the Development Authorities in respect of its employees who are in service in the manner provided under the Rules. The contribution is in the form of a fixed percentage of salary of each of the employees. There is therefore no provision for an employer making an additional Contribution in respect of its past employees who are the existing pensioners.

71. However , in the case of the petitioners the Development Authorities themselves have expressed their willingness and readiness to give the retirees enhanced pensionary and other retirement benefits in terms of the recommendations of the Seventh Pay Commission. As a corollary of the Government having nothing at all to do with the said Pension Fund, it is for the Development Authorities to bear the additional financial burden and consequently to determine also the date of application of the enhanced pensionary benefits to their retired employees.

72. Moreover, the impugned Office Memorandum disallows payment of arrears of revised pension with effect from 01.01.2016, and also the benefit of

enhanced pension made admissible to retirees of State Government, by modifying the formula and method for calculation of revised pension as given in Government Orders dated 18.07.2017 and 04.09.2017. The Government Order dated 23.12.2016 and also the Shasikiya Sankalp dated 16.12.2016 provides that pension and other retirement benefits shall be available to employees of other autonomous institutions and statutory bodies at par with State Government employees, if they were getting such parity in the past. Under Rule 4, 5, 7 and 34 of the Retirement Benefit Rules 2011, the pensioners of Development Authorities become entitled to payment of pension, family pension and Gratuity as is admissible to employees of the State Government as soon as the relevant Government Orders are issued in this regard as they were incorporated by reference in the Retirement Benefit Rules of 2011. Therefore, the recommendations of the Seventh Pay Commission with regard to salaries have been duly implemented with effect from 01.01.2016 for employees of Development Authorities by Government Order dated 04.01.2017.

73. It has not been submitted by learned Counsel for the Respondents that the Coordinate Bench decision in *Shakuntala Singh* was questioned in Appeal and set aside by any appellate Court. The Coordinate Bench decision has taken care of arguments of the State Respondents that employees of Centralized Services of Development Authorities cannot claim parity with State Government employees by referring to the Retirement Benefit Rules 2011 and the Centralized Service Rules of 1985, where it has been clearly provided that for all matters which have not been specifically provided for, in the Rules, the employees shall be governed by Rules

and Regulations and orders as applicable to Government Servants engaged in the affairs of the State. ***The Supreme Court in the case of Indian Ex-Servicemen's Movement Vs. Union of India and others, 2022 (7) SCC 323***; has observed in paragraph 34:-

".....A hierarchy in law exists between Statutes and Rule. A statutory provision will have precedence over delegated legislation if the latter conflicts with the former. Similarly, executive instructions cannot overrule a Statute or Rules made in pursuance of a Statute."

74. The Supreme Court in paragraph 55 and 56 of the judgement rendered in All India Ex-Servicemen Movement (supra), observed as follows: -

"In the decision of this Court in Nakara, the Constitution Bench was deciding on the issue of whether the date of retirement would be a relevant consideration for determining the application of a revised formula for computation of pension. The liberalised pension scheme was made applicable prospectively to those employees who retired on or after 31 March 1979 in the case of Government Servants covered by the 1972 Rules and in respect of defence personnel, those who became non-effective on or after 1 April 1979. Consequently, those who retired prior to the date were not entitled to the benefit of liberalised pension scheme. It was held that payment of pension constitutes a compensation for the service rendered in the past and as a measure of social welfare for providing social economic justice to those who have rendered service to the state. The court noted that earlier, the measure of pension was related to the average emoluments

during a period of 36 months prior to retirement. By the liberalised scheme, the period was reduced to an average of 10 months preceding the date of retirement, coupled with the above aspects, a slab system for computation was introduced and the ceiling was raised. This Court held that there was no justification for arbitrarily selecting the criteria for eligibility for grant of benefits under the scheme based on the date of retirement. Hence, this court held that all pensioners formed a homogeneous class and where an existing scheme of pension was liberalised, a distinction could not be made on the basis of a specified cut-off date."

"56. At the same time, it must also be noted that the decision in Nakara noted that "the financial implication in such matters has some relevance". This Court struck down the portion of the memoranda by which the benefit of the liberalised pension scheme was only confined to persons retiring on or after the specified date which resulted in the benefit being extended to all retirees, irrespective of the date of retirement.

75. The Supreme Court in One Rank One Pension case however emphasized the observations made by it in *Indian Ex Services League* (supra) by making the following observations in paragraph 61 of the Report:-

"61. In Indian Ex Services League (supra), it was contended that in view of the decision in Nakara, all retirees who held the same rank irrespective of the date of retirement must receive the same amount of pension. This Court observed that there was nothing in Nakara that backed the claim of the appellants that the same Pension must be given to all retirees of the same rank. The Court observed that

it was held in Nakara that only the same formula for the calculation of pension was to be used and over which the emoluments of the retirees revised.

(emphasis supplied)

76. It was observed that the effect of the judgement in the Nakara was that the same computation according to liberalised formula must be applicable to pre and post 1st April 1979 retirees, and that the decision cannot be construed to mean that the same amount of pension must be receivable. The Supreme Court in the case of One Rank One Pension also went on to quote the judgement rendered by it in K.L. Rathee versus Union of India, 1997 (6) SCC 7, where the decision in Nakara was explained in paragraph 6 and 7. In paragraph 7 in K L Rathee, the Supreme Court observed as follows: -

"7. It is to be seen that the judgement did not strike down the definition of emoluments. It merely held that if pension was to be calculated on the basis of last 10 months emoluments of a government servant, after 1 April 1979, there is no reason why those who retired before 1 April 1979 should get pension calculated on the basis of average of last 36 months emoluments. In other words, the rule of computation must be the same. The Court did not hold that those who have retired before 1 April 1979 must be treated as having the same emoluments as those who retired on or after 1 April 1979 for the purpose of calculation of pension. Therefore, on the strength of Nakara case, the petitioner is not entitled to ask for computation of pension with reference to the emoluments which he never got - -."

(emphasis supplied)

77. In K.L. Rathee and also in the One Rank One Pension case, the Supreme Court clarified that while rule of computation of pension must be the same i.e. average of last ten months emoluments irrespective of date of retirement, but the amount of pension of the retirees of the same rank cannot be the same irrespective of the date of retirement i.e. those who were actually drawing larger emoluments in the last ten months of their service, or at the time of their retirement their last basic pay was more, will get larger amount of pension.

78. In **B.J. Akkara Versus Union of India (2006) 11 SCC 709**, the Supreme Court summarized the principles relating to pension. It was observed in paragraph 20 as follows:-

"20. The principles relating to pension relevant to the issue are well-settled. They are:-

(A) in regard to pensioners forming a class, computation of pension cannot be by a different formula thereby applying an unequal treatment solely on the ground that some retired earlier and some retired later. If the retiree is eligible for pension at the time of his retirement and the relevant pension scheme is subsequently amended, he would become eligible to get enhanced pension as per the new formula of computation of pension from the date when the amendment takes effect. In such a situation, the additional benefit under the Government Order, made available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which day aforesaid additional benefit was conferred.

(B) But all retirees retiring with a particular rank do not form a single class

for all purposes. Where the reckonable emoluments as on the date of retirement (for the purpose of computation of pension), are different in respect of two groups of Pensioners, who retired with the same rank, the group getting lesser pension cannot contend that the pension should be identical with or equal to the pension received by the group whose reckonable emolument was higher. In other words, pensioners who retire with the same rank need not be given identical pension, where the average reckonable emoluments at the time of their retirement were different, in view of the difference in pay, or in view of different pay scales being in force.

One set cannot claim the benefit extended to the other set on the ground that they are similarly situated. Though they retired with the same rank, they are not of the same class or homogeneous group. The employer can validly fix a cut-off date for introducing any new pension/retirement scheme for discontinuance of any existing scheme. What is discriminatory is introduction of a benefit retrospectively (or prospectively) fixing a cut-off date arbitrarily thereby dividing a single homogenous class of pensioners into two groups and subjecting them to different treatment"

79. Having considered the record produced before the Court relating to the decision making and also relevant and binding precedents as above; this Court is of the considered opinion that the formula and procedure for computation of pension as given in the Government Orders dated 18.07.2017 modifying the earlier decision for Government employees who retired before 01.01.2006 shall be applicable to the petitioners as well as the Concordance Tables issued from time to time for

determination of their pension/ family pension including the ones appended to the Government Order dated 04.09.2017. The Government Order dated 01.05.2018 also shall apply to the petitioners in view of the judgment of this Court in *Shakuntala Singh*.

With regard to retrospective operation of revised pension with effect from 01.01.2016 and arrears to be paid, this Court has found nothing on record to show that question of payment of arrears with effect from 01.01.2016 to 24.02.2021 was deliberated upon seriously. It is evident from the fact that information in prepared formats continued to be collected by the Administrative Department even after issuance of the impugned office memo. It is therefore directed that the Respondent No.1 shall collect all necessary information and also determine the availability of finances and issue appropriate orders within a period of three months from the date a copy of this order is produced before it, taking into account also the observations made by this Court hereinabove.

Consequently, the writ petitions stand **party allowed** with respect to the relief claimed regarding method of computation of pension/ family pension. With regard to denial of arrears, the matter is remitted to the Respondent no.1 to take an appropriate decision as aforesaid.

The relief claimed in Writ-A No.11020 of 2021: *Ratan Kumar Nigam Vs. State of U.P. & Another*, cannot be granted at this stage as the State Government has not yet decided the issue of applicability of entire recommendations of the Seventh Pay Commission to employees of Development Authorities.

(2023) 5 ILRA 1657
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2023

BEFORE

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

First Appeal From Order Defective No. 945 of
2004

Sujan Singh Bundela & Anr. ...Appellants
Versus
Kripal Singh Yadav & Ors. ...Respondents

Counsel for the Appellants:
Sri V.C. Srivastava

Counsel for the Respondents:
Sri Sharad Kumar Purwar, Sri Satya
Prakash Singh

Civil Law- The Limitation Act,1963-Section 5- There is huge delay of 2 years and 93 days-The matter has remained pending before this Court for 19 years without steps being taken-the kind of explanation rendered does not satisfy the observations of Apex Court that if delay has occurred for reasons which does not smack of mala fide, the Court should be reluctant to refuse condonation-On the contrary a complete careless and reckless long delay on the part of applicant which has remain virtually unexplained at all-No reason to exercise judicial discretion so as to justify condonation of delay in the present case. (Para 13) (E-15)

List of Cases cited:

1. Collector, Land Acquisition Vs Katiji, 1987(2) SCC 107
2. P.K. Ramachandran Vs St.of Kerala, AIR 1998 SC 2276
3. Shakuntala Devi Jain Vs Kuntal Kumari, AIR 1969 SC 575

4. Brij Indar Singh Vs Kanshi Ram ILR (1918) 45 Cal 94

5. St.of Nagaland Vs Lipok AO & ors., AIR 2005 SC 2191

6. Vedabai @ Vijayanatabai Baburao Vs Shantaram Baburao Patil & ors., JT 2001(5) SC 608

7. Pundlik Jalam Patil (dead) by LRS. Vs Executive Engineer, Jalgaon Medium Project & anr.(2008) 17 SCC 448

8. Maniben Devraj Shah Vs Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157

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

1. This is an application seeking condonation of delay in filing the appeal which was filed in the year 2004.

]

2. There is huge delay of 2 years and 93 days. The matter has remained pending before this Court for 19 years without steps being taken. Today also, none is present for the appellants.

3. Reasons for the delay as explained in the affidavit attached to this application reads as under :

"2. That the impugned judgment was passed on 8.11.2001 and decree was passed on 24.11.2001, but the Certified Copy of the Order was applied on 17.3.2004 and received on the same date, and Certified Copy of the Decree was also applied on 17.3.2004 and received on the same day.

3. That the appellants were not a party in the case. Pooran Singh Bundela was a party and proceedings was in the in the knowledge of the appellants.

4. *That when the Collection Officials were directed to recover the amount from the appellants, then the appellants came to know about the proceedings.*

5. *That after obtaining the Certified Copy of the Judgment and Decree, the appellants fell ill and they could not direct the deponent to contact the counsel for filing of the aforesaid case before this Hon'ble Court. The date of knowledge of the proceedings of the appellants is 17.3.2004, when they obtained the copy of the judgment and decree of the Courts below"*

3. The above reasons will have to be looked into the with the principle enunciated by the Courts from time to time for condonation of delay. The expression "sufficient cause" in Section 5 of Act, 1963 has been held to receive a liberal construction so as to advance substantial justice and generally a delay in preferring appeal may be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay. **In Collector, Land Acquisition Vs. Katiji, 1987(2) SCC 107**, the Court said, that, when substantial justice and technical considerations are taken against each other, cause of substantial justice deserves to be preferred, for, the other side cannot claim to have vested right in injustice being done because of a non deliberate delay. The Court further said that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

4. In **P.K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276** the Court said:

"Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds."

5. The Rules of limitation are not meant to destroy rights of parties. They virtually take away the remedy. They are meant with the objective that parties should not resort to dilatory tactics and sleep over their rights. They must seek remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The statute relating to limitation determines a life span for such legal remedy for redress of the legal injury, one has suffered. Time is precious and the wasted time would never revisit. During efflux of time, newer causes would come up, necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The statute providing limitation is founded on public policy. It is enshrined in the maxim *Interpublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). It is for this reason that when an action becomes barred by time, the Court should be slow to ignore delay for the reason that once limitation expires, other party matures his rights on the subject with attainment of finality. Though it cannot be doubted that refusal to condone delay would result in foreclosing the person who initiate suit from putting forth his cause but simultaneously the party on the other hand is also entitled to sit and feel carefree after a particular length of time, getting relieved from persistent and continued litigation.

6. There is no presumption that delay in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.

7. We need not to burden this judgment with a catena of decisions explaining and laying down as to what should be the approach of Court on construing "sufficient cause" under Section 5 of Act, 1963 and it would be suffice to refer a very few of them besides those already referred.

8. In **Shakuntala Devi Jain Vs. Kuntal Kumari**, AIR 1969 SC 575 a three Judge Bench of the Court said, that, unless want of bona fide of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

9. The Privy Council in **Brij Indar Singh Vs. Kanshi Ram** ILR (1918) 45 Cal 94 observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. This principle still holds good inasmuch as the aforesaid decision of Privy Council as repeatedly been referred to, and, recently in **State of Nagaland Vs. Lipok AO and others**, AIR 2005 SC 2191.

10. In **Vedabai @ Vaijayanatabai Baburao Vs. Shantaram Baburao Patil and others**, JT 2001(5) SC 608 the Court said that under Section 5 of Act, 1963 it should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

11. In **Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project and Anr.** (2008) 17 SCC 448, in para 17 of the judgment, the Court said :

"...The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights."

12. In **Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157**, in para 18 of the judgment, the Court said as under:

"What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest."

13. In our view, the kind of explanation rendered herein does not satisfy the observations of Apex Court that if delay has occurred for reasons which

does not smack of mala fide, the Court should be reluctant to refuse condonation. On the contrary, we find that here is a case which shows a complete careless and reckless long delay on the part of applicant which has remain virtually unexplained at all. Therefore, we do not find any reason to exercise our judicial discretion exercising judiciously so as to justify condonation of delay in the present case.

14. In view of the above, this application requires to be rejected hence, the same is rejected.

Order on Appeal

Since application seeking condonation of delay in filing this appeal has been dismissed vide order of date, the appeal being barred by limitation, is accordingly dismissed.

(2023) 5 ILRA 1660
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.05.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ-C No. 1000408 of 2001

Mohd. Naim	...Petitioner
Versus	
Additional Commissioner, Admin., Gonda & Ors.	...Respondents

Counsel for the Petitioner:

Shyam Krishna Srivastava, Najeem Zafar, Rafar Farooqui, T.H. Khan, Z. Jilani

Counsel for the Respondents:

C.S.C., D.C. Mukherjee, Deepak Seth, Iqbal Ahmad, Jitendra Saxena, Kumar Ayush, Mohd. Aslam Khan, Mohd. Kumail Haider,

Mohd. Mustafizul Haq, Mohiuddin Khan,
R.N. Gupta

Civil Law-The Uttar Pradesh Zamindari Abolition and Land Reforms Act-1950-Sections 122-C (3) & (6)- No proposal of the Gram Sabha / Land Management Committee to allot the land to the petitioner as no such document is available on record. As per the material available on record no list has been filed to convince the Court that a preferential list in terms of section 122C-(3) of U.P.Z.A. & L.R. Act has been prepared- The power to pass any order u/s 122-C(6) vests with the Collector- The impugned order has been passed by the Additional District Magistrate / Additional Collector having power u/s 122-C(6) after hearing all the parties including petitioner. (E-15)

(Delivered by Hon'ble Rajesh Singh
Chauhan, J.)

1. Heard Sri M.M. Haq, learned counsel for the petitioner, Sri A.S. Tiwari, learned Addl. C.S.C. for the State respondents and Sri Mohd. Kumail Haider and Iqbal Ahmad, learned counsel for the respondent no. 5.

2. By means of this petition the petitioner has assailed the order dated 29.12.2000 passed by the Additional District Magistrate / Additional District Collector, Balrampur in Case No. 7/11/19/49/31 filed u/s 122C(6) of the U.P.Z.A. & L.R. Act, 1950 thereby in a suit filed by the private opposite party the authority has cancelled the patta being granted in favour of the petitioner u/s 122C. The petitioner has also assailed the order dated 23.1.2001 passed by the Additional Commissioner, Administration, Devi Patan Mandal, Gonda in a revision whereby the revisional authority has rejected the revision holding that any order

being passed u/s 122C(6) of U.P.Z.A. & L.R. Act is a final order, therefore, no revision would be maintainable.

3. Learned counsel for the petitioner has stated that initially one suit u/s 122 C(6) of U.P. Z.A. & L.R. Act bearing Suit No. 195 : State vs. Naim, has been filed before the Chief Revenue Officer, Gonda and Chief Revenue Officer, Gonda vide order dated 5.2.1996 cancelled the lease given to the petitioner for the reason that the lease given to the petitioner on Gata no. 396 is a land recorded in the revenue record as a 'Sadak Khas'. He has further stated in his order that the lease granted by the Sub-Divisional Officer concerned is per se illegal as no lease can be granted on the public utility land and the preferential list has not been prepared.

4. The aforesaid order has been assailed by the petitioner by filing revision before the Commissioner and that revision of the petitioner was allowed vide order dated 13.1.1998 by the Additional Commissioner, Administration, Faizabad Mandal, Faizabad setting aside the order dated 5.2.1996 passed by the Chief Revenue Officer. In the aforesaid order the revisional authority has categorically indicated that any order u/s 122C(6) can be passed by the Collector after following the due procedure of law, therefore, the order passed by the Chief Revenue Officer is without jurisdiction order.

5. Thereafter the private opposite party being aggrieved for the fact that on account of lease given to the petitioner on Gata no. 396 which is a public utility land his right to utilize such land being a tenure holder of the adjacent gata number has filed a case before the Additional District Magistrate / Additional Collector,

Balrampur. In the aforesaid case the notices were issued to the petitioner and petitioner participated in the proceedings. The Addl. District Magistrate / Assistant Collector, Balrampur has allowed the case of the private opposite party vide order dated 29.12.2000 cancelling the order dated 8.2.1991 passed by the Sub-Divisional Officer, Uttraula granting lease to the petitioner and directed that the documents be corrected accordingly. The petitioner assailed the aforesaid order dated 29.12.2000 filing the revision before the Additional Commissioner and the said revision was dismissed vide order date 23.1.2001 being not maintainable but the learned counsel for the petitioner has stated that when the issue in question has already been adjudicated, the same issue should have not been adjudicated under some provision of law. He has further submitted that when a lease was given to the petitioner by the S.D.O. concerned, the said lease may not be cancelled by the Additional District Magistrate / Assistant Collector invoking powers of section 122C(6) of the U.P.Z.A. & L.A. Act.

6. Therefore, the impugned order dated 29.12.2000 is liable to be set aside and the revisional order is liable to be set aside inasmuch as if any order u/s 122C(6) has been passed without jurisdiction, the same may be decided under the revisional authority.

7. Learned Addl. C.S.C. as well as learned counsel for the private opposite party have opposed the aforesaid submission of learned counsel for the petitioner. They have submitted that while setting aside the order dated 5.2.1996 passed by the Chief Revenue Officer the revisional court vide order dated 13.1.1998 has itself observed that the power u/s

122C(6) can be invoked only by the Collector and in the present case the impugned order dated 29.10.2000 has been passed by the Addl. District Magistrate / Additional Collector, Balrampur, therefore, the order dated 29.12.2000 has been passed strictly in accordance with law. Further attention has been drawn towards section 122C(7) which provides that every order passed by the Assistant Collector under sub-section 4 shall subject to the provisions of section 122-C(6) and every order passed by the Collector under sub-section 6 shall be final and provision of section 333A shall not apply in relation thereto. Therefore, the order passed by the revisional authority dated 23.1.2000 is patently legal and justifiable.

8. Learned counsel for the opposite party have also stated that in the present case the petitioner was given lease on 8.2.1991 without having any proposal of the Land Management Committee and no preferential list was prepared in terms of section 122-C(3) of U.P.Z.A. & L.R. Act. They have also stated that the relevant fact has not been considered that the petitioner was himself having his own house in the village in question, therefore, he should have not been given lease for housing purposes. Further, when the impugned order dated 29.12.2000 was passed, there was no house or constructed area on the gata in question, however, the petitioner has constructed one house on the area after 29.12.2000 which is also illegal and unwarranted .

9. Having heard learned counsel for the parties and having perused the material available on record, I would like to refer the order dated 24.4.2023 passed by this Court wherein the learned Standing Counsel was directed to seek instructions

about the current status of the area in question. In compliance of the aforesaid order Sri A.S. Tiwari, learned Addl. C.S.C. has produced the copy of instruction letter dated 2.5.2023, same is taken on record.

10. As per aforesaid letter dated 24.4.2023 the Tehsildar, Uttraula conducted the fresh spot inspection in respect of the Gata no. 396/0.053 Hect. The aforesaid gata number is still recorded as 'Sadak Khas' in the revenue records. Presently, the petitioner has constructed one pakka room encroaching 0.008 Hect. land of the aforesaid gata number, however, that pakka room is vacant as none is residing in such pakka room for the reason that the petitioner is having his own pakka house in the village in question where he lives with his entire family. Further, remaining part of Gata no. 396 there is a vacant pathway as the same is being utilized by the villagers. Naxa najri to this effect has been enclosed with the instructions which also indicates the same fact. So as to show the nature of the land the copy of khatauni and khasra has been filed with the instructions.

11. Therefore, from the aforesaid instructions it is clear that the petitioner has constructed one pakka room over the gata in question after 29.12.2000 when the impugned order has been passed wherein it has been categorically indicated that there was no construction over the gata in question and that fact has not been disputed by the petitioner before the revenue authorities. Notably, there was no proposal of the Gram Sabha / Land Management Committee to allot the land to the petitioner as no such document is available on record. As per the material available on record no list has been filed to convince the Court that a preferential list in terms of section

122C(3) of U.P.Z.A. & L.R. Act has been prepared. The impugned order dated 29.12.2000 provides that the petitioner is having his own residential house in the village and that fact has again been indicated by the S.D.O., Uttraula, Balrampur in its comments to show that the petitioner is living in his own house along with his family and no one is living in pakka room constructed over Gata no. 396 on 0.008 Hect. The earlier order dated 5.2.1996 was passed by Chief Revenue Officer and that order may not be treated as order being passed u/s 122-C(6) inasmuch as the power to pass any order u/s 122-C(6) vests with the Collector, therefore, earlier revisional authority has rightly indicated this fact while setting aside the order dated 5.2.1996 passed by the Chief Revenue Officer. However, the impugned order dated 29.12.2000 has been passed by the Additional District Magistrate / Additional Collector having power u/s 122-C(6) of the U.P.Z.A. & L.R. Act. The impugned order dated 29.12.2000 is not an ex-parte order rather it has been passed after hearing all the parties including the petitioner and perused the material available on record. The revisional authority has rightly rejected the revision of the petitioner vide order dated 23.1.2001 inasmuch as in view of 122-C(7) of the U.P.Z.A. & L.R. Act the order have been passed by the Collector u/s 122-C(6) shall be final.

12. Therefore, in view of the above, I do not find any infirmity or illegality in the impugned orders dated 29.12.2000 passed by the Additional District Magistrate / Additional District Collector, Balrampur in Case No. 7/11/19/49/31 filed u/s 122C(6) of the U.P.Z.A. & L.R. Act, 1950 and order dated 23.1.2001 passed by the Additional Commissioner, Administration, Devi Patan Mandal, Gonda

13. Accordingly, the writ petition is dismissed.

14. Consequences to follow.

(2023) 5 ILRA 1664
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Writ-C No.20901 of 2022

Kunwar Pal @ Kumar Pal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Kripa Shankar Shukla

Counsel for the Respondents:
 Sri Rajeev Singh (S.C.), Ms. Archi Agarwal

**Civil Law- The Land Acquisition Act, 1894-
 Section 28A(1)- The proviso to Section
 28A(1) aforesaid mandates exclusion from
 the period of three months limitation, for
 the purpose of making an application to
 the Collector, the day on which the
 Reference Court makes the award and the
 time spent in obtaining a certified copy
 thereof- The petitioner is entitled to the
 exclusion of 36 days spent in obtaining a
 certified copy of the award on the basis of
 which he had moved the Special Land
 Acquisition Officer under Section 28A of
 the Act-The order of the Special Land
 Acquisition Officer, holding the
 proceedings under Section 28A of the Act
 to be barred by time, is manifestly illegal.
 (Para 5)**

Writ petition allowed. (E-15)

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

Hon'ble J.J. Munir, J.)

1. This writ petition is directed against an order of the Special Land Acquisition Officer (Sanyukt Sangathan), Aligarh dated 30.04.2022 rejecting the petitioner's application under Section 28A of the Land Acquisition Act, 1894 (for short, 'the Act') as time barred.

2. Heard Mr. K.S. Shukla, learned counsel for the petitioner, Mr. Rajeev Singh, learned Standing Counsel appearing on behalf of Respondent Nos. 1 and 2 and Ms. Archi Agarwal, learned counsel appearing on behalf of Respondent No. 3.

3. The petitioner, Kunwar Pal made an application to the Collector-cum-Land Acquisition Officer, Aligarh dated 29.01.2001 saying that his land comprising Khasra No. 7/0-2-0, Khasra No. 10/0-4-0, Khasra No. 27(m)/0-10-0 and Khasra No. 414 (m)/1-14-0 admeasuring a total of 2 *Bigha 2 Biswa* situate at village Talaspur Kalan, Post Quarsi, Pargana & Tehsil Koil, District Aligarh was acquired by the State for the purpose of Planned Industrial Development by the Uttar Pradesh State Industrial Department Corporation, Kanpur. It was the petitioner's case that in LAR No. 70 of 1993, Mahendra Singh and others vs. State of U.P. and others, the XIth Additional District Judge, Aligarh while deciding the reference under Section 18 of the Act relating to the same notification 4(1) through which the petitioner's lands were acquired vide his judgment and award dated 25.10.2000 enhanced the compensation to Rs. 50 per square yard together with a proportionate increase in the other statutory entitlements. The petitioner claims that he was entitled to redetermination of the compensation payable to him as originally awarded, in

accordance with the award made by the Court as aforesaid.

4. The Special Land Acquisition Officer noticed that the petitioner had made his application under Section 28A of the Act on the basis of the judgment and award of the Court dated 25.10.2000, on 29.01.2001. The Land Acquisition Officer held that upon an examination of the certified copy of the Court's award, on the foot of which the application under Section 28A(1) of the Act was moved, it is evident that the application has been made beyond the period of three months from the date of the award, contrary to what is envisaged under Section 28A of the Act. In the opinion of the Special Land Acquisition Officer, the application under Section 28A of the Act, was time barred. It is on the aforesaid reasoning that the impugned order has been passed rejecting the application under Section 28A as barred by time.

5. Mr. Shukla, learned counsel for the appellant has taken us through the application under Section 28A, in particular, the averments in paragraph no. 6 thereof and also through a photostat of the certified copy of the judgment and award passed by the XIth Additional District Judge, Aligarh in LAR No. 70 of 1993 that was filed before the Special Land Acquisition Officer in support of the application under Section 28A of the Act. From a perusal of the folio, that is part of photostat of the certified copy at page no. 21 of the paper book, we find that an application for the certified copy of the Reference Court's order was made on 20.12.2000, and, it was ready on 25.01.2001. Delivery of the copy was taken on 25.01.2001. In the circumstances, the time spent in preparation of the certified

copy of the Reference Court's award, that is the basis of the invocation of jurisdiction under Section 28A of the Act, has to be excluded from the period of limitation. This is precisely what is stated in paragraph no. 6 of the application under Section 28A of the Act. The proviso to Section 28A(1) aforesaid mandates exclusion from the period of three months limitation, for the purpose of making an application to the Collector, the day on which the Reference Court makes the award and the time spent in obtaining a certified copy thereof. The time spent in obtaining the certified copy of the Reference Court's award between 20.12.2000 and 25.01.2001 is 36 days which have to be added to the available period of limitation of three months, reckoned from the date of award passed by the Court. If those 36 days are added, the application dated 27.01.2001, based on the award dated 25.10.2000, would be well within the period of three months prescribed under Section 28A(1) of the Act. Clearly, the petitioner is entitled to the exclusion of 36 days spent in obtaining a certified copy of the award on the basis of which he had moved the Special Land Acquisition Officer under Section 28A of the Act. Thus, the order of the Special Land Acquisition Officer, holding the proceedings under Section 28A of the Act to be barred by time, is manifestly illegal.

6. There is an added remark in the impugned order that Gata No. 414 has not at all been acquired. That is a matter of evidence. The impugned order has thrown out the application under Section 28A of the Act at the threshold, without affording the petitioner any opportunity to produce evidence. Once the proceedings under Section 28A of the Act are restored to file of the Special Land Acquisition Officer under our orders made hereby, the Special

Land Acquisition Officer will afford opportunity to the petitioner to produce evidence in support of his case. The Special Land Acquisition Officer may thereupon decide the issue.

7 In the circumstances, this petition **succeeds** and is **allowed**. The impugned order dated 30.04.2022 passed by the Special Land Acquisition Officer (Sanyukt Sangathan), Aligarh, Annexure 4 to the writ petition, is hereby **quashed**. The application under Section 28A of the Act is restored to file of the Special Land Acquisition Officer (Sanyukt Sangathan), Aligarh to be heard and determined in accordance with law after affording the parties due opportunity.

(2023) 5 ILRA 1666

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.05.2023

BEFORE

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

Matters Under Article 227 No. 4747 of 2019
(CIVIL)

Smt. Jeera Devi & Anr. ...Petitioners
Versus
A.D.J. Court No. 12 Varanasi & Ors.
...Respondents

Counsel for the Petitioners:

Sri Brij Raj, Sri Atul Dayal (Sr. Advocate)

Counsel for the Respondents:

Sri Shambhu Nath, Sri Pratik J. Nagar, Sri Triveni Shanker, Sri Awadhesh Kumar

Civil Law- Civil Law-Code of Civil Procedure,1908-Order 23 Rule 1, Order 1 Rule 10- Whether the fact notwithstanding that a colluding plaintiff and a defendant may have contrived to

defeat a third party's rights and the plaintiff, to effectuate that purpose, makes an application to unconditionally withdraw the suit under Order XXIII Rule 1 of the Code, can the third party in jeopardy be permitted to be substituted for the withdrawing plaintiff and granted leave to prosecute the suit; or in any event, impleaded as a plaintiff under Order I Rule 10 of the Code and permitted to pursue the suit?- the Registry is directed to place the matter urgently before His Lordship the Hon'ble The Chief Justice for constitution of a larger Bench. (Para 10 & 31) (E-15)

List of Cases cited:

1. Meera Rai Vs Additional Sessions Judge & ors.2017 (12) ADJ 817
2. Smt. Raisa Sultana Begam & ors.Vs Abdul Qadir & ors.AIR 1996 Allahabad 318
3. The Sunni Central Board Vs Sri Gopal Singh Visharad 2010 ADJ 1 (SFB)(LB)
4. M/s. Auto Oil Company & anr. Vs Indian Oil Corporation Ltd. & ors.2011 (5) ADJ 800
5. Bhajan Lal & ors.Vs Smt. Rajmala Daughter of Kamta Prasad 2013 (2) ALJ 476
6. Rajendra Prasad Gupta Vs Prakash Chandra Mishra & ors.(2011) 2 SCC 705
7. Smt. Kanteshwari Tiwari (Dead) through L.Rs. Vs Badri Prasad & ors.2013 (98) ALR 76
8. M. Siddiq (dead) through legal representatives (Ram Janmabhumi Temple case) Vs Mahant Suresh Das & ors.(2020) 1 SCC 1
9. Anurag Mittal Vs Shaily Mishra Mittal (2018) 9 SCC 691
10. Gopal Krishna Indley Vs 5th A.D.J., Kanpur & ors.AIR 1981 All 300
11. Ganga Saran Vs Civil Judge, Hapur, Ghaziabad & ors.AIR 1991 All 114

12. Raman Gopi & anr. Vs Kunju Ram Uthaman
2011 SCC OnLine Ker 4028

13. D.VS Lakshmana Rao Vs St.of Karnataka &
ors.ILR 2001 Kar 2689

14. Misc. Application No. 315 of 2022 in Special
Leave Petition (C) No. 6526 of 2020

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

This is a petition under Article 227 of the Constitution of India preferred by Smt. Jeera Devi and Ghanshyam Patel, third parties to Original Suit No. 154 of 1999, Munnar Devi v. Smt. Amrawati Devi, who have been denied leave to continue the suit on the basis of assignment *pendente lite* and further, are faced with an order permitting withdrawal of the suit by the plaintiff. This order turning tables for the petitioners has been passed in an appeal by the Additional District Judge, Court No. 12, Varanasi, reversing the Trial Court, which had granted leave to the petitioners to continue the suit and declined permission to the plaintiff to withdraw it.

2. The facts giving rise to this petition, in necessary detail, are these :

Plot No. 40 admeasuring 0.243 hectare and Plot No. 156 admeasuring 0.72 decimal, situate in Village Mauza Saraimugal, Pargana Athagaon, Tehsil Pindra, District Varanasi was recorded in the name of one Smt. Munnar Devi. She was a co-sharer in the two plots to the extent of a half share along with her co-tenure holder, Smt. Ramdei Devi, wife of Ramdas. One Smt. Amrawati Devi, wife of Late Panna Lal, claimed that Smt. Munnar Devi had executed a sale deed of her half share in the plots of land above mentioned on 09.10.1998. Smt. Amrawati Devi got her name recorded as a co-tenure holder along

with Smt. Ramdei Devi, after mutating out the name of Smt. Munnar Devi in the revenue records on 11.08.1999. This was done on the basis of the sale deed dated 09.10.1998. On 08.02.1999, Smt. Munnar Devi brought a prompt action against Smt. Amrawati Devi, seeking a declaration that the sale deed dated 09.10.1998 was null and void, with a prayer that the declaration granted be communicated to the Sub-Registrar, where the deed had been registered for recording the declaration. A permanent injunction was also claimed against Smt. Amrawati Devi to the effect that the defendant be restrained from interfering with the plaintiff's title and possession in the suit property or otherwise creating an obstruction in any manner, and further not to destroy the standing crops in the suit property. The aforesaid suit brought by Smt. Munnar Devi against Smt. Amrawati Devi was numbered on the file of the Civil Judge (Junior Division) Haveli, Varanasi as Original Suit No. 154 of 1999. The short case of Smt. Munnar Devi in the suit was that the impugned conveyance dated 09.10.1998 was not her deed. It had been got executed by Smt. Amrawati Devi through the agency of an imposter, a woman, different from Smt. Munnar Devi. The sale deed was, therefore, impugned as a void document.

3. On 03.07.2000, a written statement was filed by Smt. Amrawati Devi, contesting the plaintiff's case. It would not be material, for the purpose of this petition, to enumerate what her defence was. Smt. Munnar Devi put in a replication on 29.08.2000. On 30.08.2000, the Trial Court struck issues, a total of seven. What the issues were is also not relevant for the purpose of this petition. The sole plaintiff, Smt. Munnar Devi, was examined as P.W.1. She testified in the dock on

11.02.2003 and 17.07.2003. Pending suit, Smt. Munнан Devi executed two sale deeds - one in favour of Smt. Jeera Devi, conveying her half share in Plot No. 156, that is to say, the area of 0.298 hectare out of the total of 0.596 hectare; and the other in favour of Ghanshyam Patel, conveying her half share in Plot No. 40 admeasuring 0.121 hectare out of the total of 0.243 hectare. Both these sale deeds were executed on 21.05.2011 and admitted to registration by the Sub-Registrar, Pindra, Varanasi on 23.05.2011. On the 9th of February, 2013, Smt. Munнан Devi passed away, while the suit was still pending.

4. On 15.04.2013, Smt. Phulpatti Devi, daughter of Smt. Munнан Devi, applied to be substituted in place of the sole plaintiff. The substitution application was granted by the Trial Court on 05.07.2013. Smt. Phulpatti Devi, the substituted plaintiff, seems to have prosecuted the suit for a period of approximately five years until 05.04.2018, when she made an application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 seeking to unconditionally withdraw the suit. The aforesaid application is numbered on the record of the Trial Court as Paper No. 45π.

5. Close on heels of the sudden termination of action by Smt. Phulpatti Devi, Smt. Jeera Devi filed an application bearing Paper No. 48κ under Order XXII Rule 10 of the Code, seeking leave of the Court to continue the suit.

6. On 22.08.2018, Smt. Jeera Devi filed objections to the application dated 05.04.2018 made by Smt. Phulpatti Devi, seeking to withdraw the suit. On the 4th of July, 2018, Ghanshyam Patel made an application 54κ under Order XXII Rule 10

of the Code, seeking leave of the Court to continue the suit. On 13.07.2018, Smt. Jeera Devi and Ghanshyam Patel made an application, seeking recall of the order granting substitution in favour of Smt. Phulpatti Devi, but no orders were passed on the said application by the Trial Court. The Trial Court, by its order dated 04.09.2018, allowed the applications 48κ and 54κ made by Smt. Jeera Devi and Ghanshyam Patel, respectively, seeking leave to continue the suit and rejected the application 45π made by Smt. Phulpatti, praying for withdrawal of the suit.

7. Smt. Phulpatti Devi preferred Misc. Civil Appeal No. 143 of 2018 to the District Judge of Varanasi under Order XLIII Rule 1(l) of the Code, seeking reversal of the order dated 04.09.2018 passed by the Additional Civil Judge (Junior Division) Court No. 7, Varanasi. The appeal, upon assignment, came up for determination before the Additional District Judge, Court No. 12, Varanasi on 04.05.2019, who proceeded to allow the appeal, set aside the order dated 04.09.2018, rejected the two applications seeking leave to continue the suit and accepted Smt. Phulpatti Devi's application to withdraw.

8. Aggrieved by the order dated 04.05.2019, Smt. Jeera Devi and Ghanshyam Patel have instituted this petition under Article 227 of the Constitution.

9. Heard Mr. Atul Dayal, learned Senior Advocate assisted by Mr. Brij Raj, learned Counsel for the petitioners, Mr. Shambhu Nath, learned Counsel appearing on behalf of respondent no. 3 and Mr. Triveni Shanker along with Mr. Awadhesh

Kumar, learned Counsel appearing for respondent no. 4.

10. The question that falls for consideration in this case is : Whether the fact notwithstanding that a colluding plaintiff and a defendant may have contrived to defeat a third party's rights and the plaintiff, to effectuate that purpose, makes an application to unconditionally withdraw the suit under Order XXIII Rule 1 of the Code, can the third party in jeopardy be permitted to be substituted for the withdrawing plaintiff and granted leave to prosecute the suit; or in any event, impleaded as a plaintiff under Order I Rule 10 of the Code and permitted to pursue the suit?

11. Mr. Atul Dayal, learned Senior Advocate has argued that the right to withdraw is not absolute under Order XXIII Rule 1 of the Code and the withdrawal becomes effective once the Court passes an order. This is for the reason that the withdrawal is not without its entailed consequences, the most obvious being an order on the item of costs. He submits that till the Court makes that order, the Court cannot be said to have become *functus officio* and the suit struck off the file, merely because an unconditional withdrawal has been prayed by the plaintiff, lodging an application for that purpose.

12. The second limb of the submission is that if the Court can see that the application for unconditional withdrawal, assuming that it otherwise operates *ipso facto* as a withdrawal of the suit, is a device to defeat the interest of a third party, who has come forward either through an application seeking impleadment under Order I Rule 10 of the Code or an

application under Order XXII Rule 10, seeking leave to pursue the suit, the Court ought not to permit the plaintiff to withdraw the suit. He submits that if in the face of a position like this, the plaintiff is permitted to withdraw the suit, bringing it to a terminus, two consequences would inevitably follow : the first is that the third party whose rights are at stake would fall into the peril of being defeated about those rights without a trial; and, the second, that the third party would be, per compulsion, driven to bring his own action, which would inevitably lead to multiplicity of proceedings.

13. Mr. Dayal, in support of his submissions, has placed reliance upon a decision of this Court in **Meera Rai v. Additional Sessions Judge and others**². Briefly put, in **Meera Rai** (*supra*), the facts were that the plaintiff brought a suit for a declaration that the suit property, a land measuring approximately 1800 square feet, was a common passage that was illegally sold by one Basant Kumar in favour of the defendants first set. The plaintiff asked for a permanent injunction against the first defendant, restraining her from raising any construction over the suit property. Defendant no. 1 to the suit contested it. Pending suit, the plaintiff made an application to withdraw the suit, saying therein that he had sold his house situate in Plot No. C9 to a third party, and that he did not require the suit property as two roads were there to access the house that he had sold. Above all, he was left with no right, title or interest in the suit property, because he had already sold it. Before an order could be passed on the withdrawal application, an application under Order XXII Rule 10 of the Code appears to have been filed by the purchasers to permit them to prosecute the suit, as rights to the suit

property had been assigned to them. The said application was contested by defendant no. 1, who said that no right in the suit property came to the purchasers, who now claim through original plaintiff. The Trial Court allowed the application under Order XXII Rule 10 of the Code and dismissed the withdrawal application. A miscellaneous appeal from the said order was dismissed by the District Judge. Three of the many contentions that were urged before this Court in **Meera Rai** need to be noticed and that could be best done by quoting from the report, the way the contentions were urged :

4. Challenging the said order, the Misc. Appeal No. 37 of 2014 was filed which was dismissed on 9.12.2016 and hence this petition.

5. To challenge the order of substitution, learned Counsel for the petitioner vehemently urged :

(i) The application moved by the respondents 2 to 5 claiming interest in the suit property was in fact an amendment application filed under Order 6 Rule 17 C.P.C. as they had prayed to delete the name of the plaintiff and amend the array of parties. The said application was wrongly treated by the Courts below as substitution application under Order 22 Rule 10 C.P.C.

(ii) The filing of substitution application under Order 22 Rule 10 C.P.C. would require leave of the Court and for granting such leave, the Court has to apply its mind as to whether any right or interest had devolved upon the person seeking substitution. There is no prayer seeking leave in the application 27 Ga/1 moved by the transferees of the original plaintiff namely the applicants and as such the order of substitution cannot be sustained.

(iii) The trial Court had mechanically allowed the said application without giving any reasoning for the grant of leave. In absence of reasons, the order impugned cannot be sustained.

(iv) The withdrawal application moved by the plaintiff was prior to filing of the substitution application by the respondents 2 to 5. The effect of moving of the withdrawal application would be that the suit automatically stood withdrawn and in absence of any suit being pending as on the date of filing of the application, the application of respondent No. 2 to 5 could not be entertained. In other words, it is submitted that with the moving of the withdrawal application, withdrawal was automatic, no order was required to be passed on the said application. Reliance is placed upon the judgment of this Court in *Ram Palat Chaturvedi (Deceased) By lrs v. Chandra Bali Shastri and another*, (2008) 1 ARC 143.

(v) Further, in any case, in the event of assignment of any right or interest in the suit property, the assignees may be substituted but the name of the assignor would not be deleted from the array of parties. With reference to the amended plaint (appended with supplementary-affidavit) it is vehemently contended by learned Counsel for the petitioner that with the amendment of plaint i.e. deletion of the plaintiff, it would be a new suit. Any transfer by the plaintiff during the pendency of the suit though gives right to the assignor to pursue the suit under Order 22 Rule 10, with the leave of the Court, but the said suit cannot be pursued as a new suit. As no cause of action survives with the applicants/respondents they may be permitted to bring the fresh suit but they could not have been impleaded/substituted in the earlier suit more so when it already stood withdrawn.

(vi) The contention is that the plaintiff is dominus litus, it is his wish to continue his suit and the Court cannot compel him to pursue the suit that too when he moved a withdrawal

(vii) The Act of deletion of name of the original plaintiff itself establishes that it was an amendment application seeking amendment of plaint by the persons who claimed to have got right and interest in the suit property. Reliance is placed upon the judgment of Apex Court in Hafiz Mushtaq and others v. Mohammad Idris and others, 1965 All LJ 828.

(viii) The suit filed by the predecessor of defendant No. 2 (late Kedarnath Singh) filed against the Cooperative society namely Original Suit No. 978 of 1993 is pending consideration. No relief of cancellation of sale-deed dated 5.6.2012/6.6.2012 executed in favour of defendant No. 1 had been sought by the original plaintiff namely Hemant Kumar Agarwal. In view of the registered sale-deed being in existence, the applicants/subsequent purchasers cannot seek a relief of declaration and injunction.

(ix) Lastly, it is submitted that the right to sue cannot be transferred under Section 6(e) of The Transfer of Property Act. In the application for substitution/impleadment based on the sale-deed of the plaintiff the plea regarding transfer of alleged Rasta could not have been entertained as it would only be a transfer of right to sue for the said Rasta. Reliance is placed upon the judgment in the case of Ch. Sajjan Mal v. Bodh Raj Ramkishan Mal and others, AIR 1934 Pesawar 89. Moreover, no such right has been transferred in favour of the applicants by the Original Plaintiff. The alleged Rasta (subject-matter of instant suit) is not even shown in the sketch map which gives

description of property and is part of the sale-deed of the applicants.

6. Learned Counsel for the respondents, on the other hand, submits that by the sale-deed dated 19.10.2013, all rights and interest in the suit property were devolved upon the applicants. Under Order 22 Rule 10 of the Code of Civil Procedure, they have a right to pursue the suit on the doctrine of *lis pendens*. Any denial thereof would render them non-suited. Moreover, by the instant suit, the plaintiff sought declaration of easementary rights i.e. the right to way to approach his house by a common road which has been obstructed by the defendant No. 1. Reliance is placed upon the judgment of Apex Court in Amit Kumar Shaw and another v. Farida Khaton and another, AIR 2005 SC 2209 and in Sharadamma v. Mohammed Pyrejan (Dead) through L.Rs. and another, 2015 (6) AWC 5721, to submit that the transferee *pendente lite* can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral.

14. Repelling the contentions aforesaid urged on behalf of the defendant-petitioner, it was held :

14. The first argument of the learned Counsel for the petitioner that with the withdrawal of the present suit by application under Order 23 Rule 1 C.P.C. moved by the plaintiff, the assignees lost their right for substitution is found devoid of force in as much as no order was required to be passed on the withdrawal application. The decision of this Court in Ram Palat Chaudhary (*supra*) relied by the learned Counsel for the petitioner itself observes that though with the moving of withdrawal application on the part of the plaintiff, the withdrawal becomes effective but the order passed by the Court on the

said application is to give effect to the consequences arising out of the withdrawal (reference has also been made to Sheikh Khalikuzzama (D) through L.R.s and others v. Sheikh Akhtaruzzaman (D) and others, 2004 (2) AWC 1636 and Smt. **Raisa Sultana Begam** and others v. Abdul Qadir and others, 1966 AIR (All) 318).

15. In case, the said argument of the learned Counsel for the petitioner is accepted it would result in multiplicity of litigation in as much as the applicants would be required to bring a fresh suit for declaration on the same cause of action put forth by the original plaintiff. This cannot be the intention of the provisions as contained in Order 23 Rule 1 C.P.C. Thus it is held that in order to give effect to the consequences of withdrawal, a specific order is to be passed by the Court concerned on the withdrawal application. Even otherwise, on the principle of doctrine of *lis pendens* and the provisions as contained in Order 22 Rule 10 C.P.C. the transferees could not be denied substitution. On this principle also it cannot be said that the trial Court had erred in dismissing the withdrawal application filed by the original plaintiff in view of pending substitution application of the subsequent transferees.

16. The said view taken by this Court is fortified from the decision of the Apex Court in *Amit Kumar Shah (supra)* wherein it has been held that the transferee though is not entitled, as of right, to be impleaded in the suit, however, the Court has a discretion to make him a party. The transferee *pendente lite* can be added as a proper party, if, his interest in the subject-matter of the suit is substantial and not just peripheral. Under Order 22 Rule 10 C.P.C. an assignee *pendente lite* may be joined as party with the transfer of interest in the immovable property. He is a representative

of the transferor from whom he has acquired that interest.

17. Even otherwise there may be a situation where the plaintiff or the defendant, as the case may be, may collude with the other parties after transfer of his interest in the property, subject-matter of the pending suit. The object of Order 22 Rule 10 C.P.C. is to curb any such situation and further to avoid multiplicity of litigation.

18. It is, however, the discretion of the Court to allow substitution of an assignee of a party during the pendency of the suit. The words "by leave of the Court" used in Order 22 Rule 10 C.P.C. cannot be construed to mean that any specific order is required to be passed by the Court on a separate application seeking such leave. The order allowing substitution under Order 22 Rule 10 C.P.C. would itself mean that the Court thought it fit to grant leave to the assignees to pursue the suit. The argument of learned Counsel for the

15. To the understanding of this Court, it is one thing to hold that in order to curb multiplicity of litigation or mischief by parties to a subsisting litigation through fraud or collusion between them, affecting rights of third parties, the Court may, in its discretion, grant leave to permit an assignee from one of the parties *pendente lite* to pursue or defend the suit, or otherwise to implead such assignee of a plaintiff to the action or may be a defendant, depending on the orientation of his rights, but quite another to say that a suit is not withdrawn by the mere making of the application under Order XIII Rule 1 of the Code, if the case be of collusion affecting rights of third parties etc., and still the Court would retain jurisdiction to substitute under Order XXII Rule 10 or implead under Order I Rule 10 of the Code an affected third party. There

appears to be little quarrel about the proposition that to a pending suit, substitution in favour of an assignee *pendente lite* ought to be granted with leave to pursue the suit under Order XXII Rule 10 of the Code in order to substantially protect the rights of the party in favour of whom the interest from the original plaintiffs stands assigned, or may be, devolved. However, the difficulty arises when the original plaintiff has made an application, first in point of time, to withdraw the suit before the assignee comes and makes his application seeking substitution and/or impleadment under Order XXII Rule 10 or under Order I Rule 10 of the Code. The answer to the said issue rests, in turn, upon answer to the question whether the mere making of an application under Order XXIII Rule 1 of the Code results in withdrawal of the suit *ipso facto* or the making of an affirmative order by the Court granting that application is necessary.

16. This question has engaged the attention of Courts for a long time in this country and in the past, there has been considerable divergence of opinion amongst the High Courts. The controversy appears to have rested for a while with the decision of a Division Bench of this Court rendered in **Smt. Raisa Sultana Begam and others v. Abdul Qadir and others**³. In **Raisa Sultana Begam** (*supra*) Desai, C.J., speaking for their Lordships of the Division Bench, after noticing the various divergent authorities, held :

8. Since withdrawing a suit is a unilateral act to be done by the plaintiff, requires no per mission or order of the Court and is not subject to any condition, it becomes effective as soon as it is done just as a compromise does. Any information of

it given to the Court is no part of it, so also any order passed by the Court on receiving the information. The act is like a point and not continuous like a line having a beginning and an end. Either it is done or not done; there is nothing like its being done incompletely or ineffectively. The consequence of an act of withdrawal is that the plaintiff ceases to be a plaintiff before the Court. If he is the only plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court; if he is only one of several plaintiffs, he ceases to be a party and the suit of only the other plaintiffs continues. If he withdraws only a part of the suit that part goes out of jurisdiction of the Court and it is left with only the other part. This is the natural consequence of the act; a further consequence imposed by sub-r. (3) is that he cannot institute any fresh suit in respect of the subject-matter. He becomes subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal, If he is absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a plaintiff before the Court. The bar on his instituting a fresh suit would be meaningless if he were permitted to revoke the withdrawal and get himself restored to the status of a plaintiff in respect of the withdrawn suit. There is no provision allowing revocation of the withdrawal. We respectfully agree with Horwill, J. in *Rajagopala Rao v. Bhanoji Rao*, AIR 1940 Mad 765, where he observed at p. 766 :-

"O. 23. . . .does not make any provision for withdrawing a withdrawal; and so it would seem that there is no provision in the Code whereby the withdrawal of a suit . . .can be cancelled. The only thing that can now be done for the

plaintiff is to grant her permission to file a fresh suit."

It stands to reason that when on withdrawal the plaintiff ceased to be a party and the Court ceased to have jurisdiction over his suit and thus became *functus officio* nothing but a fresh suit can again invest the Court with jurisdiction over it. As far as the withdrawn suit is concerned the suit is at an end and no further proceeding can be taken in it; the suit and the plaintiff do not exist and no application such as one for revoking the withdrawal can be made in the suit or by the plaintiff or entertained. So long as the suit was pending the plaintiff had a status and could exercise the right of withdrawing the suit which vests in a plaintiff; after he ceased to be the plaintiff on withdrawal he is left with no status and cannot make any application or cannot do any act as a plaintiff. We are supported in this view by the decision of Ross and Pearson, JJ., in *Rajah Shamsheer Bahadoor v. Mahomed Ali Beg*, (1867) 2 Agra HCR 158.

9. In *Ram Bharos Lall v. Gopee Beebee* (1874) 6 NWP 66, it was held by another Bench of this Court, of which Pearson, it was a member, that a plaintiff who has withdrawn his suit is at liberty to rescind the act of withdrawal at any time before the final judgment because :-

"It is difficult to understand why a plaintiff should have liberty to withdraw from a suit and not have equal liberty to rescind the act of withdrawal at any time before final judgment".

We may with respect point out the reason and it is that the right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by O. 23, R. 1 and no right

All322 is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the

plaintiff he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. The learned Judges distinguished *Rajah Shumsheer Bahadoor*, (1867) 2 Agra HCR 158 (*supra*) on the ground that in that case there was a long interval of time between the withdrawal and the revocation of withdrawal whereas in this case there was an interval of only one day. With great respect, we find it difficult to understand that whether withdrawal can be revoked or not depends upon the delay with which it is revoked. The question is of a right and not of delay with which it is sought to be exercised. In *Raj Kumari Devi v. Nirtya Kali Debi*, (1910) 7 Ind Cas 892 (Cal), it was held at p. 893 that

"it was competent to the plaintiff to recall her petition of withdrawal at any time before the final order had been passed."

The learned Judges relied upon the case of (1874) 6 NWP 66, and distinguished the case of *Shumsheer Bahadoor* (1867) 2 Agra HCR 158. It has not been pointed out by them why an order of the Court is required in order to complete or effectuate the withdrawal and have not dated any authority for imposing this condition. We have pointed out that on withdrawal certain orders may be passed by the Court but they are not for giving effect to the withdrawal, but to give effect to consequences arising out of the withdrawal. O. 23, R. 1 does not require any order; there can be no question of an order if no application is to be made by the plaintiff. We, therefore, respectfully disagree with the view of the Calcutta High Court. In *Mukkammal v. Kalimuthu Pillay*, 15 Ind Cas 852 (Mad), *Sundara Aiyar, J.* was of the view that the plaintiff has a right to

revoke the act of withdrawal, while Sadasiva Aiyar, J. was inclined to the view that neither can he revoke his withdrawal application except on good grounds nor can he be allowed to play fast and loose with the litigation launched by him at his sweet will and pleasure. Sundara Aiyar, J. referred to the absence of any provision in the Code giving a light to a defendant to insist that a petition of withdrawal not acted upon by the Court must be enforced as against the plaintiff and thought that a mere petition of withdrawal does not debar the plaintiff from proceeding with the suit unless, in the meanwhile, the suit has been dismissed by the Court. We respectfully disagree as no order of the Court is required when a plaintiff withdraws a suit and there is no justification for saying that the act of withdrawal is not complete so long as the Court does not dismiss the suit. The bar imposed by sub-r. (3) operates on withdrawal and not on any order by the Court dismissing the suit and must be deemed to include the prevention of revival of the suit.

In *Lakshmana Pillai v. Appalwar Alwar Ayyangar*, AIR 1923 Mad 246, it was assumed by Oldfield, J. that an application for withdrawing a suit is conditional on the passing of an order regarding costs. But it seems to us, with respect to the learned Judge, that there is a distinction between withdrawal by a plaintiff of the suit and his liability to be awarded the costs of the suit. The liability arises out of the withdrawal but it would be wrong to argue that so long as the liability is not imposed the withdrawal is not complete. There may be an interval of time between the withdrawal and imposition of the liability through an order without its in any way derogating from the effect of the withdrawal. The facts in *Midnapur Zamindari Co. Ltd. v. Raja Bijoy Singh*

Dudhuria, AIR 1941 Cal 1, were distinguishable because the plaintiff sought to withdraw from the suit with permission to file a fresh one and that required an order from the Court granting permission. There is a distinction between withdrawal without liberty to file a fresh suit which is at the absolute discretion of the plaintiff and withdrawal with liberty which can be done only when the Court grants permission. In this case the Court postponed passing orders on the application for permission to withdraw with liberty and before the orders were passed the plaintiff withdrew the application. A plaintiff may have a right to withdraw an application for withdrawal with liberty but it does not follow that a plaintiff who withdraws the suit under sub-r. (1) has a right to revoke the withdrawal before the Court passes some order. Then we come to *Yeshwant Govardhan v. Totaram Avasu*, AIR 1958 Bom 28, in which Dixit and Vyas, JJ. held that an application by a plaintiff withdrawing the suit requires an order, that so long as no order is passed it can be withdrawn and that no reasons are required for his withdrawing the application. With great respect we find it difficult to agree. It is true that a Court has control over the proceedings initiated by a plaintiff through a suit but the plaintiff has been given an absolute right to withdraw from it at any stage and the Court has no control over this act of withdrawal. The learned judges said at p. 29

"If. . . the plaintiff has a right to withdraw his suit, he has, equally, a right to withdraw his withdrawal, and so long as the Court has not made an order showing that the withdrawal has become complete or effective there is always a *locus paenitentiae* for the plaintiff to withdraw his withdrawal."

The right to withdraw has been expressly conferred by rule 1(1); there is no

provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke' the withdrawal. As we said earlier, certain consequences arise from the withdrawal which prevent his revoking the withdrawal, the withdrawal is complete or effective as soon as it takes place, and, in any case, as soon as information of it is conveyed to the Court, and no order of the Court is required to effectuate it or even to recognise it. Then the learned Judges referred to the order regarding costs and inferred that the Court has to make an order after the withdrawal. Whatever order the Court may, or may have to make is not regarding the withdrawal but regarding the effect or consequences of the withdrawal, which is quite a different All323 matter. The proposition that a plaintiff has an absolute right to withdraw his application for withdrawal is not accepted universally and we have already referred to the observations to the contrary. Lastly, we come to Masulipatam Municipality v. Venkatappayya, AIR 1960 Andh Pra 572. Umamaheshwaram and S. Oamar Hassan, JJ. observed at p. 575 :-

"Without the stroke of the judicial pen under O. 23, R. 1, sub-r. (3), C.P.C. the suit is not terminated and that in appropriate cases the provisions of O. 1, R. 10 or O. 22, R. 10 C.P.C. may be applied."

The order referred to in R. 1, sub-r. (3) is only one imposing costs upon the plaintiff on account of his withdrawal from the suit; this provision does not contemplate any order.

10. In AIR 1958 Bom 28 (*supra*) and AIR 1923 Mad 246, the doctrine of locus paenitentiae was advanced and it was held that a plaintiff can revoke his withdrawal of a suit at any time before an order is made by the Court regarding withdrawal. With great respect, we may

point out that if locus paenitentiae has to be allowed it must be allowed by the legislature and not by the Courts. We see no reason why we should be so solicitous about a plaintiff on the threshold of withdrawal of his suit that we should allow him locus paenitentiae. There is no reason why a plaintiff should claim to have locus paenitentiae and in any case whatever locus paenitentiae he needs is already there between his mental decision to withdraw and his informing the Court of the withdrawal. He has no locus paenitentiae in the matter of institution or of compromise of a suit and there is no justification for saying that he has locus paenitentiae after withdrawal of the suit. The doctrine of locus paenitentiae falls to the ground when it is realised that he has not to apply for withdrawing and that he needs neither the permission of the Court for withdrawing nor its order allowing, recognizing or confirming the withdrawal.

11. Our answer, therefore, to the question referred to us is in the negative.

17. The decision of the Division Bench in **Raisa Sultana Begam** making unconditional withdrawal under Order XXIII Rule 1 of the Code effective on the mere making of the application by the plaintiff was overruled by the Full Bench of this Court in **The Sunni Central Board v. Sri Gopal Singh Visharad**⁴, where it was held :

1035. Once a suit is duly instituted, the Court would pass

order issuing summons to the defendants to appear and answer the plaint. Such summons, vide Order V Rule 3, are required to be signed by the Judge or such officer as he appointed, and also the seal of the Court. A suit once duly instituted and registered in the Court would not struck off

from the record of the Court on the mere communication by the plaintiff orally or in writing that he intends to withdraw unless an order is passed by the Court to the said effect, which would have the legal consequence of bringing the proceedings set in motion by instituting the suit, to a halt. Mere absence of any provision permitting withdrawal of the application filed by a plaintiff for withdrawing the suit does not mean that no such power is vested in the plaintiff. So long as an order is not passed by the Court, if the plaintiff informs the Court by moving an application that he intends to withdraw the application for withdrawal of suit, he can always request or inform the Court that he does not want to press the application and the same may be dismissed as not pressed or withdrawn. It is only where the plaintiff press his application before the Court requiring it to pass the order for withdrawal of the Suit, the Court would pass the said order in accordance with law since it cannot compel a plaintiff to pursue a suit though he want to withdraw the same. It would thus be wholly unjust to hold that once an application to withdraw the suit is filed by a plaintiff, he cannot withdraw the same and the suit would stand dismissed as withdrawn. This would have serious and drastic consequences in as much as he cannot file a fresh suit on the same cause of action.

1036. Moreover, the existence of a provision i.e. Rule 1(3), empowering the Court to consider as to whether the plaintiff should be saddled with the liability of payment of cost or not also contemplates that an application for withdrawal of suit by itself would not result in any consequences whatsoever unless the Court has applied its mind regarding the cost. If what has been held in *Smt. Raisa Sultana Begam (supra)* is taken to be correct, it would mean that

there would be no occasion for the Court to apply its mind on the question of cost under Rule 1(3) since the suit would stand dismissed as withdrawn as soon as the plaintiff informs the Court about his decision for withdrawal of the suit either orally or in writing. This is nothing but making Rule 3 (1) redundant. The earlier judgement of this Court in *Raja Shumsher Bahadoor Vs. Mirja Mahomed Ali (1867) Agra H.C.R. 158* wherein this view was taken that the withdrawal must be regarded as terminating automatically the proceedings in the suit involving the suit's immediate dismissal was not found to be correct subsequently by the Division Bench in *Ram Bharos Lall*. We, therefore, find it appropriate in the entire facts and circumstances to take a different view and have no hesitation in holding though with great respect to the Bench, that the law laid down in *Smt. Raisa Sultana Begam (supra)* is not correct. In our view, the law laid down in *Ram Bharos Lall (supra)*, *Mukkammal Vs. Kalimuthu Pillay (supra)*, *Raj Kumari Devi Vs. Nirtya Kali Debi (supra)* and *Yeshwant Govardhan Vs. Totaram (supra)* lay down the correct law. We also find that a Division Bench of Orissa High Court in *Prema Chanda Barik Vs. Prafulla Kumar Mohanty AIR 1988 Orissa 33* has also taken the same view and did not find itself agreeable with the Division Bench decision in *Smt. Raisa Sultana Begam (supra)*. In fact, a Division Bench of Calcutta High Court in *Rameswar Sarkar Vs. State of West Bengal and others AIR 1986 Cal. 19* has gone slightly further by observing that where there is no provision under the Code providing for withdrawal of application for withdrawal of suit, Section 151 C.P.C. would apply.

18. **Raisa Sultana Begam** was, therefore, held no longer good law by a

learned Single Judge of this Court in **M/s. Auto Oil Company and another v. Indian Oil Corporation Ltd. and others**⁵ and by another learned Judge in **Bhajan Lal and others v. Smt. Rajmala Daughter of Kamta Prasad**⁶, who also took note of the decision in **M/s. Auto Oil Company** (*supra*). It is worthy of notice that in both the decisions of this Court, to wit, **Bhajan Lal** (*supra*) and **M/s. Auto Oil Company**, the decision of the Supreme Court in **Rajendra Prasad Gupta v. Prakash Chandra Mishra and others**⁷ was referred to, where it has been held :

1. Heard the learned counsel for the appellant and Respondents 1 to 3. No one appeared for Respondent 4.

2. This appeal, by special leave, has been filed against the impugned judgment of the High Court of Allahabad dated 6-2-2004 passed in FAFO No. 2103 of 2003. It appears that the appellant was the plaintiff in Suit No. 1301 of 1997 before the Court of the Civil Judge (Junior Division), Varanasi. He filed an application to withdraw the said suit. Subsequently, it appears that he changed his mind and before an order could be passed in the withdrawal application he filed an application praying for withdrawal of the earlier withdrawal application. The second application had been dismissed and that order was upheld by the High Court. Hence, this appeal by special leave.

3. The High Court was of the view that once the application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without any order on the withdrawal application. Hence, the second application was not maintainable.

4. We do not agree. Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives

inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application.

5. In *Narsingh Das v. Mangal Dubey* [ILR (1883) 5 All 163], Mahmood, J. the celebrated Judge of the Allahabad High Court, observed:

“Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed.”

6. The above view was followed by a Full Bench of the Allahabad High Court in *Raj Narain Saxena v. Bhim Sen* [AIR 1966 All 84] and we agree with this view. Accordingly, we are of the opinion that the application praying for withdrawal of the withdrawal application was maintainable. We order accordingly.

7. In the result, the impugned judgment of the High Court is set aside and the appeal is allowed. No costs. The suit shall proceed and to be decided on merits, expeditiously.

19. The learned Judge deciding **Bhajan Lal** noticed some difference of opinion in the decisions of the Supreme Court and held in favour of the view relying on the Full Bench in **The Sunni Central Board** (*supra*) and the authority of the Supreme Court in **Rajendra Prasad Gupta** that withdrawal does not come about until an order is passed by the Court

permitting it. In **Bhajan Lal**, after considering the difficulties posed by conflict of judicial opinion and considering it in the backdrop of rights of parties that may arise in varying circumstances, it was held :

31. The contention raised that Order 21 Rule 89 (II) has similar wordings and the order of the Court is not necessary, is not attracted, as the ingredients of Order XXIII are entirely different as discussed herein above. A litigant can surrender his right to contest a matter which is the essence of Order XXIII. The right to withdraw such an intention of surrender or revoke the same which can arise in the circumstances as discussed herein above is a different issue. These ingredients, therefore, in relation to the entire disclaimer of the claim is not comparable with the provisions of Order 21 Rule 89 (2) in a matter arising out of execution.

20. In **Smt. Kanteshwari Tiwari (Dead) through L.Rs. v. Badri Prasad and others**⁸ a learned Single Judge of this Court followed the Full Bench in **The Sunni Central Board** and endorsed the view of the learned Single Judge in **M/s. Auto Oil Company**. In **Kanteshwari Tiwari (supra)**, it was observed :

26. I find that this part of judgment is no longer a good law inasmuch as the Division Bench judgment in **Raisa Sultan Begam (supra)** has already been over-ruled by this Court in the majority decision in **Sunni Central Board of Waqf v. Sri Gopal Singh Visharad** [2010 ADJ Page 1 (SFB) (LB) : 2010 (83) ALR 26 (Sum.).] and this has been referred to and followed by another Single Judge of this Court in **Auto Oil Company Majhola Devi v. Indian Oil Corporation Ltd.** [2011 (5) ADJ 800.] .

The Hon'ble Single Judge has found that recently even the Apex Court has taken a similar view in **Rajendra Prasad Gupta v. Prakash Chandra Mishra** [2011 (85) ALR 715 (SC).] , reversing a decision of this Court. The view taken by this Court that once an application to withdraw the suit is filed there is no occasion to file a further withdrawal application to withdraw the earlier application, has been negated by Apex Court observing that an application praying for withdrawal of withdrawal application was maintainable.

21. So far as the proposition that the Bench decision in **Raisa Sultana Begam** is no longer good law, as it stands overruled about the effect of making of an application under Order XXIII Rule 1 of the Code by the plaintiff, in view of the holding of the Full Bench in **The Sunni Central Board** is not tenable, as the Full Bench decision of this Court in **The Sunni Central Board** stands set aside by the Supreme Court in **M. Siddiq (dead) through legal representatives (Ram Janmabhumi Temple case) v. Mahant Suresh Das and others**⁹. Nothing has been brought to the notice of this Court that the principle of law in the Full Bench regarding the effect of the making of an application under Order XXIII Rule 1 of the Code, where no orders are passed by the Court, has been approved by their Lordships of the Supreme Court. The effect of setting aside of the judgment of this Court by the Supreme Court in **M. Siddiq (supra)**, in the opinion of this Court, would lead to effacement of the principle on the point that was laid down by the Full Bench in **The Sunni Central Board** and followed by the learned Judges in **M/s. Auto Oil Company** and **Bhajan Lal**.

22. To the contrary, there is a later decision of the Supreme Court in **Anurag**

Mittal v. Shaily Mishra Mittal¹⁰ where, on the issue that falls for consideration here, it has been held :

17. The High Court of Bombay in *Anil Dinmani Shankar Joshi v. Panvel Municipal Council* [*Anil Dinmani Shankar Joshi v. Panvel Municipal Council*, 2003 SCC OnLine Bom 24, paras 3-4 : AIR 2003 Bom 238, p. 239] followed the judgment of this Court in *Shiv Prasad* [*Shiv Prasad v. Durga Prasad*, (1975) 1 SCC 405] and held that the said judgment is applicable to suits also. The High Court recognised the unconditional right of the plaintiff to withdraw his suit and held that the withdrawal would be complete as soon as the plaintiff files his *purshis* of withdrawal.

23. To the understanding of this Court, the holding of the Supreme Court in **Anurag Mittal** (*supra*) , which is a much later decision than **Rajendra Prasad Gupta** would bind this Court. In the event of conflict between two decisions of the Supreme Court, a question may arise before the High Court, in the context of a conflict between a larger Bench of the Supreme Court and a Bench of lesser strength, or it may arise in the context of two conflicting decisions rendered by Benches of the same strength. The principle to be followed by the High Court, about which precedent of the Supreme Court will bind, fell for consideration of a Full Bench of this Court in **Gopal Krishna Indley v. 5th Additional District Judge, Kanpur and others**¹¹. In **Gopal Krishna Indley** (*supra*), K.C. Agrawal, J., speaking for the Bench, held :

19. The Supreme Court has dealt with the binding nature of its pronouncements in a number of decisions. It is, not necessary to refer to those cases.

In a case where a High Court finds any conflict between views expressed by larger and smaller Benches of the Supreme Court the Supreme Court said that proper course for such a High Court is to follow the opinion expressed by larger Benches of the Supreme Court in preference to those expressed by smaller Benches of the Court (*See State of U.P. v. Ram Chandra*, (1976) 4 SCC 52 : AIR 1976 SC 2547).

20. The difficulty, however, before us is slightly different, and is not covered by the authority cited above. We are faced with a situation where there are conflicts between the two decisions of the Supreme Court given by Judges of equal strength. We are not concerned here with reasons which led to these conflicts.

21. Rupert Cross in his book on "*Precedent in English Law*" third edition page 133, has dealt with this matter in the following words:—

"If there is, an increasing tendency to recognise the possibility that previous decisions of the same Court may conflict, it is a tendency which is to be applauded. The Court's attention is frequently not drawn to all the relevant authorities, some cases are not particularly well argued and unreserved judgments are often delivered. It is useless to deplore these occurrences because they will continue as long as barristers, Judges, and litigants, remain human.....".

22. To meet a situation like the present reference may be made to a Full Bench decision of our Court in *U.P.S.R.T.C. v. State Road Transport Tribunal, U.P. Lucknow* (AIR 1977 All 1) : (1976 All LJ 683) where the Full Bench held:—

"Even if there is some conflict in the two Supreme Court's decisions, we have to follow the law as declared in the latter case of Mysore State Transport Corporation".

23. To the same effect is the view taken by a Full Bench of Karnataka High Court in *Govindanaik G. Kalghatagi v. West Patent Press Co. Ltd.* (AIR 1980 Kant 92) and by Calcutta High Court in *Sovachand Mulchand v. Collector of Central Excise and Land Customs* (AIR 1968 Cal 174). **Thus, what follows is that in the event of there being clear conflict, the decision of such latter Bench would be binding on us.**

24. xxxxx

25. We, therefore, cannot ignore the subsequent decision of the Supreme Court on the basis of the same being per incuriam.

(emphasis by Court)

24. In a later Full Bench decision of this Court in **Ganga Saran v. Civil Judge, Hapur, Ghaziabad and others**¹², it was observed by their Lordships :

6. With respect to the first question the decision of Supreme Court in the case of *Qamaruddin* which is later decision on one hand and decisions in *Vishesh Kumar v. Shanti Prasad (Supra)* and *Vishnu Awatar v. Shiv Awatar (Supra)* which affirm the decision of this Court in *Jupiter Chit Fund (Pvt) Limited v. Dwarka Diesh (Supra)* would show that there is a direct conflict on the question of maintainability of revision in High Court u/S. 115, C.P.C. Both the judgments of the Supreme Court are by a bench consisting of two Hon'ble Judges. In such a situation the questions which arise for consideration are namely: When there is a direct conflict between the two decisions of Supreme Court rendered by Judges of equal strength, which of them should be followed by the High Court and whether later decision of

the Supreme Court has effect of overruling the earlier decision of the Supreme Court?

7. One line of decision is that if there is a conflict in two Supreme Court decisions, the decision which is later in point of time would be binding on the High Courts. The second line of decisions is that in case there is a conflict between the judgments of Supreme Court consisting of equal authorities, incidence of time is not a relevant factor and the High Court must follow the judgment which appears to lay down law elaborately and accurately.

8. Similar situation arose before a Full Bench of Punjab and Haryana High Court in the case of *Indo Swiss Time Limited, Dundahera v. Umrao*, AIR 1981 Punj & Har 213. What the Full Bench in the said case held is extracted below (at pp. 219-220 of AIR):

“Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the superior Court are of co-equal Benches and therefore, of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extant then both of them cannot be binding on the courts below. Inevitably a choice, though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of coequal Benches of the Superior Court are earlier later is a consideration which appears to me as hardly relevant.”

9. xxx

10. For the above reasons it must be held that the decision of Supreme Court in *Qamaruddin's* case (1990 All WC 308) (*Supra*) to the extent it holds that revision against an appellate or revisional order passed by the district court is maintainable u/S. 115, C.P.C. (as amended by U.P. Act 31/78) to the High Court does not state the law accurately or overrule the decision of the Full Bench of this Court in *Jupiter Chit Fund (Pvt) Ltd. v. Dwarka Diesh* (AIR 1979 All 218) (*Supra*) particularly when it has specifically been approved by the two earlier decisions of the Supreme Court.

25. The question also came up before a Full Bench of the Kerala High Court in more recent time in **Raman Gopi and another v. Kunju Ram Uthaman**¹³. In **Raman Gopi** (*supra*) on the issue, it is opined :

77. The legal position, which therefore emerges on a discussion and analysis of the principles stated in various decisions of the Apex Court and other High Courts including this Court, so as to act as guidance to the High Courts and Subordinate Courts, when faced with a conflicting decisions, are summarised below:—

(i) In case of conflicting views taken in the decisions of two Benches of equal strength of the Apex Court, the decision later in point of time, will prevail over the earlier one;

(ii) What is binding is the *ratio decidendi*. A decision is only an authority for what it actually decides.

(iii) A decision which is not expressed and is not found on reasons nor proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Art.

141 of the Constitution. Similarly, any declaration made or conclusion arrived at without application of mind or preceded without a reason, cannot be a declaration of law, or authority as a binding precedent;

(iv) It is well settled that what is the essence of a decision is the ratio and not every observation, nor what logically follows from various observations made in it.

(v) The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract *ratio decidendi*, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution.

(vi) A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. (*Salmond on Jurisprudence* 12th Edn. p. 153).

(vii) A Division Bench, in case of conflict between the decision of a Division Bench of two Judges and the decision of a larger Bench and in particular, a Constitution Bench, would be bound by the latter decision.

(viii) Per incuriam means a decision rendered by ignorance of a previous binding decision such as a decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. A ruling making a specific reference to an earlier binding precedent may or may not be

correct, but cannot be said to be per incuriam.

(emphasis by Court)

26. The same issue was echoed in a Karnataka High Court decision in **D.V. Lakshmana Rao v. State of Karnataka and others**¹⁴, where it was observed :

14. It is now well settled that if there are two conflicting judgments of the Supreme Court, of benches with equal number of Judges, then the latter will prevail over the earlier. But where the earlier judgment is of a larger bench and the latter judgment is of a smaller bench, then the decision of the larger bench will be binding. In *State of U.P. v. Ramchandra* [AIR 1976 SC 2574.] the Supreme Court held that where the High Court finds a conflict between the views expressed by a larger bench and a smaller bench, the proper course for the High Court is to find out the *ratio decidendi* of the decision of the Larger Bench and follow the same in preference to the opinion expressed by the Smaller Bench. Hence I am bound to follow the decisions in *Satendra Prasad Jain and Pratap* which are of Larger Benches, instead of following the decision in *Mariyappa* which is of a smaller Bench.

(emphasis by Court)

27. Here, what the Court finds is that the decision of the Supreme Court in **Rajendra Prasad Gupta** is earlier in point than **Anurag Mittal**. Both the decisions are by a Bench of two Judges. Going by the thumb rule, about which, there is consensus, the later decision would bind this Court. Therefore, this Court would be bound by the principle in **Anurag Mittal**. Even if the other principle that the later Full Bench of our Court has propounded as an alternate to the later decision rule, that is

to say, the Full Bench in **Ganga Saran** were followed, this Court would have to see which decision appears to have laid down the law elaborately and accurately. Judged from that point of view also, the decision in **Anurag Mittal** appears to be more elaborate, where the issue has received a fuller consideration. On either premise, though this Court goes by the thumb rule about the later decision, the principle in **Anurag Mittal** seems to bind this Court.

28. The principles laid down by this Court in **Raisa Sultana Begam**, therefore, appear to be good law, in view of the subsequent decision of the Supreme Court in **M. Siddiq**, and, in particular, the decision in **Anurag Mittal**. So far as the decision of this Court in **Meera Rai** is concerned, certainly, that is a different view of the matter. Paragraph No. 15 of the report holds an affirmative order on an application by the plaintiff under Order XIII Rule 1 of the Code, imperative. Therefore, the withdrawal of the suit can become effective after the Court has passed an affirmative order, allowing the application and granting a withdrawal of the suit. This does not seem to be in accord with the law laid down by the Supreme Court in **Anurag Mittal**.

29. In view of what this Court has said above, we are in respectful disagreement with the view expressed as aforesaid in **Meera Rai**. However, sitting singly, it would not be appropriate for this Court to proceed to judgment.

30. Therefore the following questions of law are referred for consideration by a larger Bench :

(i) Whether the decision of this Court in **Raisa Sultana Begam**, AIR 1996

Allahabad 318 holding that an application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 once moved, leads to a withdrawal of the suit *ipso facto* without the Court passing an affirmative order, is still good law, in view of the subsequent decision of the Full Bench in **The Sunni Central Board v. Sri Gopal Singh Visharad**, 2010 ADJ 1 (SFB)(LB) and the Supreme Court in **M. Siddiq (dead) through legal representatives (Ram Janmabhoomi Temple case) v. Mahant Suresh Das and others**, (2020) 1 SCC 1 and **Anurag Mittal v. Shaily Mishra Mittal**, (2018) 9 SCC 691 ?

(ii) Whether the decision in **Meera Rai v. Additional Sessions Judge and others**, 2017 (12) ADJ 817 does not lay down the law correctly, in view of the law laid down by the Supreme Court in **Anurag Mittal v. Shaily Mishra Mittal**, (2018) 9 SCC 691 on the issue if the mere lodging of an application to unconditionally withdraw a suit under Order XXII Rule 1 of the Code of Civil Procedure, 1908 operates as a withdrawal of the suit *ipso facto* and without an affirmative order ?

31. In view of the orders of the Supreme Court in **Misc. Application No. 315 of 2022** in **Special Leave Petition (C) No. 6526 of 2020** dated 28.02.2022, the Registry is directed to place the matter urgently before His Lordship the Hon'ble The Chief Justice for constitution of a larger Bench.

(2023) 5 ILRA 1684
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2023

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 8454 of 2022

And

Criminal Appeal No. 7997 of 2022

Hemraj Patwa **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:
 Sri Rahul Pandey, Sri Rang Nath Pandey

Counsel for the Opposite Party:
 G.A.

Criminal Law-The Code of Criminal Procedure, 1973-Section 389(1) & 439- There is a difference between the grant of bail under Section 439 of the CrPC in case of pre-trial arrest and the suspension of sentence under Sec 389(1) of the CrPC and the grant of bail, post-conviction. In the earlier case, there may be a presumption of innocence, which is a fundamental postulate of criminal jurisprudence. The courts may take a liberal view depending on the facts and circumstances of the case, whereas in the case of post-conviction bail, there is a finding of guilt against the accused persons. The question of presumption of conviction does not arise. The Court considering an application for suspension of sentence and grant of bail is to consider the *prima facie* merits of the appeal, coupled with other factors. There should be strong, compelling reasons for the grant of bail, which must be recorded in the order granting bail. (Para 11) (E-15)

List of Cases cited:

1. Preet Pal Singh Vs St.of U.P 2020 (8) SCC 645
2. Kashmira Singh Vs St.of Pun. 1977 (4) SCC 291
3. Babu Singh and Ors. Vs St.of U.P. 1978 (1) SCC 579
4. Kalyan Chadra Sarkar Vs Rajesh Ranjan & anr. 2004 (7) SCC 528

5. Chaman Lal Vs St.of U.P. & anr. 2004 (7) SCC 525

(Delivered by Hon'ble Vinod Diwakar, J.)

**In Re: Criminal Misc
Suspension of Sentence Applications**

1. I have heard learned counsel for the accused - appellants and learned A.G.A for the State.

2. Aggrieved by the judgment and order dated 30.09.2022 passed by Additional Sessions Judge/F.T.C.-II/Special Judge, N.D.P.S. Act, Kaushambi, in Case No. 14 of 2012 titled as State Vs. Bhola Patel (lead case), the accused-applicant Hemraj Patwa, and Vinita Devi have preferred separate appeals bearing Criminal Appeal No. 8454 of 2022 and Criminal Appeal No. 7997 of 2022, respectively. The accused, Bhola Patel, Raju Maurya @ Anil Kumar and Manoj Kumar Maurya, have been acquitted under Section 8/20 NDPS Act by giving the benefit of the doubt, whereas accused-appellants Hemraj Patwa and Vinita Devi have been convicted and sentenced to ten years rigorous imprisonment along with fine of Rs. 1,00,000/- each.

3. As per the prosecution case, on 17.04.2012 at about 12.30 p.m. SHO Dinesh Prakash Pandey, along with other police officials, were patrolling and checking the anti-social elements. At the same time, SI Onkar Nath Pandey, Hawaldar Singh and lady constable Rukmani Devi have also joined the police party. On receipt of secret information that accused Bhola of village Pachasa P.S. Saini has hidden huge quantity of Ganja in his thatch and he could be arrested along with other suspects. Upon conducting the raid,

one man and one woman were apprehended by the police, but one man ran away from the place of the incident taking advantage of darkness. On enquiry from the apprehended suspects, one disclosed his name as Hemraj Patwa and the woman disclosed her name as Vinita Devi W/o Bhola Patel. On enquiry from the suspects, it's revealed that Bhola Patel had escaped by taking advantage of darkness. Upon compliance with the statutory provisions, a huge quantity of recovery seizure was made, and a total of 152 Kg Ganja was recovered from the possession of accused persons. The 152 Kg Ganja have been kept in four bags, each containing 47 kg, 45 kg, 35 Kg and 25 Kg. From the possession of Hemraj Patwa, two bags of Ganja were recovered containing 47 Kg and 45 Kg each, whereas 60 Kg of Ganja was recovered from accused Vinita Devi, kept in two bags containing 35 Kg and 25 Kg each.

4. Upon completion of the trial, both the accused-appellants were awarded the maximum sentence of 10 years and a fine of Rs.1,00,000/- and in default payment of the fine, the accused-appellants were further directed to undergo simple imprisonment for a period of two years.

5. Learned counsel for the accused appellants submits that the accused-appellants were falsely implicated in the case at the behest of police. He further urged that when the matter was highlighted in the media on the national level and in local newspapers, that the huge quantity of contraband has been recovered from the truck container within the jurisdiction of P.S. Saini, District Kaushambi, the driver and Khalasi of the truck were let to go by the police by taking huge bribe. The actual culprits paid the bribe, and they were freed

by the police and planted the recovery on the accused-appellants. He further urged that no independent witnesses to the recovery have been produced by the prosecution nor the compliance of Section 50 of the NDPS Act been effected. The investigating officer has also not complied with the requirement of Section 57 of the NDPS Act. He further urged that the information of the alleged recovery was not provided to the senior officers immediately, violating the spirit of Section 42 of the NDPS Act. The non-compliance of Sections 42, 50 and 57 has seriously damaged the prosecution's case, and the prosecution has failed to prove the recovery from the possession of accused persons and lastly urged that both the accused persons were on bail during the trial.

6. Per contra, learned A.G.A. submits that the provisions of Sections 42, 50 and 57 of NDPS Act have been duly complied with by the investigating agency, the same has been duly proved from the perusal of the testimony of S.I. Dinesh Prakash Pandey, Inspector Raj Kumar Pandey, S.I. Onkar Nath Pandey and Inspector Ravindra Tiwari. Learned A.G.A further urged, upon perusal of the trial court record, it transpires that a huge quantity of Ganja measuring 152 Kg was recovered from the possession of the accused persons. Learned A.G.A further submits that the testimony of the prosecution witness cannot be discarded only because the prosecution case is proved by the official witnesses in the present case. S.I. Dinesh Prakash Pandey, Inspector Raj Kumar Pandey, SI Onkar Nath Pandey and Inspector Ravindra Tiwari have fully supported the prosecution case, and their testimony is consistent and reliable. He further submits that the recovery of contraband

substances has been effected from the possession of accused-appellants Hemraj Patwa and Vinita Devi.

7. Admittedly, the huge commercial quantity of Ganja of 152 Kg has been recovered from the possession of accused-appellants Hemraj Patwa and Vinita Devi, and they are presumed to have the criminal mental State to possess the above contraband substance, and hence burden lies upon them to prove the absence of criminal intent.

8. Even though the police witnesses are interested witnesses, but there is no reason on record to disbelieve the testimony of above said witnesses.

9. Therefore, the combined effect of Sections 35 and 54 of the NDPS Act is that if the accused is found to be in possession of contraband substance, the Court shall presume that he has committed an offence under the provisions of the Act unless or until the contrary is proved further, if the criminal mental State of the accused is required to be established for the offence. In that case, the Court shall also presume that the accused shall have a mental state, and it is only the defence of the accused to prove that he has no such mental state to possess contraband.

10. The short question that arises for consideration in this application is, whether accused-appellants are entitled to be released on bail when they were on bail during the trial.

11. As observed by this Court in **Preet Pal Singh vs. State of U.P.1**, There is a difference between the grant of bail under Section 439 of the CrPC in case of pre-trial arrest and the suspension of

sentence under Section 389(1) of the CrPC and the grant of bail, post-conviction. In the earlier case, there may be a presumption of innocence, which is a fundamental postulate of criminal jurisprudence. The courts may take a liberal view depending on the facts and circumstances of the case, whereas in the case of post-conviction bail, there is a finding of guilt against the accused persons. The question of presumption of conviction does not arise. The Court considering an application for suspension of sentence and grant of bail is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong, compelling reasons for the grant of bail, which must be recorded in the order granting bail.

12. The discretion under Section 389(1) is to be exercised judicially, and the High Court is obliged to consider whether the accused has a strong likelihood to succeed in appeal, and there is no unreasonable delay in disposal of the appeal, as held by Apex Court in **Kashmira Singh v. State of Punjab²** and **Babu Singh and Ors. v. State of U.P.³**

13. In **Kalyan Chadra Sarkar v. Rajesh Ranjan and Anr⁴**, the Hon'ble Supreme Court has held:-

"11. The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly where the accused is charged

of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind."

14. Even though a detailed examination of the merits of the case may not be required by the courts while considering an application for bail, at the same time, the exercise of jurisdiction has to be based on well-settled principles and in a judicious manner and not as a matter of course as held by this Court in **Chaman Lal v. State of U.P. and Anr⁵**.

15. Be that as it may, the detailed examination of evidence and detailed documentation on the merits of the case need not be undertaken while deciding the application of suspension on bail. The power of this Court to grant bail under Section 389(1) Cr.P.C, are subject to the limitations contained in amended Section 37 of the NDPS Act, and the restrictions placed on the power of the Court under the said section are applicable to this Court in the matter of granting bail.

16. Hon'ble Supreme Court in **Preet Pal Singh (supra)** has held as under:-

"35. There is a difference between the grant of bail under Section 439 of the CrPC in case of pre-trial arrest and suspension of sentence under Section 389 of the CrPC and the grant of bail, post-conviction. In the earlier case, there may be a presumption of innocence, which is a fundamental postulate of criminal jurisprudence. The courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. and Anr. (supra). However, in case of post-conviction bail, by suspension of operation

of the sentence, there is a finding of guilt, and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted once there is a conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong, compelling reasons for the grant of bail, notwithstanding an order of conviction, by suspension of sentence. This strong and compelling reason must be recorded in the bail order, as mandated in Section 389(1) of the Cr.P.C.

38. *In considering an application for suspension of sentence, the Appellate Court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there is evidence that the Trial Court has considered, it is not open to this Court to consider the application under Section 389 (1) Cr.P.C to re-assess and/or re-analyze the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail."*

17. The huge quantity of 152 kg of Ganja has been recovered from the possession of the accused-appellants, and they are presumed to have the criminal mental State to possess the above contraband substance; hence burden lies upon them to prove the absence of criminal intent.

18. The accused-appellant, Hemraj Patwa is involved in four cases registered at Police Station Dhoomanganj, District Prayagraj. The details are as under:-

(i) Case Crime No. 186 of 2012, under Section 8/20 N.D.P.S. Act, P.S. Saini, District Kaushambi.

(ii) Case Crime No. 233 of 2016, under Section 3/25 Arms Act, P.S. Pipari, District Kaushambi.

(iii) Case Crime No. 199 of 2016, under Section 3025/120B IPC, P.S. Pipari, District Kaushambi.

(iv) Case Crime No. 348 of 2016, under Section 2/3(1) U.P. Gangster Act, P.S. Pipari, District Kaushambi.

19. The total custody period of accused-appellant Hemraj Patwa as on date is 10 months and 15 days with remission whereas total custody period of accused-appellant Vinita Devi as on date is 11 months and 2 days with remission.

20. (i) The counsel for the accused-appellants could not point out patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. At this stage, it is not open to this Court to reassess and / reanalyze the same evidence to take a different view, to suspend the execution of the sentence and release the convict on bail.

20. (ii) Considering the actual custody of the accused-appellants, the huge commercial quantity of Ganja recovered from the possession of the accused-appellants.

20. (iii) And the condition contained in Section 37 of the NDPS Act are not satisfied.

21. The application for suspension of sentence filed in Criminal Appeal No.8454

of 2022 and Criminal Appeal No.7997 of 2022 are rejected.

22. Through this common order, the applications for suspension of the sentence of accused-appellants Hemraj Patwa and Vinita Devi are disposed of accordingly.

23. The observation made by this Hon'ble Court while disposing of the application for suspension of sentence in Criminal Appeal No.8454 of 2022 and Criminal Appeal No.7997 of 2022 shall have no bearing on the outcome of the final appeal.

24. List this appeal for hearing after six months. If the appeal is not heard within two years despite the cooperation and endeavours of the accused-appellants, they shall be at liberty to revive the prayer for grant of bail.

(2023) 5 ILRA 1689

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 15.05.2023

BEFORE

THE HON'BLE DINESH PATHAK, J.

Second Appeal No. 318 of 2023

M/s Chaudhary Properties & Ors.

...Appellants

Versus

Smt. Laxmi Devi

...Respondent

Counsel for the Appellants:

Sri Ram Dayal Tiwari, Sri M.D. Singh Shekhar (Sr. Advocate)

Counsel for the Respondent:

Sri Rahul Mishra, Sri Sanjay Mishra, Sri Satendra Kumar Singh, Sri Suresh Chandra Varma, Sri S.K. Verma

Civil Law-The Contract Act,1872-Section 10 read with Sec 2(e)- There is no case of any party that formation of concluded oral agreement was result of misrepresentation or undue influence or without free will, therefore, formation of contract under Section 10 read with Section 2 (e) and (h) of Contract Act cannot be denied-Agreement can be oral and same is enforceable provided formation of the contract is with free will-In absence of written document particular period/time limit, prima facie, cannot be said to be an essence for the agreement and same cannot be ascertained in the absence of written terms and conditions.(Para 10, 13 & 15)

The Specific Relief Act, 1963-Section 39-The court may in its discretion grant mandatory injunction, when it is necessary to compel the performance of certain contracts which the court is capable of enforcing, to prevent the breach of an obligation and also to compel the performance of requisite act. (Para 19)

Appeal dismissed. (E-15)

List of Cases cited:

1. Atma Ram Vs Charanjeet Singh reported in (2020) 3 SCC 311
2. Badri Prasad Vs St .of M. P. & anr., AIR 1970 Supreme Court 706
3. Brij Mohan & ors.Vs Smt. Sugra Begum & ors.(1990) 4 SCC 147
4. Aloka Bose & ors.Vs Parmatma Devi & ors.(2009) 2 SCC 582

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Shri M.D.Singh Shekhar, learned Senior Counsel assisted by Shri R.D.Tiwari, learned counsel for the appellant and Shri S.K.Verma and Shri S.K.Singh, learned counsel for the

contesting respondents on admission of the instant appeal and perused the record placed on the Board.

2. Suit for mandatory injunction for issuing a direction against the defendants-appellants to execute the registered sale deed in favour of the plaintiff-respondent with respect to plot no. C-107 area 300 sq. yards situated in Ganga Vihar Colony (Pink City), Gram Sadullabad Pargana Loni, Tehsil and District Ghaziabad after receiving the balance amount of Rs. 252.70 and to declare the cancellation letter dated 7.10.2011 null and void filed on behalf of the plaintiff-respondent has concurrently been decreed by both the courts below. Having been aggrieved against the decretal of suit, defendants-appellants have preferred the instant second appeal assailing the judgment and decree dated 17.1.2023 passed by the learned District Judge, Ghaziabad in Civil Appeal No. 117/19 affirming the judgment and decree dated 3.9.2019 passed by the Civil Judge (Senior Division)/Fast Track Court, Ghaziabad in Original Suit No. 601 of 2011.

3. Plaintiff-respondent came with the plea that the defendants-appellants have developed a colony in the name of Hal Ganga Vihar Colony (Pink City) in Village Sadullabad, Pargana Loni, Tehsil and District Ghaziabad in the year 1986 and advertised for allotment of several size of plots in the said colony. In pursuance of the advertisement, the plaintiff-respondent had applied for allotment of plot. Consequently, she has been allotted plot no. C-107 area 300 sq. yard @ Rs. 252.70 per sq. yard on 23.12.1987 after getting discount from the original proposed rate i.e. Rs. 266/- per sq. yard. Plaintiff-respondent has deposited money amounting Rs. 80,500/- on

5.1.1988. The defendants-appellants, by the letter dated 30.12.2008, has admitted the deposition of money amounting Rs. 83,000/- and further demanded Rs. 22,592/- . In pursuance thereto, the plaintiff-respondent has deposited more money amounting Rs. 51,350/-, than the demanded amount i.e. Rs.25,592/-, on 28.1.2009. When the plaintiff-respondent has requested to execute the sale deed in light of the letter dated 30.12.2008, the defendants-appellants have deferred the execution of sale deed on the pretext of pendency of the Writ Petition No. 22445 of 2007 wherein use of land, which has been changed by the Ghaziabad Development Authority, was under challenge. Through letter dated 15.11.2009, the defendants-appellants have informed the final disposal of the aforesaid writ petition and also assured that the sale deed will be executed soon. Later on, dishonesty prevailed in the mind of the defendants-appellants who have started demanding more money whereas major part of the agreed amount has already been deposited by the plaintiff-respondent. A registered letter dated 12/13.1.2010 has been sent by plaintiff to defendants with a request to executed a registered sale deed in her favour. However, defendants-appellants are throughout avoiding to executed registered sale deed, therefore, suit for mandatory injunction has been filed against the defendants-appellants to execute the sale deed.

4. During pendency of the suit, defendants-appellants have issued a cancellation letter dated 7.10.2011 informing the plaintiff-respondent qua cancellation of allotment of plot made in her favour. Plaintiff-respondent has tried to persuade defendants-appellants to withdraw the said cancellation letter and execute sale

deed, however the defendants-appellants turned a deaf ear, therefore, the plaintiff-respondent has moved an amendment application seeking ancillary relief to declare the cancellation letter dated 7.10.2011 null and void.

5. The defendants-appellants, though admitted the allotment of plot no. C-107 area 300 sq. yards in favour of plaintiff-respondent and deposition of money amounting Rs.80,500/- as well, however, raised dispute with respect to rate of plot and bonafide at the part of the plaintiff-respondent. It is averred in the written statement that plaintiff-respondent has deposited money amounting Rs.80,500/- on 5.1.1988 accepting the rate of plot @ Rs. 550/- per sq. yard. The defendants-appellants have disputed the genuineness of letter dated 30.12.2008 for which they have filed Original Suit No. 572 of 2010 to declare it as null and void. In the written statement defendants-appellants have mentioned the issuance of letter dated 7.10.2011 as well which has been sought to be declared as null and void by moving an amendment application. The defendants-appellants have questioned the locus of the plaintiff-respondent to file a suit and maintainability of the plaint as well under Order 7 Rule 11 C.P.C. and under Section 41 of the Specific Relief Act.

6. Learned Trial court has framed as many as 9 issues and after careful discussion of the evidence on record came to the conclusion that the defendants-appellants are under obligation to perform their part to complete the agreement. In deciding issue Nos. 1 and 8, the trial court has observed that oral agreement between the parties, with respect to execution of the sale deed, is evident from the allotment letter dated 23.12.1987 and the admission

made at the part of the defendants-appellants to receive money amounting Rs. 80,500/- paid on 05.01.1988. In deciding issue No. 2, learned trial court has observed against defendant that cause of action arose to file suit. Issue No. 4 with regard to non-maintainability of suit under Section 41 of the Specific Relief Act and issue no. 5 with regard to bars of the suit under Order 7 Rule 11 C.P.C. have been decided in negative. The trial court, in deciding issue No. 9, has given a definite finding that the plaintiff-respondent is entitled for declaratory injunction against the alleged cancellation letter dated 7.10.2011. First appellate court, on appeal being filed on behalf of defendants, has formulated as many as four points for determination and affirmed the judgment and decree passed by trial court.

7. Assailing the judgment and decree passed by the courts below, learned Senior Counsel for the defendants-appellants has confined his argument with respect to the maintainability of the suit on three folds submission; (a) that, there was no written agreement between the parties, therefore, suit for mandatory injunction to get the sale deed executed in favour of the plaintiff-respondent is not maintainable in the eyes of law inasmuch as no cause of action arose and the plaintiff-respondent has got no locus to file a suit; (b) that, the suit for mandatory injunction to get the sale deed executed amounts a suit for specific performance of contract, therefore, decree to execute the sale deed cannot be passed without returning definite finding with respect to readiness and willingness at the part of the plaintiff-respondent and (c) that, time is the essence for specific performance of contract, therefore, the suit filed on behalf of the plaintiff-respondent to execute a sale deed, in light of the allotment order

dated 10.12.1987, is barred by prescribed period of limitation, therefore, it should be dismissed on the ground of laches. In support of his submissions, learned counsel for the defendants-appellants has relied upon the judgment passed by the Hon'ble Supreme Court in the case of **Atma Ram vs. Charanjeet Singh reported in (2020) 3 SCC 311**.

8. Per contra, learned counsel for the plaintiff-respondent has vehemently opposed the submissions as advanced by the learned counsel for the defendants-appellants and contended that in absence of written agreement inked between the parties, suit for specific performance of contract is not maintainable, therefore, there is no question of considering the readiness and willingness at the part of the plaintiff-respondent under the provisions as enunciated under Section 16 of the Specific Relief Act. It is further contended that issuance of allotment letter dated 23.12.1987 from the defendants-appellants and acceptance of fund amounting Rs.80,500/- dated 5.1.1988 at their part explicitly establishes the valid oral agreement took place between the parties, therefore, the defendants-appellants cannot withdraw themselves from the obligation at their part of the agreement. It is next contended that under Section 39 of the Specific Relief Act, the Court is competent in its discretion to grant an injunction for performance of certain acts to prevent the breach of an obligation. It is also contended that in absence of any written agreement, time factor cannot be taken as an essence of the oral agreement took place between the parties, therefore, in the given circumstances, there is no question to consider the point of limitation in filing the suit. Learned counsel for the plaintiff-respondent has made emphasis on the

judgement dated 11.1.2021 passed by coordinate Bench of this Court in Second Appeal No. 439 of 2020; M/s Chowdhary Properties and two others vs. Vipin Bahadur and Another wherein identical matter has been decided by this Court against the M/s Chowdhary Properties and others, who are also the defendants-appellants in the instant Second Appeal in hand. In aforesaid Second Appeal No. 439 of 2020, suit was filed on similar set of facts wherein plaintiff (in the said suit) was allotted plot no. A-74 in the colony known as Pink City.

9. Having considered the rival submissions advanced by the learned counsel for the parties and perusal of record, it reveals that the defendants are the colonizers, who have advertised widely to sell their plots carved out in the colony known as 'Pink City'. Attracting to the advertisement, plaintiff has proceeded to allot the plot C-107, area 3 square yards and, accordingly, deposited the money. Facts with respect to the allotment of the plot in favour of the plaintiff, vide allotment letter dated 23.12.1987, and receiving money amounting Rs. 80,500/- on 5.1.1988, have been admitted by the defendants. However, the defendants have raised dispute qua rate of plot to be Rs. 550/- per square yard in place of Rs. 252.70 paise per square yard as claimed by plaintiff, which was agreed upon between the parties after concession from the original rate i.e. at the rate of Rs. 266/- per square yard. There is also dispute with regard to default in the payment of consideration amount. As per the plaintiff case, she has deposited entire money even more than required as demanded by the defendants, vide letter dated 3.12.2008, whereas, on the other hand defendants has disputed the payment of entire money and

blamed to the plaintiff for default in payment.

10. In the given circumstances of the present case, it is evident that the proposal made on behalf of the defendant with respect to the allotment of plot in the colony known as 'Pink City' has been accepted by the plaintiff and in furtherance thereof, the plaintiff has deposited the money on 23.12.1987 amounting to Rs. 2,500/- (paper No. 8C) and after accepting said amount, the defendant/coloniser (promissor) has issued allotment letter on the same day i.e. 23.12.1987 to allot the plot No. C-107 admeasuring area 300 square yards in favour of the plaintiff, who, in turn, has deposited money on 5.1.1988 amounting Rs. 80,500/- (paper No. 9-C). At later stage, the defendants have issued a letter dated 30.12.2008 (paper No. 10-C) demanding additional amount of Rs. 22,592/-. In pursuance thereof, the plaintiff has deposited Rs. 51,350/- on 28.1.2009. In this view of the matter, the existence of concluded oral agreement taken place between the parties cannot be denied. The aforesaid proposition of law has carefully been considered by the learned trial court while deciding the issue No. 1 and 8. There is no case of any party that formation of concluded oral agreement was result of misrepresentation or undue influence or without free will, therefore, formation of contract under Section 10 read with Section 2 (e) and (h) of Contract Act cannot be denied. Learned trial court has held the valid relationship of transferor and transferee between the parties. In support of its finding, he has relied upon the following cases:

(i) Badri Prasad Vs. State of Madhya Pradesh and another, AIR 1970 Supreme Court 706,

(ii) Brij Mohan and others Vs. Smt. Sugra Begum and others (1990) 4 SCC 147 and

(iii) Aloka Bose and others Vs. Parmatma Devi and others (2009) 2 SCC 582.

11. I am convinced with the findings returned by the trial court who has decided the case after considering the evidence on record in right perspective, which has appropriately been affirmed by the first appellate court, that there was an existence of concluded oral agreement between the parties, which is enforceable in the eye of law.

12. So far as non-existence of written agreement between the parties is concerned, as submitted by the learned counsel for the appellants in his first submission, I am of the considered view, as discussed in preceding paragraph, that there is no legal requirement under the law for written document to enforce the agreement which took place between the parties. Agreement can be oral and same is enforceable provided formation of the contract is with free will. Hon'ble Supreme Court in the matter of **Brij Mohan and others (supra)** has clearly observed in paragraph 20 of its judgment as follows:-

“There is no requirement of law that an agreement or contract of sale of immovable property should only be in writing. However, in a case where the plaintiffs come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the plaintiffs to prove that there was consensus ad idem between the parties for a concluded oral agreement for sale of immovable property. Whether there was

such a concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement.” **(Para 20)**

12. Same view was pronounced by Hon’ble Supreme Court in the matter of **Aloka Bose (supra)**. In paragraph Nos. 16, 17 and 18 of the judgment, it has been held as follows:-

“An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it. **(Para 16)**

Considering Section 10 of the Contract Act, 1872 and the proviso thereto, no attention has been drawn to any law applicable in the State concerned at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an

oral agreement will also be valid. In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of the purchaser alone signing an agreement of sale.”.

(Paras 17 and 18)

13. Having considered the pleading of the parties and dictum of Hon’ble Apex Court, as cited above, it cannot be said that oral agreement instituted is not enforceable and suit for mandatory injunction to get the sale deed executed on behalf of plaintiff is not maintainable. Plaintiff, being a bonafide purchaser, has paid Rs. 2,500/- + 80,500/- to dependants, who in turn have accepted said amount and issued allotment letter dated 23.12.1987, however, later on they have refused to execute sale deed. Therefore, cause action arisen compelling the plaintiff to institute a civil suit to protect her legal rights. As such, I found no force in the first submission advanced by learned counsel for the defendants/appellants.

14. So far as the second submission advanced by the learned counsel for the appellant treating the suit as suit for specific performance of contract and requirement of finding on readiness and willingness, is concerned, written statement evince that defendants have not taken such plea in their written statement. They have simply disputed the rate of land and pleaded default in payment of demanded money at the part of the plaintiff. However, in the given circumstances, conduct of the parties explicitly indicates their intention to enter into an agreement for the purposes of

sale and purchase of the plot in question. Proposal made by the defendants (promisor), through advertisement was accepted by the plaintiff/purchaser (promisee) creates the formation of contract between them. Even in absence of a written document, the plaintiff cannot be deprived of to protect her rights which occurred after accepting the proposal made by the promisor and she has acted upon in pursuance of that proposal. Though, in my opinion, in the absence of any written agreement between the parties explaining the specific terms and conditions the ingredients as required under Section 16 (c) of Specific Relief Act qua readiness and willingness at the part of the plaintiff to perform her part of contract cannot be ascertained, intention of the plaintiff to purchase the allotted land is explicit by her conduct when she had hurriedly deposited the money and obtained the allotment order in her favour and, according to the plaintiff, she has made full payment. As per the pleadings made by the parties, execution of the sale deed was hampered due to pendency of the writ petition being Writ Petition No. 22445 of 2007. Vide letter dated 15.11.2009, the defendants have informed the plaintiff qua decision dated 26.10.2009 in the said writ petition. Even assuming for the sake of arguments that the courts below have not given any finding with respect to the readiness and willingness, I am of the considered view that, prima facie, bonafides of the plaintiff in performing her part of oral contract cannot be denied considering the last payment made by her in pursuance of demand letter dated 30.12.2008 and registered notice dated 12/13.9.2010 sent to defendants to execute registered sale deed qua allotted plot. It is explicitly evident that the last price fixed by the defendants was 1,11,150/- whereas against the said amount,

the plaintiff has already deposited money amounting Rs. 1,34,350/-. As per the case of the plaintiff, she is ready to pay the remaining amount, if any, for the purposes of execution of the sale deed, therefore, due diligence and bonafides at the part of the plaintiff cannot be denied in this matter.

15. The third submissions, as advanced by the learned counsel for the appellant qua limitation in filing the suit, is unfounded as well. In the given circumstances of the present case, as discussed above, there is no-existence of a written document reciting the condition of time limit/period qua execution of sale deed, which is admitted to both the parties, therefore, particular period/time limit, prima facie, cannot be said to be an essence for the agreement and same cannot be ascertained in the absence of written terms and conditions. In this peculiar circumstances, the law of limitation to file suit for mandatory injunction cannot be said to be applicable in the instant matter. Relying upon the case of **Atma Ram (supra)** learned counsel for appellant has tried to submit that even if the suit was filed for the mandatory injunction and the same has been treated as a suit for specific performance of contract, therefore, in that eventuality, amendment of plaint was required under Order 6 Rule 17 CPC, and the limitation would be considered from the date of amendment carried out in the plaint for the purpose of competence of the suit. There is no doubt qua proposition of law that specific time, in case, prescribed under the terms and conditions of the contract took place between the parties, same shall be the relevant date for enforcement of the contract and law of limitation will apply accordingly. It is also settled that where the amendment relates to the limitation of filing the suit, the limitation will be

reckoned considering the date of amendment in the pleading which shall be relevant date for the purposes of deciding the competence of the suit which was required to be filed within the prescribed period of limitation. Such amendment bears on law of limitation and is exception to the doctrine of relation back. In the cited case, as relied upon by the learned Senior Advocate, suit was filed for mandatory injunction to direct the respondent to execute the documents of transfer of property in question after receiving balance sale consideration and, accordingly, Court's fee was paid by the plaintiff. It appears that the said suit was filed on the basis of an agreement dated 12.10.1994 which had taken place between the parties. Respondents have filed written statement denying the pleading made by the plaintiff including the execution of the agreement. He has also questioned the maintainability of the suit in the form in which it was filed. During the pendency of the said suit, the defendant has moved an application with respect to the maintainability of the suit on the ground that the suit is not maintainable for the enforcement of specific performance of contract of sale. Learned trial court has disposed of said application holding that suit was in fact one for specific performance of agreement to sale and the technical objection regarding the maintainability could be overcome by directing the plaintiff to pay the requisite court's fee and, accordingly, the trial court has directed the plaintiff to cure the defect by depositing the court fee. In pursuance of the said order, the plaintiff has deposited the court fee. In this backdrop of the case, Hon'ble Supreme Court has held that in the event of suit for specific performance, the plaintiff ought to have submitted the requisite court fee of the value on the basis of the sale consideration mentioned in the

agreement. It is further observed that, in case, the suit is only for the mandatory injunction then the recourse is open for the plaintiff to seek an amendment under Order 6 Rule 17 of the CPC. It is further observed that law of limitation will, accordingly, be applicable. The relevant paragraph No. 7, 8 and 9 of judgment **Atma Ram (supra)** relied upon by the learned Senior Advocate for the appellant is quoted hereinbelow:

7. As a matter of fact, if the suit was actually one for specific performance, the petitioner ought to have at least valued the suit on the basis of the sale consideration mentioned in the agreement. But he did not. If the suit was only for mandatory injunction (which it actually was), the only recourse open to the petitioner was to seek an amendment under Order 6 Rule 17 CPC. If such an application had been filed, it would have either been dismissed on the ground of limitation (*K. Raheja Constructions Ltd. v. Alliance Ministries*) or even if allowed, the prayer for specific performance, inserted by way of amendment, would not have been, as a matter of course, taken as relating back to the date of the plaint (*Tarlok Singh v. Vijay Kumar Sabharwal, Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit v. Ramesh Chander*). Therefore, a short-cut was found by the petitioner-plaintiff to retain the plaint as such, but to seek permission to pay deficit court fee, as though what was filed in the first instance was actually a suit for specific performance. Such a dubious approach should not be allowed especially in a suit for specific performance, as the relief of specific performance is discretionary under Section 20 of the Specific Relief Act, 1963.

8. It may be true that the approach of the High Court in non-suiting the petitioner-plaintiff on the ground of

limitation, despite the original defect having been cured and the same having attained finality, may be faulty. But we would not allow the petitioner to take advantage of the same by taking shelter under Section 149 CPC, especially when he filed the suit (after more than three years of the date fixed under the agreement of sale) only as one for mandatory injunction, valued the same as such and paid court fee accordingly, but chose to pay proper court fee after being confronted with an application for the dismissal of the suit. Clever ploys cannot always pay dividends.

9. Coming to the second aspect revolving around Section 16(c), a look at the judgment of the trial court would show that no issue was framed on the question of readiness and willingness on the part of the petitioner-plaintiff in terms of Section 16(c) of the Specific Relief Act, 1963. The fact that the petitioner chose to issue a legal notice dated 12-11-1996 and the fact that the petitioner created an alibi in the form of an affidavit executed before the Sub-Registrar on 7-10-1996 (marked as Ext. P-2) to show that he was present before the Sub-Registrar for the purpose of completion of the transaction, within the time stipulated for its performance, was not sufficient to conclude that the petitioner continued to be ready and willing even after three years, on 13-10-1999 when the plaint was presented. No explanation was forthcoming from the petitioner for the long delay of three years, in filing the suit (on 13-10-1999) after issuing a legal notice on 12-11-1996. The conduct of a plaintiff is very crucial in a suit for specific performance. A person who issues a legal notice on 12-11-1996 claiming readiness and willingness, but who institutes a suit only on 13-10-1999 and that too only with a prayer for a mandatory injunction carrying a fixed court fee relatable only to

the said relief, will not be entitled to the discretionary relief of specific performance.”

16. The facts and circumstances of the cited cases are distinguishable from that of the given circumstances in the case in hand. In the present matter, terms and conditions of the agreement are not taken down in the nature of document, however, the oral agreement between the parties is concluded by their conduct. Issuance of allotment letter and acceptance of sale consideration at the part of defendant/colonizer (promissor) is sufficient to prove the formation of contract between the parties. There is nothing on the record to prove that the time was essence of the agreement as the same has not been specified anywhere. In case in hand, there is no judicial order to treat/convert the suit for mandatory injunction in the suit for specific performance of contract nor the plaint has been modified/corrected by moving any amendment application or by submitting the court fee treating it to be a suit for specific performance of contract, therefore, in my opinion, there is no case of incompetence of suit being barred by prescribed period of limitation. More so, Writ Petition No. 22445 of 2007 was decided on 26.10.2019, thereafter, plaintiff has sent registered notice dated 12/13.9.2010 to the defendants requesting them to execute sale deed qua allotted plot and file suit within three years i.e. on 12.3.2011. Therefore, suit cannot be treated to be filed beyond prescribed period of limitation from the date when cause of action arose.

17. While filing the instant appeal, the appellant has formulated as many as 12 substantial questions of law as averred at the bottom of the memo of appeal. For

ready reference, they are quoted hereinbelow:

“A. Whether the courts below illegally granted the relief of specific performance of contract in suit in which the relief was sought for the mandatory injunction without amendment of any relief in the suit which was simple suit of mandatory injunction?

B. Whether, courts below have committed manifest illegality treating the suit of mandatory injunction as a suit for relief of specific performance of contract and granted the relief?

C. Whether, the suit of the plaintiff-respondent was not maintainable and the plaint is liable to be rejected under Order-VII Rule 11 of C.P.C.?

D. Whether, suit of the plaintiff respondent for the relief which was granted by courts below was barred by limitation the court below had failed to consider that allotment of the plot was alleged to have done on 23.12.1987 and suit being O.S. 601 of 2011 was filed on 17.3.2011 after 24 years?

E. Whether the relief of specific performance of the contract suit was barred by limitation even though the court below decreed the suit granting relief of specific performance of the contract in the suit for mandatory injunction?

F. Whether, there was no agreement to sell registered or unregistered in between the parties nor any concluded enforcement contract even though the courts below decreed the suit for specific performance of the contract which is liable to be set-aside?

G. Whether on 1.1.1977 amendment had taken place in Section 54 of the transfer of the property Act and 17(2) of the Registration Act by which agreement to sell regarding the agricultural

property are require to be registered document in the present no registered or unregistered agreement even though the court below decreed the suit of mandatory injunction treating the same as suit for specific performance of the contract hence judgment and decree passed by courts below is liable to be set-aside?

H. Whether, in the suit of plaintiff-respondent no relief could be granted as per provision of Section 41-E and 41H of the Specific Relief Act but the court below had not consider the said aspect of the matter as such the judgment and decree passed by courts below is liable to be set-aside?

I. Whether, courts below had committed gross illegality the valuation of the disputed plot as Rs. 266 per sq. gaj while valuation settled Rs. 550/- per sq. gaj at the time of booking of plot in the year 1987 and no evidence was produced by the plaintiff-respondent about the valuation even though the courts below in arbitrary manner held the valuation Rs. 266/- per sq. gaj?.

J. Whether, as per the booking development charge is liable to be paid by the booking holder of the plot but the courts below have not considered this aspect of the matter as such judgment and order of the courts below is liable o be set-aside?

K. Whether, suit for specific performance can be decree without framing any issue and without deciding readiness and willingness as contemplated U/s 16 (C) of specific Relief Act?

L. Whether, booking of the plot was done on 23.12.1987 and suit was filed after 24 years on 17.3.2011 hence the suit was time barred and liable to be barred under Order VII Rule-11 C.P.C.?”

18. I have carefully considered all the substantial questions of law as formulated

by the appellants which appears to be misconceived and non-substantial as emerges from the facts and circumstances of the present case. Considering the short submissions advanced by the learned Senior Advocate for the appellants in the light of the given circumstances of the present case, I am of the view that the courts below have rightly decreed the suit for mandatory injunction directing the defendants-appellants to execute the sale deed in favour of the plaintiff after receiving the money amounting Rs. 2,500/- and declared the cancellation letter dated 7.10.2011 to be null and void. Issuance of cancellation letter dated 7.10.2011 at subsequent stage during the pendency of the suit explicitly indicates the malafide intention of the defendants, who have deliberately taken such a step after institution of the suit just to avoid their obligation which they promised to be fulfilled at the time of allotment of the plot in question i.e. plot No. C-107 measuring area 300 square yards through allotment letter dated 23.12.1987. It would not be out of context to cite the provisions of Section 39 of Specific Relief Act, which is quoted hereinbelow:

“39. Mandatory injunctions.- When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.”

19. A simple reading of the provisions as enunciated under Section 39 of the Specific Relief Act connotes that the court may in its discretion grant mandatory injunction, when it is necessary to compel the performance of certain contracts which

the court is capable of enforcing, to prevent the breach of an obligation and also to compel the performance of requisite act. Applying the aforesaid provision, in the given circumstances, it is explicit that the defendants are at the fault who are trying to avert their obligation to perform part of their contract, which was concluded between the parties. Appellants have received the consideration money, however, averted their part to execute the registered sale deed in favour of the plaintiff/respondent. In this backdrop of the case, the suit for mandatory injunction has rightly been filed by the plaintiff-respondent against the defendants-appellants and the courts below have rightly decreed the suit upholding the entitlement of the plaintiff for mandatory injunction and for the declaratory injunction as well declaring the cancellation letter dated 7.10.2011 null and void. Overall conduct of the plaintiff, from the date of depositing the money up to the date of sending the registered letter in the nature of notice, indicates the bonafide intention of the plaintiff to get the sale deed executed in her favour.

20. Moreover, the Court cannot oblivious as well to the judgment dated 11.1.2021 passed by the co-ordinate Bench of this Court in second appeal No. 439 of 2020 rendered in the similar facts and circumstances of the case wherein another plot No. A-74 situated in the ‘Pink City’ has been promised to be transferred by the present defendants/appellants. Suit filed on behalf of plaintiff (allottee) has concurrently been decreed by the trial court as well as first appellate court, and ultimately culminated in favour of the plaintiff by dismissing the second appeal filed on behalf of the defendant (colonizer) vide judgment dated 11.1.2021.

21. In this conspectus as above, I am of the considered view that the bonafide claim of the plaintiff cannot be denied on hyper technical grounds as tried to be submitted by the learned counsel for the appellants, whereas, they have failed to make out any substantial questions of law to entertain the instant second appeal against the judgment and decree, under challenge, passed by the courts below.

22. After careful consideration of the matter in hand, I failed to find out any substantial questions of law so as to interfere in the concurrent finding of fact returned by the courts below in exercise of second appellate jurisdiction under Section 100 CPC. It is settled that with respect to the questions of fact, the first appellate court is the last court of facts. At the second appellate stage, no second appeal under Section 100 CPC can be entertained without making out a substantial question of law. Submission as raised by the learned Senior Advocate for the appellant cannot be treated to be a substantial questions of law in the given circumstances of the present case.

23. Resultantly, the present writ petition, being devoid of merits and misconceived, is dismissed with no order as to the costs.

(2023) 5 ILRA 1700
APPELLATE JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 15.05.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR
UPADHYAYA, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 228 of 2023

Dr. R.M.L. Ins. of Medical Science Lko. & Ors. ...Appellants

Versus

Dr. Charu Mahajan & Ors. ...Respondents

Counsel for the Appellants:

Anupras Singh, Sr. Advocate

Counsel for the Respondents:

Gaurav Mehrotra, C.S.C.

Service Law-Dr. Ram Manohar Lohia Institute of Medical Sciences Act, 2015-Section 42 - The Constitution of India-1950-Article 226- Mere availability of an alternative remedy not exhausted by the party approaching this Court invoking writ jurisdiction, does not oust the jurisdiction of the Court that will render a writ petition not maintainable-the petitioner has not taken recourse to Section 42 of the Act 2015, rather has challenged the order of the President as communicated to her by the Director of the Institute by means of the order dated 22.02.2023. Thus, it cannot be said that the order of dismissal from service could not be challenged by filing writ petition under Article 226 of the Constitution of India unless it is given finality by the Visitor of the Institute. (Para 23, 26 & 37)

Special Appeal dismissed. (E-15)

List of Cases cited:

1. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors., reported in (1998) 8 SCC 1,
2. Godrej Sara Lee Ltd. Vs Excise and Taxation Officer-cum-Assessing Authority & ors., reported in 2023 SCC OnLine SC 95
3. M/s Radha Krishan Industries Vs St.of Himachal Pradesh & ors., decided on 20.04.2021, reported in (2021) 6 SCC 771.
4. Committee of Management & anr. Vs Vice-Chancellor & ors.(2009) 2 SCC 630

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

1. Dr. Ram Manohar Lohia Institute of Medical Sciences, Lucknow (here-in-after referred to as '**Institute**') is before us in this intra-court appeal filed under Chapter VIII Rule 5 of the Rules of the Court challenging an order dated 13.04.2023 passed by the learned Single Judge in Writ-A No.2822 of 2023 whereby the preliminary objection raised on behalf of the appellant-Institute regarding maintainability/entertainability of the writ petition has been overruled and the appellant-Institute has been required to file its counter affidavit to the prayer for grant of interim relief made by the respondent no.1-petitioner in the writ petition.

2. Heard Shri Asit Kumar Chaturvedi, Senior Advocate, assisted by Shri Anupras Singh, learned counsel representing the appellant-Institute and Shri Gaurav Mehrotra, Advocate representing the respondent no.1-petitioner. Learned State Counsel representing the State-respondents has also been heard. We have also perused the records available before us on this special appeal.

3. At the outset, learned counsel for the respondent no.1-petitioner has argued that this special appeal is not maintainable for the reason that the order under appeal does not decide any issue; rather by the said order learned Single Judge has only entertained the writ petition overruling the objection of the appellant-Institute that against the order under challenge in the writ petition, the respondent no.1-petitioner has got an alternative remedy under section 42 of Dr. Ram Manohar Lohia Institute of Medical Sciences Act, 2015 (here-in-after referred to as '**the Act, 2015**') before the Visitor, as such writ petition ought not to have been entertained by the learned Single Judge. Thus, the submission against the

maintainability of this special appeal is that once the learned Single Judge has decided to entertain the writ petition overruling the objection of there being an alternative remedy, such discretion need not be interfered with by this Court in this special appeal.

4. Replying to the aforesaid submission made by the learned counsel representing the respondent no.1-petitioner regarding maintainability of this intra-court appeal, Shri Chaturvedi, learned Senior Advocate has strenuously argued that in the wake of availability of statutory alternative remedy under section 42 of the Act, 2015, which is efficacious too, learned Single Judge has erred in law in maintaining the writ petition. In his submission, he has urged that the writ petition is not maintainable in view of the aforesaid and it ought to have been dismissed relegating the respondent no.1-petitioner to the remedy under section 42 of the Act, 2015. In support of his submission, Shri Chaturvedi has placed reliance on the judgments in the case of (i) **Dr. G. Sarana vs. University of Lucknow and others**, reported in (1976) 3 SCC 585, (ii) **State of Goa and others vs. Leukoplast (India) Ltd**, reported in (1997) 4 SCC 82, (iii) **A. P. Foods vs. S. Samuel and others**, reported in (2006) 5 SCC 469, (iv) **Transport and Dock Workers Union and others vs. Mumbai Port Trust and another**, reported in (2011) 2 SCC 575, (v) **Ansal Housing and Construction Ltd. vs. State of Uttar Pradesh and others**, reported in (2016) 13 SCC 305 and (vi) **Krishna Kumar vs. Director, Sanjay Gandhi Post Graduate Institute of Medical Sciences**, reported in (2008) LawSuit (All) 1060.

5. We have carefully considered the rival submissions made by the learned counsel representing the respective parties.

6. Before dealing with the competing submissions made by the parties, we find it appropriate to notice certain facts, which can be gathered from the pleadings available on record, as also from the submissions made by the learned counsel for the parties.

7. The Institute was initially started as a Centre of Sanjay Gandhi Post Graduate Institute of Medical Sciences to make available super-speciality medical care. It was initially registered under the Societies Registration Act, 1860 and was functioning as autonomous Institution since the year 2006. The State Government, however, decided to provide for conferring on the said Institute status of a University so as to ensure that Institute functions more efficiently as a Teaching and Research Centre to meet the requirement of Higher Education and Research in Medical, Para-Medical and Allied Health Service. Accordingly the State Legislature enacted the Act, 2015 (U.P. Act No.41 of 2018) which inter alia provided for establishing of the institute on the pattern of All India Institute of Medical Sciences, New Delhi.

8. As per section 5 of the Act, 2015 the Institute consists of various members which include the Governor of Uttar Pradesh who is its Visitor (ex-officio) and the Chief Secretary of the Government of Uttar Pradesh, who is its President (ex-officio). Section 10 of the Act, 2015 provides that the Visitor, the President, the Vice-President, the Director, the Dean of the Institute, the Finance Officer and such other officers as may be required by the Regulation, are the officers of the Institute. Section 11 of the said Act provides that the Governor of Uttar Pradesh shall be the Visitor of the Institute. Sub-section 6 of section 11 provides that subject to the

provisions of section 42, the Visitor may, by an order in writing, annul any proceeding of the Institute if the same is not found in conformity with the Act or the Rules or the Regulations made under the Act. As per Section 12 of the Act, 2015 the Chief Secretary of Uttar Pradesh is the President of the Institute and he is also the Chairman of the Governing Body. Section 18 defines the authorities of the Institute which includes Board of Governors. Section 19 states that the Board of Governors shall be the principal governing body of the Institute which shall consist of the Chief Secretary, Government of Uttar Pradesh being its Chairperson (ex-officio). Section 26 provides that Professors, Associate Professors, Assistant Professors and Group 'A' Officers of the Institute shall be appointed by the Chairperson of the Governing Body i.e. the Chief Secretary of the Government of Uttar Pradesh. Section 34 empowers the Institute to make regulations with the previous approval of the State Government to provide for the matters enumerated therein. Section 40 empowers the State Government to issue such directions on policy matters from time to time which shall not be inconsistent with the provisions of the Act. It further provides that such a direction shall be complied with by the Institute. Apart from power of issuing directions, the State Government has also been vested with the power to cause inspection of the Institute.

9. Section 42 of the Act, 2015, with which we are concerned in this case, provides that if an issue arises whether any person has been elected or appointed or is entitled to be a member of the Institute, Governing Body, any authority or any body of the Institute or whether any decision of the Institute, Governing Body or any authority or body of the Institute is in

conformity with the Act or the rules or regulations, the matter shall be referred to the Visitor and the decision of the Visitor in that regard shall be final. The first proviso appended to section 42 provides that no reference under the said provision shall be made more than three months after the due date when the question could have been raised for the first time. Further, the second proviso empowers the Visitor to act suo motu or entertain a reference after expiry of the period of three months in exceptional circumstances. Section 42 of the Act, 2015 is quoted herein below:

"42. If any question arises whether any person has been duly elected or appointed as or is entitled to be, a member of the Institute, Governing Body, any authority or other body of the Institute or not, or whether any decision of the Institutes, Governing Body or any authority or other body of the Institute is in conformity with this Act or the rules or regulations made thereunder or not, the matter shall be referred to the Visitor and the decision of the Visitor shall be final."

10. Having noticed the broad scheme of the Act, we now proceed to narrate the facts which engage our attention in this case. An advertisement was issued by the Institute on 08.09.2016 inviting applications for filling up various vacant teaching posts in several departments including two posts of Assistant Professor in the Department of Obstetrics & Gynaecology. The essential qualification mentioned in the advertisement was as per MCI (Medical Council of India) requirement. The advertisement further provided that medical qualification as essential qualification shall be as provided in the "Minimum Qualification for Teachers in Medical Institutions Regulations, 1998" with

amendments. For the post of Assistant Professor, the requisite experience as advertised in the advertisement was three years teaching experience after prescribed Post-Graduate (MD/MS/PhD etc.) at a recognized teaching institution as on 30.06.2016. The post of Assistant Professor, Obstetrics & Gynecology is mentioned at serial no. 29 in the said advertisement. Against the said post the "Minimum Qualification" prescribed is MD/MS (Obstetrics & Gynaecology). Along with educational qualification, the advertisement mentioned requirement of three years post MD/MS teaching experience in the subject in a recognized medical college/teaching institution as Senior Resident/Registrar/Demonstrator/Tutor/Lecturer.

11. The petitioner considering herself to be eligible made her application for appointment to the post of Assistant Professor (Obstetrics & Gynaecology) against the advertisement dated 08.09.2016 and was subjected to selection. On the basis of selection held, she was appointed on the post of Maternity and Child Welfare-cum-Lecturer/Assistant Professor in the Obstetrics and Gynaecology in the regular scale of pay of Rs.15600-39100 with Academic Grade Pay of Rs.8,700/-.

12. The said appointment was made under the appointment order issued by the Director of the Institute on 16.12.2016. On her appointment, the respondent no.1-petitioner assumed her charge on the said post and had since then been discharging the functions and duties of her post.

13. A Public Interest Litigation (Civil) No.24194 of 2018 was filed before this Court with the prayer to issue direction to the State Government as also the

authorities of the Institute to act upon a report dated 25.04.2018 based on an enquiry conducted by the Director General of Medical Education, Uttar Pradesh against the then Director of the Institute regarding alleged malpractices in selection of teaching faculties at the Institute. The said P.I.L was disposed of, noticing that the Director General, Medical Education had conducted an enquiry and submitted a report dated 28.06.2019 and in the said enquiry certain discrepancies were noticed and the matter was pending before the State Government, with the direction to take appropriate action pursuant to the enquiry report dated 28.06.2016. The matter thereafter appears to have been considered by the Board of Governors in its meeting held on 30.07.2020 wherein it was observed by the Board of Directors that the respondent no.1-petitioner was appointed on the post of Assistant Professor in the concerned department irregularly and accordingly the Board of Directors decided that the Director should take appropriate action for termination of service of the respondent no.1-petitioner treating her appointment to be *void ab initio*.

14. A show cause notice was thereafter issued by the Director on 11.02.2021 intimating the respondent no.1-petitioner that the Board of Directors in its meeting held on 30.07.2020 had taken a decision to terminate her services treating her appointment to be void ab initio and accordingly she should explain within a fortnight as to why her services as Assistant Professor, Obstetrics & Gynecology should not be terminated in the light of the findings recorded and decision taken by the Board of Directors in its meeting dated 30.07.2020. The respondent no.1-petitioner submitted her reply to the said show cause notice on 23.02.2021 denying the allegation

that the respondent no.1-petitioner did not fulfill the requisite teaching experience and that there was no illegality in her appointment hence the show cause notice given to her for termination of her services being bad in law, was liable to be recalled.

15. Instead of acting upon the show cause notice dated 11.02.2021 and the reply submitted by the respondent no.1-petitioner to the said show cause notice on 23.02.2021, a charge-sheet dated 18.01.2022 was issued to the respondent no.1-petitioner with the sole allegation that she had applied for appointment in question vide her application dated 26.09.2016 allegedly mentioning wrong facts about her experience and she got her appointment accordingly. The documents relied upon in the said charge-sheet were -- (i) photo copy of application form of the respondent no.1-petitioner, (ii) photo copy of her experience certificates and (iii) photo copy of Enquiry Report submitted by the Director General, Medical Education & Training, U.P. The respondent no.1-petitioner submitted her reply to the said show cause notice on 31.01.2022 stating therein that she had not furnished any wrong facts relating to her teaching experience while making her application against the advertisement. Nothing was done in pursuance of the said charge-sheet dated 18.01.2022, instead another charge-sheet was issued to the respondent no.1-petitioner, dated 04.02.2022 which contained the same allegation as mentioned in the charge-sheet, dated 18.01.2022, except that in support of the charge apart from relying on the three documents as mentioned in the charge-sheet dated 18.01.2022, two more documents were relied upon, one of which was the photo copy of the advertisement and the other was the MCI Regulations, 1998 as amended till 13th July, 2016.

16. The respondent no.1-petitioner submitted her reply to the said charge-sheet on 22.02.2022 denying the allegations levelled against her and stating therein that the charge had wrongly been framed against her for the reason that the respondent no.1-petitioner did not conceal any fact. She also stated that in case reply/explanation furnished by her is not accepted, she shall cross-examine the members of the Scrutiny Committee, Dr. Reena Srivastava, Professor, Obstetrics & Gynaecology, B. R. D. Medical College, Gorakhpur, Dr. Alka Kriplani, Professor, Obstetrics & Gynaecology, All India Institute of Medical Sciences, New Delhi, Dr. Deepak Malviya, Member of the Selection Committee and the Director General Medical Education, U.P., another member of the Selection Committee.

17. The respondent no.1-petitioner also furnished a supplementary reply to the charge-sheet on 12.04.2022. The Enquiry Officer submitted the enquiry report which was served upon the respondent no.1-petitioner by means of a letter dated 04.07.2022 by the Executive Registrar of the Institute requiring her to submit her response to the enquiry report. The respondent no.1-petitioner accordingly submitted her comments on the enquiry report vide letter dated 20.07.2022 stating inter alia that she had requested for an oral enquiry to cross-examine five persons as mentioned by her in the reply submitted to the charge-sheet and hence it was obligatory on the part of the enquiry officer to have fixed a date for such oral enquiry after calling the witnesses. She also stated that the enquiry officer had relied upon the opinion of the Director General, Medical Education, U.P., who despite request, was not produced during the course of enquiry permitting her to cross-examine him. The

appellant-petitioner also challenged the findings recorded by the enquiry officer in the enquiry report and lastly submitted that the enquiry conducted against her was inter alia against the principles of natural justice.

18. Thereafter an office order dated 22.02.2023 has been passed by the Director with the approval and in compliance of the order of the President of the Institute whereby the respondent no.1-petitioner has been dismissed from service of the Institute without any bar for applying for future recruitment under the Government.

19. It is the aforesaid order dated 22.02.2023 issued by the Director with the approval of the President whereby she has been dismissed from service which has been challenged by the respondent no.1-petitioner by instituting Writ-A No.2822 of 2023. Apart from challenging the office order dated 22.02.2023, the respondent no.1-petitioner has also challenged the resolution of the Board of Directors dated 30.07.2020 whereby it was decided that treating the appointment of the respondent no.1-petitioner to be void ab initio, the Director must take appropriate decision for terminating her services.

20. The objection regarding the very maintainability of the writ petition as argued by the appellant-Institute, has been overruled by the learned Single Judge by means of the order which is under appeal before us. The learned Single Judge has decided to exercise his discretion to entertain the writ petition.

22. In the aforesaid facts and circumstances, the question which falls for our consideration is as to whether the order dated 13.04.2023 passed by the learned Single Judge which is under appeal herein,

whereby the writ petition filed by the respondent no.1-petitioner has been entertained and the learned Single Judge has decided to exercise his discretion in the matter, is liable to be interfered with in this special appeal or not?

22. Quoting the judgment of Hon'ble Supreme Court in the case of ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others, reported in (1998) 8 SCC 1***, learned Single Judge has observed that the facts of the case presented before him, persuaded him to exercise his discretion for entertaining the writ petition.

23. There cannot be any quarrel on the legal proposition that exercise of jurisdiction under Article 226 of the Constitution of India by the High Courts is discretionary. There is also no dispute to the legal principle that availability of alternative remedy provided by the relevant statute is not an absolute bar to entertain a writ petition; rather the High Court has discretion whether to entertain the writ petition or not bearing in mind the facts of the case being brought before the Court. One of the self-imposed restrictions on entertaining a writ petition is that this Court should not normally entertain the writ petition where effective and efficacious alternative remedy is available, however, simultaneously it should also be borne in mind that mere availability of an alternative remedy not exhausted by the party approaching this Court invoking writ jurisdiction, does not oust the jurisdiction of the Court that will render a writ petition not maintainable.

24. Underlying the distinction between "entertainability" and maintainability" of writ petition in the wake of availability of alternative remedy, the

Hon'ble Supreme Court in a latest pronouncement in the case of ***Godrej Sara Lee Ltd. vs. Excise and Taxation Officer-cum-Assessing Authority and others, reported in 2023 SCC OnLine SC 95***, has held that the exceptions carved out in the case of *Whirlpool Corporation* (supra) to entertain a writ petition even in the wake of availability of alternative remedy have to be kept in mind. Paragraphs 4 to 8 of the judgment in the case of *Godrej Sara Lee Ltd.*(supra) are relevant which are extracted hereunder:

"4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the high courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be

construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition "not maintainable". In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner,

despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.

5. A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in 1958 SCR 595 (*State of Uttar Pradesh v. Mohd. Nooh*) had the occasion to observe as follows:

*"10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, Certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of Certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of Certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. ***"*

6. *At the end of the last century, this Court in paragraph 15 of its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation v. Registrar of Trade Marks, Mumbai) carved out the exceptions on the existence whereof a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute. The same read as under:*

(i) *where the writ petition seeks enforcement of any of the fundamental rights;*

(ii) *where there is violation of principles of natural justice;*

(iii) *where the order or the proceedings are wholly without jurisdiction; or*

(iv) *where the vires of an Act is challenged.*

7. *Not too long ago, this Court in its decision reported in 2021 SCC OnLine SC 884 (Assistant Commissioner of State Tax v. Commercial Steel Limited) has reiterated the same principles in paragraph 11.*

8. *That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of Uttar Pradesh v. Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 (Union of India v. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the*

appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available."

25. The exceptions carved out in the case of *Whirlpool Corporation (supra)* are as under:

(i) *where the party approaching the Court seeks enforcement of any of the fundamental rights,*

(ii) *there is violation of principles of natural justice,*

(iii) *where the order or the proceedings are wholly without jurisdiction or*

(iv) *where the vires of an Act is under challenge.*

26. Before the judgment by the Apex Court in the case of *Godrej Sara Lee Ltd. (supra)* similar observations were made and legal principle was enunciated by Hon'ble Supreme Court in the case of *M/s Radha Krishan Industries vs. State of Himachal Pradesh and others*, decided on 20.04.2021, reported in (2021) 6 SCC 771. After discussing various judgments, Hon'ble Supreme Court has also considered the legal principle evolved by the Apex Court in the case of *Whirlpool Corporation (supra)* and enunciated the principle of law in para 24 of the said judgment. One of the legal principles evolved by Hon'ble Supreme Court in the case of *M/s Radha Krishan Industries (supra)* is that there are

certain exceptions to the rule of alternative remedy and such exceptions are that where a writ petition has been filed for enforcement of fundamental right protected by Part-III of the Constitution of India, where there has been a violation of principles of natural justice, where the order or the proceedings are wholly without jurisdiction and where the vires of legislation is challenged. Hon'ble Supreme Court in the said case of *M/s Radha Krishan Industries (supra)* has also held that an alternative remedy by itself does not divest the High Court of its power under Article 226 of the Constitution of India in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious and alternative remedy is provided by law. It has also been held in the said case by the Apex Court that Rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion. Paragraphs 24 to 27 of the Judgment in the case of *M/s Radha Krishan Industries (supra)* read as under:-

"24. The High Court has dealt with the maintainability of the petition under Article 226 of the Constitution. Relying on the decision of this Court in CCT v. Glaxo Smith Kline Consumer Health Care Ltd. [CCT v. Glaxo Smith Kline Consumer Health Care Ltd., (2020) 19 SCC 681 : 2020 SCC OnLine SC 440] , the High Court noted that although it can entertain a petition under Article 226 of the Constitution, it must not do so when the aggrieved person has an effective alternate remedy available in law. However, certain exceptions to this "rule of alternate remedy" include where, the statutory authority has not acted in accordance with the provisions of the law or acted in defiance of the fundamental principles of judicial procedure; or has

resorted to invoke provisions, which are repealed; or where an order has been passed in violation of the principles of natural justice. Applying this formulation, the High Court noted that the appellant has an alternate remedy available under the GST Act and thus, the petition was not maintainable.

25. In this background, it becomes necessary for this Court, to dwell on the "rule of alternate remedy" and its judicial exposition. In Whirlpool Corpn. v. Registrar of Trade Marks [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1] , a two-Judge Bench of this Court after reviewing the case law on this point, noted : (SCC pp. 9-10, paras 14-15)

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has

been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

(emphasis supplied)

26. Following the dictum of this Court in *Whirlpool (supra)*, in *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.*, this Court noted that :

*"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies : (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See *Whirlpool Corpn.v. Registrar of Trade Marks [Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1]* .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the appellants' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving*

them to the need of initiating arbitration proceedings."

(emphasis supplied)

27. The principles of law which emerge are that:

1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is

objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

27. Yet in another case reported in (2009) 2 SCC 630, ***Committee of Management and another vs. Vice-Chancellor and others***, which had emanated from a judgment of this Court in relation to the provisions contained in Section 68 of U.P. State Universities Act, 1973 which is similarly worded as section 42 of the Act 2015, Hon'ble Supreme Court has held that alternative remedy is not an absolute bar and relegation to alternative remedy will not be warranted where an order passed by an authority is without jurisdiction or the same is in violation of principles of natural justice. Section 68 of the U.P. State Universities Act, 1973, in respect of which Hon'ble Supreme Court has made the aforesaid observations in the case of ***Committee of Management and another*** (supra) is extracted herein below:

"68. Reference to the Chancellor.—If any question arises whether any person has been duly elected or appointed as, or is entitled to be, member of any authority or other body of the University, or whether any decision of any authority or officer of the University (including any question as to the validity of a Statute, Ordinance or Regulation, not being a Statute or Ordinance made or approved by the State Government or by the Chancellor) is in conformity with this Act or the Statutes or the Ordinance made thereunder, the matter shall be referred to the Chancellor and the decision of the Chancellor thereon shall be final:

Provided that no reference under this section shall be made—

(a) more than three months after the date when the question could have been raised for the first time;

(b) by any person other than an authority or officer of the University or a person aggrieved:

Provided further that the Chancellor may in exceptional circumstances—

(a) act suo motu or entertain a reference after the expiry of the period mentioned in the preceding proviso;

(b) where the matter referred relates to a dispute about the election, and the eligibility of the person so elected is in doubt, pass such orders of stay as he thinks just and expedient;

(c) * * * *

28. Thus, from the legal principles as propounded by Hon'ble Apex Court in the aforementioned judgments, it is abundantly clear that exercise of discretionary jurisdiction under Article 226 of the Constitution of India depends on the facts of each case. It is also equally settled that availability of alternative statutory remedy is not an absolute bar, it is rather a rule of self-imposed discipline/restriction and public policy, and in certain cases falling within the exception as carved out by Hon'ble Supreme Court in the case of ***Whirlpool Corporation (supra)***, even in the wake of availability of alternative statutory remedy, this Court can decide to exercise its discretion under Article 226 of the Constitution of India.

29. Now, if we apply the aforesaid legal principles in the present case, the question which arises for our consideration is as to whether the facts of the case presented before the learned Single Judge by the respondent no.1-petitioner in her writ petition make out a case for exercise of discretion under Article 226 of the

Constitution of India in the wake of availability of alternative statutory remedy under Section 42 of the Act 2015 or not.

30. We have already noticed the facts of the case which have led the respondent no.1-petitioner to institute the proceedings of Writ-A No.2822 of 2023. One of the grounds taken to challenge the order of dismissal dated 22.02.2023 is that during the course of enquiry, though the respondent no.1-petitioner had categorically requested that certain witnesses be produced for cross-examination, however, the said prayer was denied to her. In this regard we may state that while submitting her reply to the charge-sheet dated 04.02.2022 vide her letter dated 22.02.2022 the respondent no.1-petitioner had clearly indicated therein that in case the enquiry officer did not agree with the explanation/reply submitted by her to the charge-sheet she intended to cross-examine five persons which included the members of the Scrutiny Committee which had initially scrutinized the application form submitted by the respondent no.1-petitioner and also two Professors in the department of Obstetrics & Gynaecology, one in the State Medical College at Gorakhpur and the other at All India Institute of Medical Sciences and also two members of the Selection Committee. We may also note that while submitting her comments to the enquiry report the respondent no.1-petitioner had again mentioned that she had desired an oral enquiry and to cross-examine five persons while submitting her reply to the charge-sheet and hence it was obligatory on the the part of enquiry officer to have fixed a date for recording such oral evidence after calling the witnesses.

31. We also notice that despite the aforesaid request in categorical terms for

cross-examining the witnesses, there is nothing on record before us which can establish that the respondent no.1-petitioner was permitted to cross-examine the said persons. We may also note that the witnesses whom the respondent no.1-petitioner intended to cross-examine during the course of enquiry cannot be said to be irrelevant in the context of the subject matter of enquiry for the reason that the members of the Scrutiny Committee who had initially examined the application form submitted by the respondent no.1-petitioner and further that the members of the Selection Committee which comprised of experts of the field also did not find anything wrong with the application form submitted by the respondent no.1-petitioner. Thus, prima facie we are of the opinion that there existed a rationale for the prayer made by the respondent no.1-petitioner to cross-examine certain witnesses during the course of enquiry. Denial of cross-examination of witnesses or denial of summoning the witnesses as per the prayer made by the respondent no.1-petitioner during the course of enquiry without any justifiable reason, would certainly amount to violation of principles of natural justice. Neither the enquiry report nor the order dated 22.02.2023 dismissing the respondent no.1-petitioner from service contains any recital that her prayer for cross-examining was denied by giving reasons.

32. In this view, the pleading as available on the writ petition, inter alia, assert that the enquiry on the basis of which the order impugned in the writ petition has been passed, suffers from the vice of violation of principles of natural justice.

33. Accordingly, the case as set up by the respondent no.1-petitioner falls within

one of the exceptions as carved out by the Hon'ble Supreme Court in the aforementioned judgments in the case of **Whirlpool Corporation (supra)**, **M/s Radha Krishan Industries (supra)** and **Godrej Sara Lee Ltd. (supra)**.

34. So far as the judgments relied upon by the learned counsel for the appellant-Institute, Shri Chaturvedi, learned Senior Advocate, are concerned, we may note that judgment in the case of **Dr. G. Sarana (supra)** which is based on Section 68 of U.P. State Universities Act, 1973 does not have any application to this case for the reason that in the said matter the recommendations made by the Selection Committee were yet to be approved/disapproved by the Executive Council and hence challenge to the recommendations made by the Selection Committee without its consideration by the Executive Council of the University concerned was held to be untenable by instituting the writ petition under Article 226 of the Constitution of India. We also note that in the case of **Dr. G. Sarana (supra)** Hon'ble Supreme Court did not interfere with the decision of the High Court whereby writ petition was not entertained giving the reason that the petitioner in the said writ petition had pleaded personal bias against the members of the Selection Committee, however, despite knowing all the relevant facts he had not raised the said issues before appearing or at the time of interview against the constitution of the Selection Committee. In this view, the judgment in the case of **Dr. G. Sarana (supra)**, in our opinion, does not have any application to the facts of this case.

35. So far as other judgments cited by the learned Counsel for the appellant-

institute are concerned, they have been rendered in the facts and circumstances of the case. However, the said judgments can be said to run contrary to the law laid down by the Apex Court in the case of **Whirlpool Corporation (supra)**, **Radha Krishna Industries (supra)** and **Godrej Sara Leel Ltd. (supra)**.

36. One of the arguments made by the learned Senior Advocate representing the appellant-institute is that having regard to the language occurring in Section 42 of the Act, it is the decision of the Visitor which is final in case any question arises as to whether any decision of the institute or governing body or any authority is in conformity with the Act or Rules or Regulations made therein. His submission thus is that finality to the decision of the President dismissing the services of the respondent No.1-petitioner as communicated by the Director vide Office Order dated 22.02.2023 can be attached only once an order in that regard is passed by the Visitor. The aforesaid submission of the learned Counsel for the appellant is absolutely misconceived and fallacious. If we minutely read the language of Section 42 of the Act, 2015, what we find is that the decision of the Visitor is final only if any Reference is made to the Visitor under Section 42 of the Act, 2015. The finality clause as available in Section 42 of the Act, 2015 has to be read qua the order which may be passed by the Visitor and not qua the order which may be passed by the governing body or any authority or any body of the Institute. To say that the order passed by the President which has been communicated in this case by the Director vide Office Order dated 22.02.2023 is not final and the same will become final only once the Visitor will exercise his jurisdiction under Section 42 of the Act

2015, is absolutely misconceived. The occasion before the Visitor to examine an order passed by the governing body or an authority or any other body of the institute will arise only if the Visitor receives any reference in respect of such an order or he decides to entertain the reference suo motu.

37. In the instant case, the respondent No.1-petitioner has not taken recourse to Section 42 of the Act 2015, rather has challenged the order of the President as communicated to her by the Director of the Institute by means of the order dated 22.02.2023. Thus, it cannot be said that the order of dismissal from service could not be challenged by filing writ petition under Article 226 of the Constitution of India unless it is given finality by the Visitor of the Institute. The said submission of the learned counsel for the appellant-Institute in our opinion, merits rejection which is hereby rejected.

38. Even otherwise it is not a case where the writ petition filed by the respondent No.1-petitioner can be said to be not maintainable. As already pointed out above, there lies a difference between entertainability and maintainability of a writ petition under Article 226 of Constitution of India. If a writ petition for any lawful reason is not maintainable, such a situation has to be viewed differently. However, in case of objection regarding entertainability of a petition under Article 226 of the Constitution of India, if this Court for valid reasons decides to exercise its discretion, in our opinion, such an order cannot be faulted with.

39. For the reasons aforesaid, we do not find any good ground to interfere with the order passed by the learned Single Judge dated 13.04.2023 in Writ-A No.2822 of 2023, which is under appeal herein.

40. Resultantly, the Special Appeal is hereby **dismissed**.

41. However, there will be no order as to costs.

(2023) 5 ILRA 1714
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 23693 of 2018

Shailesh Khandelwal Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Krishna Mohan Asthana

Counsel for the Respondents:
 C.S.C., Sri Sanjay Kumar Dwivedi

Service Law- U.P. Intermediate Education Act, 1921-Government Order dated 21st August, 2014 clarified it that the ban as put up on the appointments of vacant positions in recognized Intermediate Colleges under the Government Order dated 15th March, 2012 would not apply to the minority institution- Chapter-II does not deal with the clerical cadre, the stand taken by the District Inspector of Schools that the position of clerk having fallen vacant in 2011 and for three months and no recruitment drive having undertaken within three months, the post would stand lapsed, is absolutely a case of misreading of the provision and resultant misapplication of law.

The District Inspector of Schools once takes an objection and the objection has been duly replied, he has to evaluate and appreciate the reply- He cannot make out third and fourth ground to reject the claim

of financial approval- From the order impugned, it clearly transpires that he has not dealt with reply of the Committee of Management in its correct perspective and has not cared to appreciate the legal position. This act and conduct of the District Inspector of Schools does not suit to the position he holds because his order would be causing serious prejudice career of a person-Result petition allowed with direction to DIOS to accord financial approval to the appointment of the petitioner as Assistant Clerk in the institution. (Para 23, 29, 33 & 42) (E-15)

List of Cases cited:

1. Mohd.Faizan & anr. Vs St.of UP & ors., 2013 (5) ADJ 471
2. Nagar Panchayat Kithore, District Meerut Vs Presiding Authority, Labout Court, UP, Meerut & anr., (2007) 1 SAC 567
3. RamRameshwari Devi & ors.Vs Nirmala Devi & ors., (2011) 8 SCC 249
4. Salem Advocate Bar Association, Tamil Nadu Vs U.O.I.AIR 2005 SC 3353

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

1. Heard Shri Krishna Mohan Asthana, learned counsel for the petitioner, Shri Sanjay Kumar Dwivedi, learned counsel for respondent No.4-Committee of Management and learned Standing Counsel for the State-respondents.

2. The respondent-Committee of Management that runs a minority institution in the name of Jain Inter College, Chaurasi, Mathura (herein after referred to as "4th Respondent") proceeded to fill up the vacant situations in the faculty of the institution as well as in the clerical cadre by issuing separate advertisements in two newspapers, namely, Kalpataru Express and Indian Express having wide

circulation in the area and the region. While advertisement in respect of Assistant Teachers in the subject of Hindi, English, Sanskrit, Arts, Mathematics, Science and Sociology, was published in Kalpataru Express News Daily on 24th August, 2015 and in the Indian Express News Daily on 24th August, 2015, the advertisement in respect of vacant positions of Clerk/Assistant Clerk was issued in News Daily Kalpataru on 23rd July, 2015 and Indian Express on 5th August, 2018. Two separate selection committees were constituted to hold selection on the post of Assistant Teachers in the faculty of the institution and clerk in the clerical cadre of the institution.

3. The petitioner having post-graduate degree in Commerce being M.Com and CCC certificate from National Institute of Electronics and Information Technology applied against the post of Assistant Clerk. The selection committee adjudged the petitioner to be the best candidate and, accordingly, recommended him for appointment.

4. The Committee of Management approved the recommendation of the selection committee and sent papers to the District Inspector of Schools vide covering letter dated 21st July, 2016 of the Manager of the institution for financial approval. Likewise, the selection committee constituted for holding selection to various positions of Assistant Teachers in subjects advertised, selected Smt.Shweta Tiwari, Smt.Babita, Shri Jitendra Singh, Shri Rajiv Kumar, Dr.Hemant Chaudhari and one other in the respective subjects against the positions of Assistant Teachers advertised and the papers were also forwarded to the District Inspector of Schools for financial approval.

5. In respect of all these recommendations, the District Inspector of Schools took up various objections and rejected the claim for financial approval in respect of Smt.Shweta Tiwari, Smt.Babita, Shri Jitendra Singh and Shri Rajiv Kumar in respect of these selections and to did not proceed to pass any order.

6. Ultimately, out of all these selectees four teachers, namely, Smt.Shweta Tiwari, Smt.Babita, Shri Jitendra Singh and Shri Rajiv Kumar filed Writ-A No.26403 of 2018 before this Court in which direction was issued for the District Inspector of Schools to dispose of their representation for approval and payment of salary. Mr.Krishna Pal Singh, District Inspector of Schools rejected their claim on various grounds as under:

(i) The post had lapsed so there could not have been any appointment without revival of these posts;

(ii) There was no valid Committee of Management in the institution to hold selection and appointment;

(iii) The written test ought to have been held and then on the basis of marks obtained by the candidates the selection should have been held.

7. This order came to be again challenged before this Court by those very writ petitioners being Writ-A No.7856 of 2019. The writ petition was allowed setting aside the order of the District Inspector of Schools vide judgment and order dated 17th May, 2019 remitting the matter for decision afresh. Mr.Krishna Pal Singh, District Inspector of Schools, again rejected the claim vide order dated 11.11.2019 holding that the selection was done by an invalid Committee of Management.

Smt.Babita and Shri Jitendra Singh challenged the said order again before this Court vide Writ-A No.18983 of 2019 in which this Court took exception to the order passed by the District Inspector of Schools and issued him a show-cause notice as to why he should not be referred to the contempt of court for appropriate contempt proceedings to be drawn against him. This order was passed on 3rd January, 2020. The operative portion of the order dated 3rd January, 2020 is reproduced here as under:

Be that as it may, this Court while rendering judgement in the case of petitioners in Writ Petition No.7856 of 2019 has already rejected the objection taken by the respondent no.3 regarding non-compliance of the procedure provided in the Government Order dated 12.03.2018 in making selection and the selection of the petitioners on the non-existent post, therefore, the said objection taken by the respondent no.3 is misconceived as judgement of this Court in Writ Petition No.7856 of 2019 has become final between the parties. Further, this Court while deciding the issue in Writ Petition No.7856 of 2019 has granted liberty to the respondent no.3 to examine the documents in respect of election of committee of management and this Court finds that respondent no.3 while passing the impugned order has not adverted to any of the documents filed by the petitioners to verify the validity of the Committee of Management, who initiated the selection procedure. The respondent no.3 has placed reliance upon the letter dated 08.12.2017 of the then District Inspector of School in paragraph 9 of the order which nowhere mentions about the validity of committee of management, and thus, facts of the case clearly establishes that respondent no.3 has

completely ignored the orders of this Court while passing the impugned order, and thus, has wilfully flouted the orders of this Court. In this view of the fact, this Court finds substance in the argument of learned Senior Counsel for the petitioners.

Thus, in view of above, let notice be issued to respondent no.3, District Inspector of Schools, District Mathura, to show cause as to why the matter should not be referred to the contempt Court for initiating contempt proceedings against him and why his personal responsibility in the matter be not fixed. He shall remain present personally on the next date along with his reply.

Put up on 20.01.2020 in the additional cause list.

(Emphasis added)

8. In order to avoid contempt, as the District Inspector of Schools, Mr. Krishna Pal Singh, had fallen in serious error of law, passed an order on 23rd January, 2020 granting approval to the selection and appointment of the petitioner, namely, Smt. Babita and Shri Jitendra Singh. Shri Rajiv Kumar citing the order of the District Inspector of Schools dated 23rd January, 2020 also challenged the order dated 11.11.2019 vide Writ-A No.2039 of 2020. This writ petition came to be allowed vide detailed judgment and order dated 10th February, 2020 in which this Court not only noticed the order dated 23rd January, 2020 passed by the District Inspector of Schools but also recorded a finding that the petitioners' case deserves to be reconsidered in the light of the decision given in the case of Smt. Babita. Paragraphs 8, 9, 10, 11 and 12 relevant in the judgment and order dated 10th February, 2020 passed in Writ-A No.2039 of 2020 are reproduced here as under:

"8. Pursuant to the same, the respondent No.3 passed order dated 23.1.2020 granted selection/appointment of the petitioners of writ petition filed by Smt. Babita (*supra*) in L.T. Grade.

9. It is argued by learned senior counsel that the case of the petitioner is identical as the case of the petitioners of the writ petition of Smt. Babita (*supra*). It is argued that petitioner being identically selected along with the petitioners of writ petition of Smt. Babita (*supra*), he is also entitled for the same relief of approval of his selection/appointment in L.T. Grade.

After order dated 23.01.2020 passed by the respondent no.3 in favour of the petitioners of writ petition of Smt. Babita (*supra*), the petitioner has preferred the present writ petition with the prayer to quash the order dated 11.11.2019 passed by the respondent No.3.

10. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents. With the consent of learned counsel for the parties, this writ petition is disposed of finally.

11. It appears from perusal of record that in terms of the orders passed by this Court in Writ A No.7856 of 2019 (Rajiv Kumar and others Vs. State of U.P. and others) on 17.05.2019, an order dated 23.11.2019 was passed by the respondent No.3 rejecting the claim of the petitioner and others. By the aforesaid order, claim of Rajiv Kumar, as Assistant Teacher in Hindi, Smt. Babita as Assistant Teacher in Hindi and Jitendra Singh as Assistant in Social Science were rejected. The aforesaid order was challenged before this Court by only two persons namely Smt. Babita and Jitendra by filing Writ A No. 18986 of 2019. In the said writ petition a detailed order was passed by this Court on 03.01.2020 which has already been quoted above. Pursuant to the same, a decision

was taken by the respondent No.3 on 23.01.2020 by which the petitioners in Writ Petition No.18986 of 2019 (Smt. Babita) (*supra*) were granted approval in respect of their selection/appointment as Assistant Teachers. Insofar as the present petitioner is concerned, no order was passed by the respondent No.3.

12. In the facts and circumstances of the case and without entering into the merits of the case, this writ petition is disposed of finally directing the respondent no.3 to pass appropriate orders in the matter of petitioner in accordance with law as has been passed in the case of Smt. Babita most expeditiously and preferably within a period of two weeks from the date of production of certified copy of this order before him."

9. Dr. Hemant Chaudhari and one another teacher were also selected in the same selection to the faculty of the institution and they also challenged the order dated 11.11.2019 rejecting their claim for grant of approval. This Court noticed the order dated 13th February, 2019 initially passed in the case of Dr.Hemant Chaudhari and also Smt.Shweta Tiwari in Writ-A Nos.8069 of 2019 and 4791 of 2019 respectively, set aside the order dated 13th February, 2019 and issued a direction for according fresh consideration to the claim of the petitioners for grant of approval. Writ petition was thus allowed vide order dated 3rd March, 2020, holding that the order passed by the District Inspector of Schools was in utter disregard to the judgment and order passed by this Court in earlier proceedings that where relating to the same selection in issue. The operative portion of the judgment and order dated 3rd March, 2020 as contained in Paragraphs 44, 45 and 46 is reproduced here as under:

"44) In view of the above, I am of the view that the DIOS while passing the impugned order has travelled beyond his scope of consideration. The order impugned is in utter disregard of the judgment and order passed in earlier proceeding by this court and teachers of the same selection have been accorded approval by the DIOS, therefore, refusal vide impugned order is illegal and cannot be sustained. Accordingly, the impugned order dated 11.11.2019 is hereby set aside.

45) The writ petition succeeds and is allowed.

46) However, the DIOS is directed to pass appropriate reasoned and speaking order of approval to the selection of the petitioners on the post of assistant teachers within a period of four weeks from the date of production of a certified copy of this order."

10. This above order was challenged in special appeal being Special Appeal No.179 of 2021, which came to be dismissed on 3rd September, 2021 by following order:

"By this appeal, a challenge is made to the judgment dated 03.03.2020 whereby writ petition preferred by the petitioners was allowed. The writ petition was filed to assail the order dated 11.11.2019 passed by District Inspector of Schools, Mathura by which the approval of the appointment of the petitioners on the post of Assistant Teachers was denied.

Learned Single Judge discussed the issue elaborately and referring to the earlier judgment in the writ petition preferred by the non-appellant/petitioners, it was held that the issue was not available for reconsideration by District Inspector of Schools when it was settled by the Court. Once learned Single Judge dealt with the

issue in reference to denial of approval to the appointment of the non-appellant/petitioners in the earlier writ petition and appeal thereupon by the State was dismissed, the District Inspector of Schools could not have opened the same issue.

The order dated 11.11.2019 was passed in reference to an order dated 16.03.2018 by which the post in question was revived and thereby, selections were conducted. The approval to the appointment was not given for the reason that initiation of selection was not with prior approval. The learned Single Judge considered the said also.

Learned Single Judge found that in regard to the same selection process, the approval was denied to other employee but the order was recalled on 11.11.2019 and approval was accorded. The petitioners were also selected in the same selection, thus could not have been given discriminatory treatment. Their case was required to be dealt with by maintaining parity between the similarly placed. Accordingly, the writ petition was allowed to direct District Inspector of Schools to pass appropriate speaking order for approval to the selection of petitioners on the post of Assistant Teacher.

The appeal has been pressed mainly on the ground that after revival of the post, selection could not have been initiated without prior approval of the competent Authority.

We have considered the submissions aforesaid and find that after revival of the post and selection, if prior approval to initiate selection was required then there was no reason for District Inspector of Schools to accord approval to the appointment of other Assistant Teachers selected out of the same selection. The appointment on the post of

Assistant Teacher out of the same selection was approved while denying it in the case of the non-appellant/petitioners causing discrimination.

We failed to understand why the appeal has been preferred by the State. If the appeal is allowed then we would be endorsing discriminatory action of the respondents.

At this stage, learned counsel for the appellants submits that approval of the appointment order in favour of the similarly placed was given pursuant to the order of this Court in their own writ petition. If that is so, then no reason exists to file the appeal rather judgment should have been complied in the same manner as was done in the case of similarly placed Assistant Teachers.

For the reasons given above, the appeal is dismissed finding no merit in reference to only question urged before us while not pressing any other ground.

At this stage, learned counsel for the non-appellant/petitioners submits that approval to the appointment has been given pursuant to the judgment under challenge. The fact aforesaid makes the appeal to be infructuous and otherwise we have decided it on merit."

(Emphasis added)

11. The writ petition of Smt. Shweta Tiwari and one another selected candidate being Writ-A No.2386 of 2020 challenging the same order dated 11.11.2019 came to be allowed vide judgment and order dated 7th January, 2020 relying upon the judgment passed in Writ-A Nos.1821 of 2020 and 18983 of 2019. The Court also referred to the order of special appellate Bench. The operative portion of the order passed in the case of Smt. Babita and another is reproduced here as under:

"This order was challenged in a Special Appeal being Special Appeal No.179 of 2021 (State of U.P. & Ors. vs. Hemant Chaudhary & Ors.) which came to be dismissed on 3.9.2021. From the order of the Special Appellate Court dated 3.9.2021, it is clear that the petitioners of Writ-A No.1821 of 2020 had been given approval.

In view of the fact that the order of the District Inspector of Schools was based absolutely on erroneous facts namely that the advertisement was not valid after the revival of the posts and that the Committee of Management was not a duly elected Committee of Management which findings had already been set-aside in the judgment of this Court dated 13.12.2018, I am of the view of that the approval ought to have been granted by the District Inspector of Schools. More so, when approvals have been granted to the petitioners in Writ-A No.1821 of 2020 and the petitioners in Writ-A No.18983 of 2019.

Under such circumstances, the order dated 11.11.2019 viz.-a-viz. the petitioners is quashed. The matter is remitted back to the District Inspector of Schools to pass approval orders after looking into the qualifications of the petitioners within a period of two weeks from the date of presentation of a certified copy of this order. Further, as and when the approval is granted, salary shall be paid to the petitioners from the date they had joined their institutions.

For the reasons stated above, the writ petition stands allowed."

12. Against this above order, Special Appeal (Defective) No.34 of 2023 was filed by the State of UP and others and the Court while referring to various orders passed in writ petitions and in an earlier appeal (supra) dismissed the special appeal

on 13th March, 2023 discussing the law on the point as well as the objection and the grounds taken in appeal in following terms:

"Heard Sri Gyanendra Srivastava, learned Standing Counsel appearing for the State-appellants and Sri Krishna Mohan Asthana, learned Advocate appearing for the respondents/petitioners.

The present appeal is directed against the judgment and order dated 07.01.2022 passed by the learned Single Judge whereby while setting aside the order dated 11.11.2019 passed by the District Inspector of Schools, Mathura, the matter has been remitted back with the direction to pass approval order after looking into the qualifications of the petitioners herein within a period of two weeks from the date of presentation of the certified copy of the said order. The further direction was to pay salary to the petitioners after approval is granted to their selection, from the date they had joined their institutions. The respondents/petitioners herein (two in number) were selected by the Committee of Management of the institution concerned in accordance with the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 read with Chapter-II of Regulation 17 of the Regulations framed thereunder. The record indicates that a dispute arose with regard to the disapproval of selection of the petitioners herein along with the nine other persons who were selected on the post of L.T. Grade Teacher by order dated 13.02.2019. On a challenge made by one of the respondents/petitioners herein in Writ-A No. 4791 of 2019 to the order dated 13.02.2019 passed by the District Inspector of Schools, declining to accord approval, the writ petition was allowed on 11.04.2019 by quashing the order dated 13.02.2019, with the direction to the District Inspector of Schools to accord fresh consideration to

the claim of the petitioner for grant of approval to their selection having regard to the observation made therein.

A perusal of the judgment and order dated 11.04.2019 passed by this Court in the aforesaid writ petition indicates that three grounds to decline approval had been taken by the District Inspector of Schools therein. The first ground was that 11 posts of Assistant Teachers in L.T. Grade in the institution were revived by orders dated 10.11.2016 and 20.03.2017 and both these orders were revoked by order dated 14.12.2017 and only 7 posts of Assistant Teachers stood revived. The Committee of Management of the Institution concerned did not make selection pursuant to the directions containing in the letter dated 14.12.2017. The second ground was that the Committee of Management of the institution concerned was not validly elected and therefore, was not competent to make selection. The appointment made by the then Committee was invalid. The third ground was that by the Government Order Dated 12.03.2018, amendments have been brought in Section 16-FF and Chapter 2 Regulation 17 of the Regulations framed thereunder and the procedure brought in place by way of amendment had not been followed. These three grounds, as is evident from the perusal of the judgment and order dated 11.04.2019 were set aside by this Court while holding that there was no infirmity in the procedure followed by the Committee of Management for the selection in question, in as much as, the scope of inquiry to the selection made under Section 16-FF of 1921 Act by the District Inspector of Schools was confined to the eligibility of the selected candidates. The question of revival of the post in question stood settled by the earlier order

passed by this Court in Writ-A N. 26403 of 2018 and Writ-A No. 25087 of 2018.

Having noted the above, we have gone through the order dated 11.11.2019 passed by the District Magistrate, Mathura which was the subject matter of challenge before the learned Single Judge in the writ petition, out of which the present special appeal has arisen. A perusal of the order of the District Inspector of Schools further indicates that same points which have been taken earlier to decline the approval by the order dated 13.02.2019, quashed by the judgment and order dated 11.04.2019, have been reiterated in the order dated 11.11.2019. This aspect of the matter has been duly considered by the learned Single Judge in the judgment and order dated 07.01.2022, subject matter of challenge herein.

Having noted the above, we further find that the present special appeal is delayed by 338 days and no plausible explanation has been given in the affidavit accompanying the delay condonation application. In similar facts and circumstances with regard to the selection subject matter of challenge herein, the Special Appeal Defective No. 996 of 2020 and Special Appeal Defective No. 995 of 2020 filed by the State have been dismissed vide judgment and order dated 24.11.2020 on account of the inordinate, unexplained delay. Another Special Appeal No. 179 of 2021 challenging the judgment and order dated 03.03.2020 passed by the learned Single Judge, allowing the writ petition filed by the persons similarly situated, has been dismissed vide judgment and order dated 03.09.2021 a copy of which is appended along with the counter affidavit filed on behalf of the respondents 1 and 2. A perusal of the judgment and order dated 03.09.2021 indicates that the finding returned by the learned Single Judge in

setting aside the order dated 11.11.2019 passed by the District Inspector of Schools for disapproval of the appointment of the petitioners therein on the post of Assistant Teacher in L.T. Grade, had been set aside. The ground of challenge taken in the said special appeal that after revival of the post, selection could not have been initiated without prior approval of the competent authority, has been turned down.

We, thus, find that the respondents are similarly situated Assistant Teacher selected in the same selection upheld by other Special Appellate benches of this Court.

Having noted that the order dated 11.11.2019 passed by the District Inspector of Schools is only reiteration of the previous order dated 13.02.2019 passed by the District Inspector of Schools, which has been set aside by this Court in the judgment and order dated 11.04.2019, and for the additional facts noted above, we do not find it a fit case for interference. The present special appeal is being dismissed both on the ground of inordinate, unexplained delay on the part of the appellants and on the merit, accordingly."

(Emphasis added)

13. Now reverting to the facts of the present case, I find that the District Inspector of Schools after examining the papers sent by the management took five objections as short-comings in his letter dated 19th August, 2016. These objections were: (i) there was a ban operating under the Government order dated 15th March, 2012 upon appointments in recognized Intermediate Colleges; (ii) the petitioner did not possess the requisite academic qualification; (iii) the reservation quota had not been certified; (iv) the post of clerk having fallen vacant on 31st March, 2011

got lapsed and so there could not have been any appointment and (v) no details of working Class-3 and Class-4 employee was furnished along with documents. It is necessary to reproduce the letter of objection written by the then District Inspector of Schools, namely, Mr. Indra Prakash Solanki dated 19.8.2016 and the same is reproduced here as under:

"प्रेषक,

जिला विद्यालय निरीक्षक,

मथुरा।

सेवा में,

प्रबन्धक,

जैन इण्टर कालेज,

चौरासी, मथुरा।

पत्रांक: मा०अ०सं०/2880-81/2016-17

दिनांक: 19-08-16

विषय: सहायक लिपिक की कथित नवीन नियुक्ति के संबंध में।

महोदय,

उपरोक्त विषयक अपने पत्र संख्या: नियु०/670/16-17

दिनांक 21.07.2016 का संदर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा शैलेश खण्डेलवाल की सहायक लिपिक पर कथित नवीन नियुक्ति कर अनुमोदन हेतु पत्राजात/पत्रावली इस कार्यालय को प्रस्तुत की है। पत्रावली के परीक्षणोपरान्त निम्नवत कमियाँ परिलक्षित हुई हैं:-

1- शासनादेश संख्या:20/1/91-का-2-2012 कार्मिक अनुभाग-2 लखनऊ दिनांक: 15 मार्च, 2012 के द्वारा /नियुक्ति पर रोक/ प्रतिबन्ध है।

2- भर्ती नवीनतम शासनादेशानुसार लिपिक पद हेतु शासन द्वारा निर्धारित शैक्षिक योग्यता पूर्ण नहीं है।

3- आरक्षण कोटा के संबंध प्रमाण-पत्र नहीं है।

4- इस पद जो 31.03.2011 को रिक्त हुआ है इतनी अवधि के बाद भरे जाने का औचित्य स्पष्ट नहीं है।

5- विद्यालय में कार्यरत चतुर्थश्रेणी कर्मचारी व लिपिक वर्ग का आरक्षण/ वर्गवार विवरण संलग्न नहीं है।

अतः तदनुसार उपरोक्त के फलस्वरूप उक्त शैलेश खण्डेलवाल की सहायक लिपिक पर कथित नवीन नियुक्ति संबंधी

पत्रावली इस पत्र के साथ मूल रूप में संलग्न कर आपको प्रत्यावर्तित/वापिस की जाती है।

संलग्नक: उक्तवत मूल पत्रावली।

भवदीय

डॉ० (इन्द्र प्रकाश सिंह सोलंकी)

जिला विद्यालय निरीक्षक

मथुरा"

(Emphasis added)

14. The Committee of Management duly replied to the District Inspector of Schools vide letter of the Manager of the institution dated 19.8.2016 clarifying its stand point-wise thus:

(i) The Government Order dated 15th March, 2012 itself clarifies that the ban on appointments would not operate in respect of minority institutions;

(ii) The selected candidate meets the criteria of academic qualification as prescribed by the State like CCC certificate and those documents are appended;

(iii) There being only three posts in the clerical cadre, reservation would not apply, so there was no question of furnishing any certificate regarding quota;

(iv) The documents appended and the Government Order dated 29.10.2014 would clarify that no post in such circumstances would laps and regarding reservation to Class-3 and Class-4 posts;

(v) It was stated that this would not apply to the recognized minority institution.

15. This reply as was submitted is also reproduced here as under for its appreciation:

"महोदय,

उपरोक्त पत्रांक के संबंध में निम्न आधारों पर जबाब दिया जा रहा है-

1- आपके उपरोक्त पत्रांक में नं० 1 कमी शासनादेश संख्या: 20/1/91-का-2-2012 कार्मिक अनुभाग-2 लखनऊ दिनांक 15/03/2012 के द्वारा/नियुक्ति पर रोक/ प्रतिबन्ध है।

इस संबंध में शासनादेश पत्रांक - सा०(1)/शि०/5794-5868/2014-15 दिनांक 29.10.2014 जो संलग्नक दो है। अशासकीय अल्पसंख्यक शिक्षण संस्थाओं में की जाने वाली नियुक्ति के अनुमोदन के विषय में शासन द्वारा आदेश संख्या रिट -249/15-12-2012-1601(404)/2012, दिनांक 17 अक्टूबर 2012, 1964/15-12-1601(404)/2012 टी०सी०, दिनांक 17 अक्टूबर 2012 तथा 2032/15-12-2012-1601(404)/2012 टी०सी०, दिनांक 25 अक्टूबर 2012 से यह स्पष्ट है कि कार्मिक विभाग का शासनादेश संख्या- 20/1/91-का-2-2012, दिनांक 15 मार्च 2012 अशासकीय सहायता प्राप्त अल्पसंख्यक संस्थाओं में प्रभावी नहीं है।

2- आपके उपरोक्त पत्रांक में नं० 2 कमी भर्ती नवीनतम शासनादेश अनुसार सहायक लिपिक पद हेतु शासनादेश द्वारा निर्धारित शैक्षिक योग्यता पूर्ण नहीं है।

इस संबंध में आपको अवगत कराया जा रहा है कि शासन द्वारा निर्धारित शैक्षिक योग्यता पूर्ण है संलग्नक तीन शैक्षिक योग्यता से संबंधित प्रमाण पत्रों की छायाप्रतियाँ हैं।

3- आपके उपरोक्त पत्रांक नं० तीन कमी आरक्षण कोटा के संबंध में प्रमाण पत्र नहीं है।

इस संबंध में आपको अवगत कराया जा रहा है कि उक्त भर्ती में आरक्षण कोटा न होने के कारण प्रमाण पत्र होना आवश्यक नहीं है।

4- आपके उपरोक्त पत्रांक में नं० चार पर जो कमी दर्शायी गयी है।

इस सम्बन्ध में संलग्नक दो द्वारा स्पष्ट है।

5- आपके उपरोक्त पत्रांक में नं० पांच पर कमी दर्शायी गयी है।

इस सम्बन्ध में आपको अवगत कराना है कि अल्पसंख्यक अशासकीय शिक्षण संस्थाओं में इसकी आवश्यकता नहीं है।

अतः उपरोक्त पत्रांक सं० द्वारा उक्त श्री शैलेश खण्डेलवाल की सहायक लिपिक पद पर नवीन नियुक्ति नियमानुसार की गई है।

अतः निवेदन है कि उक्त नियुक्ति को अनुमोदित किया जावे।

भवदीय

(मुनीष कुमार जैन)

प्रबंधक"
(Emphasis added)

16. Even thereafter, when no order was passed at the end of District Inspector of Schools, the Committee of Management again wrote to the District Inspector of Schools for granting approval to the petitioners' appointment dated 21st July, 2016 on the post of Assistant Clerk. However, when nothing happened, petitioners approached this Court vide Writ-A No.9127 of 2018 and the Court directed the District Inspector of Schools to take decision within a period of 3 months from the date of presentation of copy of the order. The operative portion of the order dated 3rd April, 2018 passed in Writ-A No.9127 of 2018 is reproduced here as under:

"Considering the facts and circumstances, this writ petition stands disposed of with a direction upon the respondent no.2 to accord consideration to petitioner's claim for appointment to the post of Assistant Clerk, in accordance with law, by means of a reasoned order to be passed, within a period of three months from the date of presentation of certified copy of this order."

17. The petitioners sent the certified copy of the order of this Court vide registered letter dated 7.8.2018 wrote to the District Inspector of Schools and the Manager of the institution and thereafter the District Inspector of Schools vide letter dated 25.8.2018 fixed 6th September, 2018 for hearing. On 6th September, 2018 both the petitioners as well as Committee of Management presented themselves and reminded him of the previous removal of defects and short-comings made by the Committee of Management. Mr.Krishna

Pal Singh, District Inspector of Schools, this time passed an order on 25.9.2018 in the same line denying the financial approval to the petitioners' appointment in which as he had denied approval in respect of Assistant Teachers, who were selected and whose case he was also dealing with.

18. It is quite surprising to notice that the objection taken this time were that prior approval was not taken for advertising the vacancy, two newspapers in which advertisement was made had no circulation in the region, the post in question had lapsed for there being no appointment till 2011, triple 'C' certificate was not obtained from DOEACC, there was no valid Committee of Management and that there was ban on appointments.

19. This order passed by the District Inspector of Schools dated 25.9.2018 has been challenged in this petition.

20. Learned counsel for the petitioner has argued following points to assail the order:

(i) Whatever the objections once had been taken by the District Inspector of Schools initially and those objections having been duly replied by the Committee of Management, it was not open for the District Inspector of Schools to take out a new objection to reject the claim of financial approval. Further, when the Government Order itself stated that there was no ban on appointments of vacant positions in respect of the minority institution, the District Inspector of Schools was not justified in taking a ground that there was a ban under that very Government Order;

(ii) The documents regarding academic qualifications were duly supplied

by the petitioner, but they were not at all looked into inasmuch as the DOEACC organisation having changed its name as National Institute of Electronics and Information Technology, the triple 'C' certificate, issued by it, would not be rendered to be not akin to the certificate earlier issued by the same organisation;

(iii) The District Inspector of Schools having not taken any objection in respect of the advertisements issued for filling up faculty positions in the institution qua two news dailies, namely, Kalpataru Express and Indian Express, he could not have taken it as an objection to deny the approval now, more especially when in his initial objection raised in his letter dated 19.8.2016, he did not object to the newspapers in which advertisements were made.

(iv) It has come in the judgments of this Court in various writ petitions filed by the faculty members that it is the same Committee of Management that has been disbursing salary to the employees of the institution and, therefore, selection and appointment made by it would not be bad. Such Committee of Management would not become incompetent in the matter of selection and appointment of the petitioner.

21. *Per contra*, learned Standing Counsel sought defend the order for the reasons assigned therein.

22. Having heard learned counsel for the respective parties and having perused the pleadings and records and the order impugned as well as various judgments cited in the matters of faculty members selected and appointed by the same Committee of Management and the arguments advanced across the Bar, I find three main points in the present case to be arising:

A. Whether the post in question would be taken to have lapsed;

B. Whether petitioner possesses requisite qualification; and

C. Whether the District Inspector of Schools could have taken ground other than those he had taken in his objection after he received and examined the papers sent by the management for financial approval to the selection and appointment of the petitioner.

23. Before I deal with the above three points, it is worth mentioning here that insofar as the ban is concerned, the Government Order dated 21st August, 2014 clarified it that the ban as put up on the appointments of vacant positions in recognized Intermediate Colleges under the Government Order dated 15th March, 2012 would not apply to the minority institution. Relevant portion of the Government Order dated 21st August, 2014 is reproduced here as under:

"शासन के आदेश संख्या-रिट-116/15-12-7-1600(574)/2007 दिनांक 12 फरवरी 2014 में यह स्पष्ट किया गया है कि अल्पसंख्यक शिक्षण, संस्थाओं में नियुक्ति प्रधानाचार्य/अध्यापकों के संबंध में माध्यमिक शिक्षा अधिनियम - 1921 की धारा-18 चर्च प्रभावी है। जिसके अनुसार अशासकीय सहायता प्राप्त अल्पसंख्यक विद्यालयों में नियुक्ति किये जाने के लिए पूर्वानुमति दिये जाने का कोई प्राविधान नहीं है। **अल्पसंख्यक शिक्षण संस्थाओं में नियुक्ति पर रोक नहीं है।** अशासकीय अल्पसंख्यक शिक्षण संस्थाओं में की जाने वाली नियुक्ति के अनुमोदन के विषय में शासन द्वारा आदेश संख्या रिट-240/15-12-2012-160(404)/2012 नियुक्ति 17 अक्टूबर 2012, 1964/15-12-2012-1601(404)/2012 टी०सी०, दिनांक 17 अक्टूबर 2012 तथा 2032/15-12-2012-1601(404)/2012 टी०सी०, दिनांक 25 अक्टूबर 2012 से यह स्पष्ट है कि कर्मिक विभाग का शासनादेश संख्या-20/1/91-का-2-2012 दिनांक 15 मार्च 2012 अशासकीय सहायता प्राप्त अल्पसंख्यक संस्थाओं में प्रभावी नहीं है।"

(Emphasis added)

24. This Government Order was very much within the knowledge of the District Inspector of Schools and, therefore, the finding to the contrary in the order impugned is per se bad in law.

25. Similarly again, this Court has already held in the case of **Mohd.Faizan and another vs. State of UP and others**, 2013 (5) ADJ 471 that no prior permission is required from the District Inspector of Schools in respect of appointments in minority institutions. Vide paragraph 4 of the said judgment, the Court has noticed the arguments and then expressed the view as under:

"4. Both these grounds have been challenged on the basis of the provisions contained in the UP Intermediate Education Act, 1921 to contend that no prior permission is required insofar as appointments in Minority Institutions are concerned. The second ground is that the relationship with the Members of the General Body of the Society is not the prohibition as contained in Chapter 3 Regulation 4 of the Regulations framed under the 1921 Act. The complaint, made through a representation alleges that the advertisement was not in accordance with law which fact has also been disputed even though no finding has been recorded by the District Inspector of Schools on that ground. It is alleged that the entire procedure was adopted in accordance with the Rules that are applicable, and in absence of any illegality in the selection procedure, the impugned order dated 6.8.2012 deserves to be quashed.

6. Having heard Sri J.J.Munir learned counsel in two of the Writ Petitions and Sri Yatindra in Writ Petition No.60172

of 2002, and the learned Standing Counsel for the State respondents in all the writ petitions, the order of the District Inspector of Schools cannot be sustained, inasmuch as, firstly there is no specific provision for applying Regulation 101 to Minority Institutions but assuming that it is regulatory, permission does not mean prior approval as envisaged under the Rules, which has already been explained in the Division Bench Judgment of Jagdish Singh vs. State, 2006 (2) UPLBEC 1851."

26. Thus the view taken by the District Inspector of Schools that prior approval was not taken for advertising the vacancy and holding the selection by the Committee of Management is not at all tenable. Furthermore, on the aspect of valid Committee of Management, in respect of selection to faculty positions in the institution, this Court has already brushed aside this objection raised in their respect and those judgments have been referred herein above in the earlier part of this judgment. Thus the finding on this aspect is also untenable.

27. Now coming to the first issue, it is worth referring here the title of Chapter-II of the Intermediate Education Act, which is quoted as such herein under:

"Appointment of Heads of Institutions and Teachers"

28. Regulation 1 deals with the qualifications for appointments of head of the institution and teachers as per Appendix-A then Regulation 2 talks of appointment of head of the institution by direct recruitment after reference to the selection committee. Regulation 3 and 3A deal with seniority. Regulation 4 deals with the status of teachers working in Junior

High School upgraded as High School. Regulation 5 and 6, both deal with promotion. Regulation 7 has been repealed/deleted. Regulation 8 refers to right of representation in the event a teacher is aggrieved by decision of the Committee of Management taken under Regulations 5, 6 and 7. Regulation 9A deals with confirmation on promotion. Regulation 10 deals with the recruitment on the post of head of the institution and teachers by direct recruitment. Section 11 deals with scrutiny of documents submitted by the candidates for direct recruitment. Regulations 12, 13, 14, 15, 16, 17 and 18 deal with the selection and appointment through direct recruitment on the post of head of the institution and teachers. Regulation 19 empowers the District Inspector of Schools to deny payment of salary if the appointment of teachers and head of the institution is de hors the procedure prescribed under the Chapter and then Section 20 provides that if the management has failed to advertise any sanctioned post, which has fallen vacant in accordance with regulations contained in this very chapter then such vacancy would be deemed to have been surrendered and before any fresh drive of recruitment its creation is to be sanctioned by the Director. Regulation 20 is reproduced here as under:

*"20. Where the Committee of Management has failed to advertise **any sanctioned post which has fallen vacant in accordance with the regulations contained in this Chapter** within a period of three months from the date of occurrence of the vacancy, such post shall be deemed to have been surrendered and shall not be filled up unless its creation is sanctioned afresh by the Director"*

(Emphasis added)

29. Thus upon perusal of the aforesaid provision and what I have discussed above, qua various regulations contained in Chapter-II, it is clear that Regulation 20 of Chapter-II of the Intermediate Education Act, 1921 is meant for vacant positions of teachers and head of the institutions. Since, Chapter-II does not deal with the clerical cadre, the stand taken by the District Inspector of Schools that the position of clerk having fallen vacant in 2011 and for three months and no recruitment drive having undertaken within three months, the post would stand lapsed, is absolutely a case of misreading of the provision and resultant misapplication of law. Thus the post against which petitioner has been selected, namely post of assistant clerk cannot be said to have been lapsed.

30. Now coming to the second issue of requisite qualification, the petitioner possesses post-graduate degree in M.Com., Bachelor of Law and also the Computer Course Concept Certificate to be called as CCC certificate from the National Institute of Electronics and Information Technology. It is to be always seen what the rule was and what the qualification was prescribed for at that point of time. The Government Order dated 3rd November, 2015 prescribed a qualification for Assistant Clerk that a candidate should be Intermediate with CCC certificate and typing with speed of 25-30 words per minute.

31. Petitioner in this case having obtained post-graduate degree is certainly Intermediate pass-out besides the fact that he had annexed the mark-sheet of the requisite minimum academic qualifications. So far as the CCC certificate is concerned, he had annexed the certificate of National Institute of Electronics and Information

Technology (NIELIT). In the official website of NIELIT, its status has been given as under:

"NIELIT Imphal Centre is cerntre of NIELIT New Delhi, which is an autonomous body of Department of Electronics and Information Technology, Ministry of Communication and Information Technology, Government of India. The centre is located in the capital city of Imphal and is having two extension centres at Churachandpur and Senapati District.

The centre was established as Centre for Electronics Design & Technology (CEDT) in the year 1987 and was renamed as DOEACC in December 2002. The Centre adopted its current name NIELIT since 2011. The campus of NIELIT Centre Imphal is located at Akampat about 5 kms in the south-east direction from the heart of the city. Spread over an area of more than 20 acres, it houses the main Institute Building consisting of Administrative wing, Lecture Halls, Faculty Rooms, Computer Labs, Mechanical Workshop. Electromedical Laboratory, PCB Lab, Servicing cell and other laboratories. Besides the main institute building, the campus houses the staff quarters, students' hostels, electrical substation and other host of essential facilities.

NIELIT Imphal specializes in development of skill in the fields of Electronics and Communication Engineering and Information Technology through various long term and short term courses."

(Emphasis added)

32. In view of the above, therefore, once the institute DOEACC has come to be renamed as NIELIT since the year 2011,

the CCC certificate issued by it, would be a valid CCC certificate. It is not the case that this institute that has issued the certificate is not recognized institute, the District Inspector of Schools appears to have pre-decided to reject the financial approval and that is why he did not get verification done of the certificate so produced. Furthermore, there is no objection as such taken in the letter of the District Inspector of Schools dated 19.8.2016 (supra) that petitioner did not know typing at all or did not posses the requisite speed of typing.

33. Insofar as the third issue is concerned, in my considered view, the District Inspector of Schools once takes an objection and the objection has been duly replied, he has to evaluate and appreciate the reply. He cannot make out third and fourth ground to reject the claim of financial approval. From the order impugned, it clearly transpires that he has not dealt with reply of the Committee of Management in its correct perspective and has not cared to appreciate the legal position. This act and conduct of the District Inspector of Schools does not suit to the position he holds because his order would be causing serious prejudice career of a person.

34. Still further I find that in matters of selection and appointments of faculty members of the same college, more or less similar grounds were taken by the District Inspector of Schools, who happened to be the same person, namely, Mr.Krishna Pal Singh, to reject the claim of financial approval, which has been set aside by various orders passed by this Court and all those teachers have been consequently accorded financial approval.

35. In paragraphs 15-16 of the writ petition in which appointment order and

consequential joining of the petitioner has been referred to and his continuous functioning, which has not been denied in paragraph 18 of the counter affidavit sworn by Mr. Krishna Pal Singh, the then District Inspector of Schools as in paragraph 18, he has simply stated that "contents of paragraphs 15 and 16 of the writ petition need no comment as these paragraphs under reply being no concerned with the answering respondent" and the Committee of Management in the counter affidavit has admitted appointment order and joining of the petitioner as Assistant Clerk in the institution.

36. The administrative exercise of power is never vested with any unchecked exercise of discretion. The authorities exercising power are required to be reasonable and at the same time, responsible also. They cannot be permitted to be whimsical. A public office entails behind it a very high sense of moral and responsibility in officers occupying such office in discharge of their official duties attached to the office. The act and that too deliberate one *to put in leaves to make one fall*, is very unfortunate and cannot be approved. The manner in which the District Inspector of Schools approved two newspapers for their being advertisements for selection and appointments of teachers in the same institution, could not have questioned those very newspapers in the matter of advertisement in case of petitioner's post of clerk. Similarly issue of ban should not have been raised once the Government Order itself made it inapplicable to the minority institutions. Rejection of claim of the petitioner in this case only appears to be for rejection sake. We are a rule of law society with a wholly book of governance called "Constitution of India". The State/Executive being an

important organ under the Constitution must school its officers to conform to the rule of law in their actions. Forcing a party to an unnecessary litigation causes both wastage of public money and public time. Thus, every wrong apparent on the face of record is a serious dent to the rule of law and not only to be remedied by striking down such act or action, but a poor litigant is equally required to be adequately compensated with cost for such unnecessary litigation forced upon him.

37. Under Chapter XXI, Rule 11 of the Allahabad High Court Rules, 1952, there is an ample provision for award of cost. The provision runs as under:

"11. Costs. - In disposing of an application under this Chapter the Court may make such order as to costs as it may consider just."

38. In order to do justice, therefore, rules (supra) provide for the imposition of the cost while disposing of the matter, as may be considered just and proper by the Court. While in the case of **Nagar Panchayat Kithore, District Meerut vs. Presiding Authority, Labout Court, UP, Meerut and another**, (2007) 1 SAC 567, the Court held that imposition of exemplary costs taking into account of the circumstances of the case as justified. Supreme Court in the case of **Salem Advocate Bar Association, Tamil Nadu vs. Union of India**, AIR 2005 SC 3353 has held that *"so far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory inasmuch as the liberal attitude of the Courts in directing the parties to bear their own costs had led the parties to file a number of frivolous cases in the Courts or to raise frivolous and*

unnecessary issues. Costs should invariably follow the even. Costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to the rule in force".

39. Apart from above, in a catena of the decisions, Supreme Court has held that the Court can award exemplary costs to the litigants who have approached the Court for commission and omission of State authorities. While no litigants can derive any benefit on account of pendency while protection of interim order has been there, the litigants can also not be prejudiced for non-consideration of their case for a service benefit, which is otherwise guaranteed to them as condition of service under the rules, just for wrongful action or inaction on the part of respondent authorities.

40. In the case of ***RamRameshwari Devi and others vs. Nirmala Devi and others***, (2011) 8 SCC 249, the Court observed that "*in order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately, wasted in a large number of uncalled for cases*".

41. However, taking lenient view in the matter with the hope that State would do the needful to ensure that its officers are reasonable and logical while dealing with matters in discharge of their administrative duties, I quantify the cost as Rs.25,000/- only to be paid to the petitioner within two months from today. It will be open for the State to recover the cost from the erring officials.

42. In view of the above, writ petition succeeds and is **allowed with cost** as quantified and directed above. The order

passed by the District Inspector of Schools dated 25.9.2018 (Annexure-15 to the writ petition) is hereby quashed. The District Inspector of Schools is directed to accord financial approval to the appointment of the petitioner as Assistant Clerk in the institution, who has already been appointed by the Committee of Management under its order dated 27.7.2016 pursuant to which petitioner submitted his joining on 1.8.2016 and has continuously been working in the institution as such.

43. The financial approval to the appointment of the petitioner will relate back to the date 27.7.2016 and petitioner would be entitled to salary with effect from 1.8.2016.

44. The Committee of Management shall calculate the entire arrears of salary after the approval is accorded. The District Inspector of Schools will ensure that current salary is paid to the petitioner forthwith and the arrears of salary shall also cleared within three months of such approval order.

(2023) 5 ILRA 1730
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.05.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ A No. 4293 of 2022
 With other cases

Dr. Rajendra Kumar Srivastava

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Vijay Dixit

Counsel for the Respondents:

C.S.C., Atul Kumar Dwivedi

Service Law- U.P. Government Servant (Discipline & Appeal) Rules, 1999, Statute 9.07, Statute 9.04 -Mainly because the petitioners were appointed during the period of particular Vice Chancellor, and there were certain allegations against him, cannot itself lead to any conclusion that the appointment made under his regime were illegal and arbitrary- no allegation that the petitioners had misrepresented about their educational qualifications or were somehow responsible for getting themselves appointed- after permitting a person to continue in service for a long time, the selection cannot be cancelled, or services cannot be terminated due to some infirmities in the selection- Petitioners working for the last 6 to 7 years and the orders of termination have been held to be illegal and arbitrary, they are entitled to all consequential benefits including the back wages from the date of termination of their services. (Para 80 & 82)

Writ Petition allowed. (E-15)**List of Cases cited:**

1. Whirlpool Corpn. Vs Registrar of Trade Marks, (1998) 8 SCC 1 at page 9

2. Mahipal Singh Tomar Vs St.of U.P., (2013) 16 SCC 771 : (2014) 3 SCC (L&S) 610 : 2013 SCC OnLine SC 1135 at page 796

3. Md. Zamil Ahmed Vs St.of Bihar, (2016) 12 SCC 342 : (2017) 1 SCC (L&S) 396 : 2016 SCC OnLine SC 416 at page 34

4. Vikas Pratap Singh Vs St.of Chhattisgarh, (2013) 14 SCC 494 : (2013) 3 SCC (L&S) 100 : 2013 SCC OnLine SC 599 at page 502

5. Saurabh Pal Vs The Chancellor, Veer Bahadur & ors.Appeal (Civil) 596 of 2008 decided on 22/01/2008

6. Basavaiah (Dr.) Vs Dr. H.L. Ramesh, (2010) 8 SCC 372

7. Ashok Kumar Sonkar vs U.O.I.& ors.(2007) 4SCC 54

8. Mohd. Abul Lash Vs St.of U.P. & ors.

9. Nahar Singh & ors.Vs St.of U.P. & ors.and Savitri Devi & ors.Vs St.of U.P. & ors.

10. Nisha Devi Vs St.of H.P., (2014) 16 SCC 392

11. Vikas Pratap Singh Vs St.of Chhattisgarh, (2013) 14 SCC 494

(Delivered by Hon'ble Alok Mathur, J.)

1. The challenge has been made in this bunch of writ petitions to the order of cancellation of selection resulting in termination of their services vide dated 06/07/2022 passed by the respondent University after conducting an enquiry. The common ground for cancellation of their selection was the lack of essential qualifications at the time of their selection with regard to their educational qualifications in the year 2014.

2. In the present bunch of writ petitions all the petitioners are teachers having been selected in the Dr. Shakuntala Mishra National Rehabilitation University pursuant to the advertisement dated 17/02/2014. They submitted relevant documents with regard to the qualifications and appeared before a screening committee, and subsequently appeared in the interview before the selection committee which recommended their candidature for appointment. The recommendations were duly placed before the Executive Council of the University pursuant to which they were appointed and were continuing till their services were

terminated by means of the impugned orders in the respective writ petitions.

3. The bunch of the cases have been heard together and are being decided together by a common judgement as the issues involved are common except the aspect pertaining to the respective educational qualifications.

4. The impugned orders of cancellation of selection have been passed by the Vice Chancellor of Dr. Shakuntala Mishra National Rehabilitation University, Lucknow which very candidly recites that in the 5th meeting of the General Body an enquiry was instituted against the previous Vice Chancellor Dr Nishith Rai and all the charges against him were proved and he was found guilty of administrative and financial irregularities. After seeking legal opinion, it was decided that all the appointments made during his tenure would be enquired on a case-to-case basis. It further states that the executive committee had appointed a three-member committee which has submitted its report where it has been found that the appointments were made without following the rules of reservation, and no approval was sought from the visitor for appointment of the panel of experts and that persons were appointed despite the fact that they did not have the requisite API score which was contrary to the rules.

5. The Executive Council in its 35th meeting held on 07/10/2021 decided to constitute a 2-member committee consisting of 2 retired Judges of the High Court to enquire into all the appointments made by the erstwhile Vice Chancellor. The enquiry was conducted by the said

committee who submitted their report which was placed before the Executive Council and was duly approved in its 38th meeting.

6. Show cause notice was given to the petitioners seeking their response. The response was placed before another committee consisting of a retired High Court Judge and subject specialist namely Professor Dhananjai Yadav, in Charge of the Recruitment Cell, Allahabad Central University, Prayagraj. The committee made its recommendations on 9.6.2022 to the University, which was accepted by the executive committee. The committee concluded that the petitioners did not fulfil the prescribed qualifications on the date of the advertisement and hence their services were terminated. It was further provided that considering that all the petitioners have worked for a period of 6–7 years, they would be eligible to apply in the fresh advertisement which would be issued and in case they are selected, their pay and allowances would be protected.

7. Sri Sudeep Seth, Senior advocate appearing for the respondent University raised preliminary objections regarding the maintainability of the writ petitions. He submitted that the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 were applicable on the respondent University, which provide for an alternative remedy of appeal against the order of termination, while the petitioners have straight-away approached this Court under Article 226 of the Constitution of India and submitted that the petitions are liable to be dismissed on the ground of alternative remedy. It was further contended that the petitioners have another

alternate remedy under Section 7 of the Dr Shakuntala Mishra National Rehabilitation University (For Differently Abled) Uttar Pradesh Act, 2009 (hereinafter referred to as the Act of 2009) before the visitor.

8. Counsel for the petitioners responding to the plea of alternate remedy, submitted that The Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as the Rules of 1999) are applicable, but the respondent University itself did not proceed in terms of the said rules as neither any charge sheet was given to them, nor was the enquiry conducted in consonance with provisions contained in Rule 7 of the said rules, nor was the complete enquiry report submitted by them along with a show cause notice. It has further been submitted that once the respondents themselves had failed to adhere to the Rules of 1999 it is not open for them to contend that the petitioners should be directed to follow the said rules. It has been submitted that the petitioners could have been relegated to the remedy of an appeal under the Rules of 1999 only when the proceedings would have been conducted under the said rules and not otherwise.

9. It was further submitted that alternate remedy is not an absolute bar, and the High Court in exercise of its powers under Article 226 of the Constitution of India would entertain petitions where, on the face of it, it can be demonstrated that the decision-making process suffers from manifest illegality or has been conducted in violation of principles of natural justice in the most arbitrary manner.

10. To consider the preliminary objection raised by the respondent with

regard to the maintainability of the writ petition on the ground of availability of an efficacious alternative remedy of an appeal under the Rules of 1999, it is undisputed that the respondent University itself did not adhere/follow to the Rules of 1999 while proceeding against the petitioners. Once the proceedings have not been initiated or conducted in terms of Rule of 1999, by the University itself then it does not lie upon them to raise an objection, that the petitioners should be required to follow the said rule. An appeal would lie under the Rules of 1999 when the proceedings are conducted under the said rules. When the proceedings are conducted under some other provision then the petitioners cannot be asked to follow the Rules of 1999 and resort to the remedy of an appeal under Rule 11 of the said rules. Learned Counsel for the respondent University fairly submitted that the proceedings against the petitioners were not conducted under the Rules of 1999, then the natural corollary would follow, and remedy of Appeal under the Rules of 1999 would not be available to the petitioners and hence the preliminary objection of the respondent with regard to availability of alternative remedy in this regard fails.

11. Secondly, the law with regard to maintainability of writ petition despite existence of alternate remedy has been well settled. The High Courts can entertain a writ petition despite the existence of an adequate alternative remedy where there are allegations of breach of fundamental rights, or violations of principles of natural justice or that the order under challenge is wholly without jurisdiction. In the present case, the ground of challenge to the order of termination is that no proper opportunity of hearing was granted to the petitioners,

the enquiry was done in various stages by different set of persons for which there is no provision either in the rules or the regulations of the University and apart from that the entire proceedings were vitiated by mala-fide as merely because the petitioners have been appointed under the regime of the erstwhile Vice Chancellor who is alleged to have conducted certain misconducts, as a retaliatory measure, all the appointments made under him was sought to be scrutinised. It is stated that such exercise of police power is not vested under the provisions of the act or rules of the University, and accordingly in regard to such facts writ petition under Article 226 would be maintainable.

12. The power of the High Court to issue prerogative writs was dealt in by the Supreme Court the case of **Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1** at page 9 and held as under:-

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has

imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. *Rashid Ahmed v. Municipal Board, Kairana [1950 SCC 221 : AIR 1950 SC 163 : 1950 SCR 566]* laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, *K.S. Rashid & Son v. Income Tax Investigation Commission [AIR 1954 SC 207 : (1954) 25 ITR 167]* which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, “unless there are good grounds therefor”, which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

17. A specific and clear rule was laid down in *State of U.P. v. Mohd. Nooh*

[AIR 1958 SC 86 : 1958 SCR 595] as under:

“But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.”

18. This proposition was considered by a Constitution Bench of this Court in *A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani* [AIR 1961 SC 1506 : (1962) 1 SCR 753] and was affirmed and followed in the following words:

“The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court.”

19. Another Constitution Bench decision in *Calcutta Discount Co. Ltd. v. ITO, Companies Distt. I* [AIR 1961 SC 372 : (1961) 41 ITR 191] laid down:

“Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income Tax Act.”

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the “Tribunal”.

In the case of **Centurary Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council**, (1970) 1 SCC 582, the Apex Court found that the parties claiming to be aggrieved by the action of a public body or authority on the plea that the action is unlawful, high handed, arbitrary or unjust is entitled to a hearing of writ petition.

In the case of **Nathi Mal Ram Sahai Mal v. V.C., Meerut**, 1998 UPLBEC 161, the Apex Court held that the existence of alternative remedy has been held to be no bar where it is alleged that the provision is ultra vires or action is in violation of the Principle of natural justice.

The learned counsel for the petitioner further placed reliance upon the case of **Dr. Shyam Narain Pandey v. V.C. Gorakhpur University**, 1985 UPLBEC 99, in which the impugned order was found to be wholly void and ineffectual under law, the Apex Court observed that the writ petition cannot be dismissed on the ground of alternative remedy after hearing has been done on merits.

31. In the case of **Hirdai Narain v. Income Tax Officer, Bareilly**, AIR 1971 SC 33, the petitioner was having an alternative remedy of filing a revision before the Commissioner of Income Tax but the High Court entertained the writ petition. The Apex Court observed that Hirdai Narain could have moved the Commissioner in revision because at the date on which the petition was moved the period prescribed by Section 33A of the Act had not expired. Their Lordship further held that the revision for an order correcting the order of the Income-tax Officer under Section 35 was not moved, the High Court would not be justified in

dismissing the petition as not maintainable, which was entertained and heard on merits.

32. In the case of **Ashok Kumar v. Managing Director, U.P. Leather Development and Marketing Corporation**, 1986 (16) LCD 6, relying upon the cases **Jai Kishan v. U.P. Cooperative Bank Ltd.**, 1989 (2) UPLBEC 144 (DB) and **Hirday Narain v. I.T.O., Bareilly**, AIR 1971 SC 33, the Division Bench of this Court observed that if an order is void and the petition does not involve controversial question of facts, the Court may not refuse to exercise its jurisdiction. The pendency of the writ petition for several years in the High Court was also taken to be a justifiable ground for not relegating the petitioners to get their grievances redressed under the provisions of the Industrial Disputes Act. Holding that in such circumstances it will not in any manner advance the cause of justice if after the lapse of several years this Court is to tell the workmen to go to the Labour Court for seeking redressal of their grievances more so in a case where there was no controversy over the relevant facts.

33. In the case **Ashok Kumar v. Managing Director, U.P. Leather Development and Marketing Corporation**, 1986 (16) LCD 6, the High Court after observing that the rule of exhaustion of statutory remedy, before a writ will be granted, is a rule of policy, convenience and discretion rather than a rule of law and it further observed that this is a matter of discretion of the Court which is to be exercised according to the facts and circumstances of each case.

34. In the case of **Akhilesh Kumar Saxena v. Director of Education (Secondary) U.P., Lucknow**, 1999 (17) LCD 904, the Division Bench of this Court

observed that where the Court has entertained the petition staying operation of the impugned order after exchange of affidavits the Court should not have disposed of the matter finally only by dismissing the petition on the ground of alternative remedy. In view of this, the appeal was allowed setting aside the order and directing that the writ petition be disposed of finally after hearing on merits.

35. In the case of **Sudhakar Malviya v. Benaras Hindu University, 1997 (2) ESC 1213**, it has been held that the High Court was wrong in dismissing a writ petition on the ground of availability of an alternative remedy when the writ petition had been entertained and had remained pending for 11 years. This was a case where statutory remedy under Section 68 of the State Universities Act was available to the petitioner but he has directly approached the High Court under Article 226 of the Constitution against the impugned order and the High Court dismissed the writ petition on the ground of availability of alternative remedy under Section 68 of the State Universities Act.

36. From the catena of decisions of the Supreme Court following propositions broadly flow:

(i) Statutory alternative remedy is not an absolute bar for the High Court to entertain a writ petition under Article 226 of the Constitution.

(ii) Refusal to entertain a writ petition on existence of statutory alternative remedy is a self imposed restriction for which following considerations weigh, namely;

(a) alternative remedy is adequate, efficacious and speedy.

(iii) The High Court can try issues of fact but may not entertain petition

where disputed question of facts have to be determined and in such cases the petitioner may be relegated to the statutory alternative forum.

(iv) If a writ petition has been entertained despite there being a statutory remedy, which may be adequate, and the said petition has remained pending for considerable period then there would be little justification for relegating the petitioner to the alternative remedy, unless there are valid and cogent reasons for doing so.

(v) Even if there exists an adequate alternative, efficacious, speedy remedy in the alternative forum, the High Court may entertain the writ petition in the following circumstances.

(a) for enforcement of any of the fundamental rights,

(b) where there has been a violation of principle of natural justice,

(c) where the order or proceedings are wholly without jurisdiction, or

(d) the vires of the Act is challenged.

Lastly, it depends upon the facts and circumstances of each case as to whether the discretion of entertaining the writ petition in the teeth of the statutory remedy has to be exercised or not."

13. Considering the rival contentions with regard to dismissal of writ petitions on ground of alternative remedy, it is seen in the present case, the allegations are that the entire proceedings against the petitioners have been conducted in gross violations of principles of natural justice, as hearing was

afforded by one committee while the decision was taken by the Executive Council, this is contrary to all canons of the decision-making process. It has further been contended that the petitioners have been working pursuant to the selection by a duly constituted selection committee for last 6 to 7 years and termination of the services, on the face of it, are illegal and arbitrary and accordingly this Court is of the considered view in light of said facts, the bar of alternate remedy does not operate against the petitioners and hence the argument of the respondents in this regard is accordingly rejected.

14. The other objection regarding the petitioners having an alternative remedy before the Visitor, is also bereft of merits in as much as the proceedings which are being assailed before this Court have already been subjected to the scrutiny by the Vice Chancellor at the behest of one Dr Abhay Krishna. The Visitor by means of order dated 11/03/2016 has already held that the procedure adopted by the respondent University and the constitution of the selection committee resulting in the appointment of the petitioners is valid. The order of the visitor has been challenged before this Court, and the writ petition is pending consideration. Once the order of the Visitor is already on record, no useful purpose would be served by relegating the petitioners before the Visitor on the same issue. It is also urged that the respondent University is itself opposed the decision of the Visitor, which itself cannot be appreciated. In the present case no useful purpose would be served by relegating the petitioners to the remedy before the Visitor. The objection raised by the petitioners have force and the plea of

dismissal on ground of availability of alternative remedy before Visitor is accordingly rejected.

15. The 1st ground raised by the petitioners assailing the proceedings initiated against them culminating with the impugned order of termination is with regard to the procedure followed by the respondents in conducting the enquiry. It is submitted that the respondents have adopted the Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999 in its meeting dated 07/10/2021, where provision for termination is provided. It is stated that once the Rules of 1999 have been adopted by the respondents, it was bound to follow the said rules while it adopted a procedure which is not prescribed either in the Act of 2009, or any regulations framed under it and therefore the entire procedure followed by the respondents is illegal and arbitrary and, hence, liable to be set aside.

16. The respondents while defending their actions submitted that the disciplinary Rules of 1999 would be attracted only when there are allegations of misconduct by the employee, while in the present case the entire selection was dehors the rules, as the petitioners did not fulfil the minimum prescribed educational qualifications and hence their services were dispensed with and their selection cancelled, and in any view of the matter, the petitioners were afforded full opportunity of hearing before cancelling their selection and consequently supported the enquiry proceedings as well as the order of termination.

17. The provisions regarding power to proceed against an employee of the respondent University can be found in the

statutes of 2009. Statute 9.04 provides that a teacher at the University may be dismissed or removed and his services terminated on one or more of the following grounds, which include wilful neglect of duty, misconduct, breach of any of the terms of the contract of service, incompetence or abolition of post. Further statute 9.07 provides as under:-

“9.07. No order dismissing, removing or terminating the services of a teacher of the University on any grounds mentioned in clause (1) of statute 9.04 (except in case of a conviction for an offence involving moral turpitude or of abolition of post) shall be passed unless a charge of been framed against the teacher and communicated to him with the statement of the grounds on which it is proposed to take action and has been given adequate opportunity:-

Of submitting a written statement of his defence of being heard in person, if he so chooses and of calling and examining such witnesses in his defence as he may wish provided that the executive Council or an officer authorised by it to conduct the enquiry, may for sufficient reason to be recorded in writing refused to call any witness

(2) the Executive Council may, at any time ordinarily within 2 months from the date of the enquiry officer report pass a resolution dismissing or removing the teacher concerned from service or terminating the services mentioned in the grounds of such dismissal, removal or termination.”

18. The Executive Council of the University in its 35th meeting held on

07/10/2021 had resolved to adopt the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 and the memorandum was issued on 25/10/2021 indicating the said rules having been adopted for conduct of enquiry against the officer and employees of the University.

19. The University has very categorically stated that it had not followed the Rules of 1999 only because there was no misconduct and hence the said rules do not apply to the present case. A perusal of the Rules of 1999 indicates that according to Rule 6 the appointing authority of a Government servant may impose any of the penalties specified in the said rules. Section 7 provides for a detailed procedure to be followed for imposing major penalty. Major penalties include withholding of increment with little effect, reduction to a low post or grade, removal from service, dismissal from service as provided in Rule 3 while minor penalties include censure, withholding of increment etc.

20. In order to appreciate the arguments raised by the respondents the Rules of 1999 were not required to be followed because there was no allegation of misconduct, and secondly the selection of the petitioners was set aside, for which there is no provision in the Rules of 1999.

21. This Court after considering the rival submissions is of the view that the Rules of 1999 were applicable in the present case and were required to be followed by the respondents. A perusal of the impugned order would clearly reveal that the executive committee had

recommended the termination of services of the petitioners, while the Vice Chancellor while complying with the order of the executive committee had set aside the selection of the petitioners. We proceed to decide the controversy in the present case treating the impugned order to be an order terminating the services of the petitioners. The services of an employee can be terminated only as a measure of penalty as provided in the Rules of 1999, or the statutes of the University. The common ground in all the cases is that the petitioners lacked the educational qualifications at the time of the selection.

22. This allegation is directly attributable to the petitioners, and such conduct would be liable to be included in the category of misconduct, which would be the act of obtaining employment without being duly qualified for the same. It is the conduct of the petitioners in submitting their educational qualifications, which according to the respondents they did not fulfil the criteria as laid down in the advertisement or the guidelines published by the University Grants Commission, for which their services have been terminated. On both these counts, this Court is of the view that it was imperative that the procedure established and accepted by the respondents, which is the Rules of 1999 were to be followed, and in not doing so the respondents have acted in the most arbitrary and illegal manner, and the impugned termination is not in accordance with law.

23. In order to impose the punishment of dismissal or removal, the Rules of 1999 will have to be followed. In order to impose major penalty facts constituting the

misconduct on which it is proposed to take action shall be reduced in the form of definite charge contained in the chargesheet, where the proposed evidence and the name of witnesses are required be mentioned. The employee is required to file his response to the charges mentioned in the chargesheet and in case he denies the charges, the enquiry officer shall call the witnesses to the proposed the charge sheet to record oral evidence, and after recording of evidence submit his enquiry report to the disciplinary authority, who may either accept the same, or differ with the report or order re-enquiry as the case may be. In case he does not order re-enquiry, he has to give a show cause notice to the employee giving him a copy of the enquiry report, and finally conclude the proceedings either exonerating the employee or awarding punishment.

24. The aforesaid procedure is also envisaged in Statute 9.07 of the respondent University. In the present case no charge sheet was given to the petitioner nor was any oral evidence of the prosecution recorded in presence of the petitioners and they were not handed over the relevant documents sought by them on the ground of confidentiality and even the copies of the enquiry report of the committees were never given to the petitioners and only a extract was given along with the show cause notice and, therefore, the procedure as provided in Statute 9.07 was not followed, and consequently the entire proceedings were held in violation of statutes of the University as well as in principle of natural justice.

25. To examine the validity of the proceedings conducted by the respondent

University culminating in the impugned orders of cancellation of selection, it is noticed that the 'authorities' of the University have been prescribed under Sections 8 and 13 of the Act of 2009. It is laid down that the Executive Council shall be the Chief Executive body of the University. Section 16 lays the power and functions of the Executive Council, according to which it has power to appoint Professor, Reader, Lecturer and other members of the teaching staff as may be necessary on recommendation of the selection committee constituted by statutes for the purpose. In exercise of powers under Section 32 (1) of the Act of 2009, the State Government on 08/07/2009 framed Dr Shakuntala Mishra rehabilitation University (For differently abled) First Statutes, 2009, (hereinafter referred to as the Statutes) wherein in Statute 8.01 provides the qualification required for appointment and career advancement of teachers in the University other than the faculty of special education which shall be as per the qualifications prescribed by the University Grants Commission. Further in Statute 8.04, it has been provided that notwithstanding anything contained in Statutes 8.01, 8.02, 8.03 the Executive Council may invite a person of high academic distinction and professional attainments to accept the post of Professor or Reader or any other academic post in the University, as the case may be, on such terms and conditions as it may deem fit.

26. Chapter IX of the Statutes of the University, specifically Statute 9.07 provides that no order dismissing, removing or terminating the services of a teacher of the University shall be passed unless a charge has been framed against the teacher and communicated to him the

statements of grounds, its proposed action and has been given adequate opportunity. In Statute 9.09, it has been provided that executive Council shall constitute, for such term as it thinks fit, a disciplinary committee in the University which shall consist of Vice Chancellor and other persons nominated by it.

27. It seems that there were several allegations against former Vice Chancellor, against whom action was taken after enquiry was instituted. The proceedings against the former Vice Chancellor Dr Nishith Rai were also looked into in Special Leave Petition No.9830/2018 by the Supreme Court, and vide order dated 06/04/2018 the University was given liberty to proceed against him on all matters except which were subject matter of writ petition No. 7695 (SB) of 2016.

28. The Executive Council decided to initiate an enquiry against the former Vice Chancellor in its 35th meeting held on 07/10/2021 and constituted a committee consisting of 2 retired High Court Judges.

29. In the present case, the entire controversy has its roots in the resolution passed by the General body of the University on 25/01/2019. In the said meeting the enquiry report submitted by Justice (Retd.) Shailendra Saxena was considered. The enquiry instituted against the former Vice Chancellor Dr Nishith Rai was conducted by Justice (Retd.) Shailendra Saxena. In the said enquiry report submitted to the General body of university the allegations against the former Vice Chancellor were proved. While

accepting the said enquiry report, the General body also resolved that action would be taken with regard to all the irregularities including technical, administrative or financial committed by the former Vice Chancellor after seeking legal opinion.

30. The General body of the University in its meeting held on 16/09/2021 decided to enquire into the appointments made by the former Vice Chancellor, in pursuance to which the Executive Council in its 35th meeting dated 17/10/2021 had resolved to have the matter relating to the appointments inquired by a committee consisting of 2 former judges of the High Court and accordingly a committee consisting of Justice (Retd) S.V.S Rathore and Justice (Retd) Pratyush Kumar was constituted for the purpose. The General body in its resolution dated 16/09/2021 had limited the scope of enquiry only to the **procedure followed in making the appointments** to the academic and non-academic posts.

31. The said committee consisting of former Judges of the High Court conducted the enquiry by going to the records of the selection committee. In the report dated 28/01/2022 submitted by the committee, the procedure for appointment of the selection committee was considered. They took notice of the fact that as per the provisions of section 25(2)(a)(iv) of the act of 2009 which deals with constitution of the selection committee provides as follows:-

25. (1) *The Executive Council shall constitute a Selection Committee for*

making recommendations to the Executive Council for appointment to the posts of teachers and other employees in the University.

(2)(a) *The selection committee shall consist of the following members, namely:-*

(i) *the Vice Chancellor who shall be the Chairperson of the Committee for all teaching posts and the nonteaching posts of Group 'A' and Group 'B';*

(ii) *the Registrar shall be the Chairperson of the committee for all nonteaching posts of Group 'C' and Group 'D';*

(iii) *the Head of the Department concerned, if any who is not lower in rank than that of the post for which selection is to be made;*

(iv)(a) *Where an appointment is to be made for any teaching post, three experts nominated by the Visitor from amongst a panel of names recommended by the Academic Council and approved by the Executive Council:*

Provided that till the constitution of Academic Council and Executive Council the above referred experts shall be nominated by the Vice-Chancellor.

(b) *Where an appointment is to be made to any post other than concerned with teaching, the Registrar shall constitute the selection committee as per the Provisions of Uttar Pradesh Direct Recruitment Rules, 2002 (Outside the Perview of Public Service Commission) for Group "c" post as amended from time to time.*

32. The committee was of the opinion that according to clause (iv) (a) of section

25 three experts have to be nominated by the visitor on the recommendation by the academic Council approved by the Executive Council, and this condition can be dispensed with only where the academic Council and Executive Council have not been constituted. According to the Enquiry Committee, at the time of appointment of the Expert Panel, the Executive Committee and the Executive Council had been constituted and consequently the Vice Chancellor could not have exercised his power as provided in the proviso to Section 25(iv)(a) of the Act, 2009. They further noticed that according to Section 44 of the Act, 2009, the proceedings of any authority, committee or body of the University shall not be invalidated merely for the reason that the General Council, Executive Council, Academic Council or any other authority or body of the University is not duly constituted or there is defect in its constitution or re-constitution.

33. It is on the basis of the aforesaid facts that the Committee came to the conclusion that appointments to the teaching post in pursuance to the advertisement nos. 17 of 2014 and 19 of 2015 were not in consonance with the statutory provisions, as the selection committee was constituted without taking approval of the Academic Council and held that constitution of the Selection Committee was illegal.

34. At this stage, it is relevant to notice that this aspect of the matter as to whether the Selection Committee was duly constituted or not had already been scrutinised by the Visitor vide order dated 11/03/2016 while deciding complaint made by one unsuccessful candidate namely Dr.

Abhay Krishna. In his complaint the complainant has also stated that the Selection Committee was constituted by the Vice Chancellor without referring the same to the Executive Council. He had further categorically stated that the Selection Committee was not constituted in terms of Section 25(2)(A)(iv)(a) of the Act, 2009.

35. The Visitor considered all these contentions and also statutory provisions and was of the considered view that:-

“In view of the aforesaid facts of the matter, there is no force in the three experts by the Visitor to the Selection Committee the composition of the Selection Committee had vitiated, Section 16(ii) of the Act provides that the teachers and the Librarian of the Rehabilitation University shall be appointed by the Executive Council on the recommendations of a Selection Committee, Section 25(2)(a) of the Act provides for the composition of the Selection Committee. Section 44(1) validates the decisions of the authorities of the Rehabilitation University even if there has been any defects etc. in the constitution of such authorities. ... There is, therefore, no force in the contrary contentions of the representationist Dr. Abhay Krishna.”

36. Undoubtedly, the Visitor is the highest authority of the University and once a decision has been rendered by the Visitor, that decision was binding on the University and in any view of the matter, the decision of the Visitor cannot be reviewed by any other authority subordinate to Visitor either by the General Body or the Vice Chancellor.

37. It is settled proposition of law that what cannot be done directly cannot be done indirectly. The order of the visitor was undoubtedly binding upon the respondent University, and only with a view to unsettle order of the visitor, the University resorted constituting a committee consisting of 2 former judges of the High Court, who in turn recorded a finding that the selection committee was not duly constituted, and the same was accepted by the University. The procedure adopted by the university is clearly illegal, arbitrary and malafide, done only with the intention to override the decision of the visitor. The order of the visitor was final and binding on the University, and it was not within the competence of the University to hold the order of the visitor to be illegal, arbitrary, or record any finding contrary to the said order. The findings recorded by the committee consisting of Retd. Judges were merely recommendatory, but the Executive Council of the University was bound to act in accordance with law, and it could not have approved the said findings contrary to the order of the visitor, and consequently the acceptance of the recommendations are clearly illegal and arbitrary. The manner in which the University has proceeded in the matter clearly indicates that to achieve their objectives, and to annul all the actions of the former Vice Chancellor, they chose not to follow the rules and basic principles which guide their actions.

38. Recommendations of the Inquiry Committee were again placed before the Executive Council which was duly considered and accepted the said recommendations in its 38th Meeting dated 19.04.2022. It was further stated that appointments made during the tenure of

former Vice Chancellor Sri Nishith Rai suffer from following illegalities :-

(a) Rules pertaining to reservation were not followed;

(b) Selection Committee was not constituted according to the rules;

(c) More persons were appointed than what was published in the advertisement.

(d) Ineligible candidates were selected only on the basis of interview.

39. It was further decided that persons who were not holding requisite qualifications at the relevant time be asked to submit their response and the said response be placed before the two members Committed consisting of a retired High Court Judge and subject Specialist and only then final decision would be taken regarding their selection.

40. Show cause notices were given to the petitioners on 22.04.2022, by the Vice Chancellor of the Dr. Shakuntala Misra National Rehabilitation University, Lucknow to show cause stating that appointments made during the tenure of former Vice Chancellor Sri Nishith Rai which were inquired into by the Committee consisting two retired High Court Judges, who submitted their report on 29.10.2021 indicating that the petitioners were not qualified for appointment. The infirmities noticed by the Enquiry Committee were informed to the various petitioners who were in turn asked to respond to the same within 15 days. Some of the petitioners responded to the notice while the others

had sought copies of relevant documents and also the entire report of the Enquiry Committee.

41. The response submitted to the show cause notice dated 22.04.2022 were considered by a committee consisting of Justice Harsh Kumar, retired High Court Judge as well as Subject Expert. After consideration of the response to the show cause notice submitted by the petitioners, the said Committee submitted its report on 09.06.2022, which has been placed before and considered by the Executive Council in its 39th Meeting held on 13.06.2022 and decided to accept the recommendations made by the said Enquiry Committee and a decision was taken to terminate the services of the petitioners. It was further resolved that order would be communicated by the Vice Chancellor of the University and accordingly selection of the petitioners has been cancelled by means of impugned order dated 06.07.2022.

42. The aforesaid order 06/07/2022 has been challenged by the petitioners on the following grounds :-

(a) Selection of the petitioners has been illegally cancelled after more than 7 years when admittedly there was no fault or mis-representation on the part of the petitioners seeking appointment.

(b) Copy of the enquiry report of the Committee was never provided to the petitioners, resulting in the orders having been passed in gross violation of principles of Natural Justice.

(c) No opportunity of personal hearing was given before passing the order dated 06.07.2022, and the proposed order

was never communicated to the petitioners, resulting in violation of principles of natural Justice.

(d) Once the Visitor has considered the entire matter and held the selections to be legally valid and proper it was not open for the respondent-University to set aside the selection of the petitioners on the same grounds.

(e) Re-visiting the entire selection process, in fact is reviewing the entire selections made on various posts which amounts to reviewing their previous order, the power of which is not clearly vested in the respondents.

(f) Forming a committee to consider the reply to the show cause notice is illegal and arbitrary. The essential decision making functions cannot be delegated.

(g) All the petitioners, in fact, are fully qualified and eligible to be appointed and by not looking into it objectively and in the right perspective, will lead to miscarriage of justice in termination of their services.

(h) The entire process is malafidely from the very start, as it was already predetermined to take action against the persons appointed by the former Vice Chancellor. Even the resolutions of the general body and exhibited council have stated this explicitly.

(i) The procedure adopted was illegal and arbitrary, neither were the Rules of 1999 followed nor the statutes of the University were followed rendering the entire process *void ab initio* and the impugned orders are liable to be set aside .

Violation of principles of natural justice:-

43. The submission made on behalf of petitioners that termination of services of petitioners could have been made only after following the procedure established by law, which in the present case was U.P. Government Servant (Discipline & Appeal) Rules, 1999, which has been duly adopted by the respondent-University. It is further submitted that apart from application of aforesaid Rules, the statute of the University itself provides procedure wherein in Statute 9.07, dismissal, removal or termination of services of teachers can be made in terms of Statute 9.04, after framing charges against the said teacher and giving him adequate opportunity of submitting response in his defence and being heard in person and calling for examining such witnesses as he may wish.

44. Even if Rules of 1999 were not followed, the respondents could have followed the provisions contained in the Statute 9.07. Testing the order of termination on the anvil of above provisions it is noticed that no charge sheet was ever given to the petitioners and only show cause notices were issued to them on two occasions i.e. on 21.1.2021 and 22.4.2022 where they had submitted reply, but again the copy of the inquiry report was never given to them. From the aforesaid, it is clear that in absence of charges being framed against the petitioners, they were unable to adequately defend themselves which is in gross violation of provisions of Statute 9.07 of the respondent-University.

45. It has also been urged that at no point of time were they informed of the consequences including cancellation of their selection or termination of their services.

46. Stand of the respondent-University that full opportunity was given before passing of the impugned order is unconvincing and it has not been denied that charge sheet was never given to the petitioners in the said process. Accordingly, this Court is of the considered view that by not following the mandate provided in Statute 9.07, the respondents have acted in most arbitrary and illegal manner and termination of services of petitioners is therefore not sustainable in law and deserves to be set aside.

47. During course of hearing, considering the arguments of the petitioner that copy of the enquiry reports were never submitted to the petitioners and only extracts of the said reports were quoted in the show cause notices given to the petitioners this Court has called upon the respondents to file the Enquiry Reports. In pursuance to the directions issued by this Court the respondents have placed the same on record by filing supplementary affidavit, after providing copies of the same to the petitioners. The law in this regard has been settled by Supreme Court in various cases some of which are as under:-

48. In the case of **Mahipal Singh Tomar v. State of U.P.**, (2013) 16 SCC 771 : (2014) 3 SCC (L&S) 610 : 2013 SCC OnLine SC 1135 at page 796 it has been held as under:-

“44. We shall now advert to the impugned orders. As analysis thereof shows that the High Court had mainly relied upon the fact-finding report prepared by the District Magistrate, referred to the provisions of the 1980 Act and held that the appellants' placement in

the particular colleges was contrary to law and they were responsible for such placement. The High Court noted that some of the appellants had been placed in the colleges which were not even advertised by the Commission and others were placed against the vacancies notified in earlier years. In the opinion of the High Court, the placement of the appellants was per se illegal and void. However, the record produced before this Court does not show the appellants' direct involvement in their placement in the particular colleges. That apart, the questions whether the appellants' placement in the particular colleges was contrary to the statute and whether their placement was subsequently changed for extraneous considerations could not have been decided without supplying each one of them copy of the inquiry report and without giving him/her an effective opportunity to controvert the findings recorded by the District Magistrate, who had prepared the report by looking at one side of the coin. He did not give opportunity to any of the appellants to represent his/her cause or explain his/her position. Not only this, he did not confront any of the appellants with the adverse material produced before him. Therefore, the report of the District Magistrate could not have been relied upon by the State Government for directing cancellation of the placement of the appellants in the particular colleges and the Director committed grave illegality by mandating the termination of their services.

45. The three judgments relied upon by the High Court for rejecting the appellants' contention on the issue of violation of the rule of audi alteram partem are clearly distinguishable. In all the cases, this Court had found that the appointments of the appellants were contrary to law and the constitutional code of equality. It was

also found that the appellants did not fulfil the conditions of eligibility. In the background of the factual matrix of those cases, this Court upheld the action taken by the employer to terminate the services of the appellants. On a factual plane, there is no similarity between the cases of the appellants and those relied upon by the High Court. Therefore, the principle that the court will not restore an illegal order could not have been invoked by the High Court for defeating the rights acquired by the appellants on the basis of their selection by the Commission.

46. In the result, the appeals are allowed. The impugned orders are set aside. The termination of the appellants' services is declared illegal and quashed. They shall be deemed to be continuing on the posts of Principals, subject to the following riders:

(i) If the management of the particular college has initiated any disciplinary action against any of the appellants for the misconduct committed during the course of service then this order shall not operate as a bar to the taking of final decision in the matter.

(ii) The Director shall be free to relocate or change the placement of the appellants in accordance with the relevant statutory provisions and the order passed by this Court shall not operate as an impediment in taking of appropriate action by the Director."

Undoubtedly, in the present case, only copy of extract of the inquiry report was supplied to the petitioners and they were never given entire report where the aspect with regard to constitution, terms of reference and the issues detailed by them have been discussed. All these matters were relevant to the petitioners for defending

themselves and also raising objections with regard to the procedure adopted by the said Committee.

49. Non supply of entire enquiry reports to the petitioners has clearly prejudiced their defence and consequently, this Court is of the considered view that proceedings were conducted in gross violation of principles of natural justice and hence on this count also the proceedings were arbitrary, illegal and liable to be quashed.

Whether the procedure followed for conducting enquiry can be sustained?

50. As already discussed above the Enquiry Committee of two former Judges of this Court was constituted who opined that the selection committee was not properly constituted and therefore it recommended cancellation of all the appointments made by the said selection committee. The said committee relied mainly upon the provisions of Section 25(2)(A)(iv)(a) of Act, 1999. The said recommendations were duly approved by the General Body of the respondent-University and a decision was taken to proceed against the teachers who lack educational qualification at the time of their selection.

51. In order to consider this aspect of the matter, show cause notice was given to the petitioners and response was sought from them with regard to their educational qualifications. The response of the teachers instead of being considered by the

Executive Council which was their appointing authority, was placed before another committee consisting of retired High Court Judge and a Subject Specialist and recommendations of said committee were again judged by the Executive Council, which proposed termination of services of petitioners and it was left to the Vice Chancellor to communicate the said order to the petitioners. The Vice Chancellor passed the impugned order cancelling their selection.

52. The procedure which has been followed is not prescribed in the Act of 1999 or in the Statute framed by the respondent-University which in fact provide for the procedure to be followed wherever the services of a teacher are to be removed/dismissed. Once a procedure has been duly adopted which provides for termination of services of teachers, then, the respondent-University was under mandate to follow the said procedure. Firstly, entire proceedings are de-horse the prescribed procedure and therefore same could not be validated or sustained. Secondly, it is noticed that to proceed against an employee is right of the employer whenever there are allegations of misconduct or breach of contract of employment. To make an enquiry into the matter and enquiry officer can be appointed, but after receiving the enquiry report the essential aspect of decision making cannot be delegated to any other authority. In the present case, response received to the show cause notice were directed to be placed before a Committee which consisted a former Judge of this Court and a Subject Specialist. They looked into the response as to whether the petitioners fulfilled all the qualifications prescribed and its recommendations were

placed before the Executive Council which had duly accepted the same. This delegation of power of looking into the response to the show cause notice, and affording personal hearing is essential feature of the enquiry conducted against a delinquent employee and such a procedure which has been followed in the present case is neither been provided in any Rule, Statute or Act, could not have been delegated to an outside agency. Needless to say, hearing is to be afforded before an authority who has to take a decision on the matter. In case hearing is done by one authority and the order is passed by another, the hearing in such a case becomes illusory and merely camouflage with regard to following the principles of natural justice. The hearing was afforded by the committee, while the decision was to be taken by the Executive Council before whom no hearing took place, and consequently the proceedings were held in violation of principles of natural justice. Even the procedure followed was arbitrary and not prescribed and accordingly entire proceedings are illegal and arbitrary and violative of natural justice and liable to be quashed on this ground alone.

53. The other ground which has been urged by the petitioners is that their recruitment was made in the year 2015 and they have been continuing on the said post for the last 7-8 years till a decision was taken by the respondent-University cancelling their selection. The first issue as to whether selections which have been made by a duly constituted Committee consisting of subject specialist from various fields and after examining the qualifications of the petitioners and recommendations have been duly accepted by the University and without there being

any additional material on record could the selections be cancelled? It was submitted that the entire matter could not have been reviewed by the University after such long lapse of time which resulted in the impugned order of cancellation of selection.

54. Further additional fact is that after their selection the petitioners completed more than one year in service their services were confirmed. It is in the case of the respondent-University that there were no complaints against the petitioners with regard to their work or any deficiency in their work was noticed as teacher in the respondent-University.

55. Once selections have been made by a duly constituted Committee as prescribed under the Rules made by the University Grants Commission and such recommendations were accepted by the University then in absence of any power, the University does not have power to review the appointments/selection, unless there are complaints with regard to defect or otherwise in their educational qualifications.

56. A perusal of the Act of 2009 also indicates that once selection has been made by a duly constituted selection committee then even if there is any lacunae, the same deserves to be ignored and the selections made are to be preserved and protected to that effect. Even Section 44 of the Act, 2009 provides that a Committee constituted by the University shall not be invalidated merely for the reason that General Body, Executive Council or any other body of the

University is not constituted or there is defect in its constitution or re-constitution. In all the matter which have been examined by this Court in the present bunch of writ petitions there is no allegation that any of the petitioners has suppressed material fact regarding their qualification or had given any forged document or degree at the time of their selection.

57. On the other hand the Selection Committee was duly constituted and its constitution in any case is saved by provision of section 44 of the Act of 2009. The allegations of the University with regard to selection of expert members also cannot be substantiated after this aspect was duly examined by the Visitor, who had rejected the allegations to the contrary. Merely because the said selections were made during the tenure of former Vice Chancellor, whose appointment itself was challenged and the appointments made during his regime were scrutinised, which indicates pre-determination on behalf of the respondent-University. Merely because the present administration of the University was adamant to inquiry into the appointments made during the regime of former Vice Chancellor against whom there were several allegations, cannot be main consideration for proceeding against the teachers appointed during the tenure of former Vice Chancellor.

58. Apart from the fact that non supply of Enquiry Reports, constitutes material illegality in conducting the proceedings against the petitioners. It was also noticed that the University had disclosed that the aspect pertaining to the selection of three experts to be nominated by the Visitor had already been examined by the Visitor on

the basis of a complaint made by one Dr. Abhay Krishna and the Visitor passed order dated 11.03.2016, where it was recorded that the Selection Committee has been properly constituted, and still the committee of judges to say to examine the said issue and recorded a finding contrary to the order passed by the visitor. The said Committee could not have made recommendations contrary to the order passed by the Visitor because at best it was exercising delegated function of authority of the University and was bound and as such was bound by the decision made by the Visitor.

59. This Court after examining various resolutions of the General Body and the Executive Council where it has been considered that all the appointments made under tenure of former Vice Chancellor required to scrutinised, which indicates mind set of the present administration who is running the affairs of the respondent-University. Conducting such an exercise after lapse of 6 to 7 years is clearly illegal and arbitrary despite the fact that there were no complaints against the appointment of the petitioners, and only reason disclosed in the resolutions of the general body and the executive Council is with regard to the procedure followed in appointing the selection committee, constituted for selection of teachers in 2014. In this regard it is relevant to consider the judgement of the Supreme Court.

60. In the case of **Md. Zamil Ahmed v. State of Bihar**, (2016) 12 SCC 342 : (2017) 1 SCC (L&S) 396 : 2016 SCC OnLine SC 416 at page 345 it has been held as under:-

“15. In these circumstances, we are of the view that there was no justification on the part of the State to wake up after the lapse of 15 years and terminate the services of the appellant on such ground. In any case, we are of the view that whether it was a conscious decision of the State to give appointment to the appellant as we have held above or a case of mistake on the part of the State in giving appointment to the appellant which now as per the State was contrary to the policy as held by the learned Single Judge, the State by their own conduct having condoned their lapse due to passage of time of 15 years, it was too late on the part of the State to have raised such ground for cancelling the appellant's appointment and terminating his services. It was more so because the appellant was not responsible for making any false declaration nor he suppressed any material fact for securing the appointment. The State was, therefore, not entitled to take advantage of their own mistake if they felt it to be so. The position would have been different if the appellant had committed some kind of fraud or manipulation or suppression of material fact for securing the appointment. As mentioned above such was not the case of the State.

61. In the case of **Vikas Pratap Singh v. State of Chhattisgarh**, (2013) 14 SCC 494 : (2013) 3 SCC (L&S) 100 : 2013 SCC OnLine SC 599 at page 502 following has been held:-

*“22. The pristine maxim of *fraus et jus nunquam cohabitant* (fraud and justice never dwell together) has never lost its temper over the centuries and it continues to dwell in spirit and body of*

service law jurisprudence. It is settled law that no legal right in respect of appointment to a said post vests in a candidate who has obtained the employment by fraud, mischief, misrepresentation or mala fide. (See **Vizianagaram Social Welfare Residential School Society v. M. Tripura Sundari Devi** [(1990) 3 SCC 655 : 1990 SCC (L&S) 520 : (1990) 14 ATC 766] , **S.P. Chengalvaraya Naidu v. Jagannath** [(1994) 1 SCC 1] and **Union of India v. M. Bhaskaran** [1995 Supp (4) SCC 100 : 1996 SCC (L&S) 162 : (1996) 32 ATC 94] .) It is also settled law that a person appointed erroneously on a post must not reap the benefits of wrongful appointment jeopardising the interests of the meritorious and worthy candidates. However, in cases where a wrongful or irregular appointment is made without any mistake on the part of the appointee and upon discovery of such error or irregularity the appointee is terminated, this Court has taken a sympathetic view in the light of various factors including bona fide of the candidate in such appointment and length of service of the candidate after such appointment (see **Vinodan T. v. University of Calicut** [(2002) 4 SCC 726 : 2002 SCC (L&S) 606] ; **State of U.P. v. Neeraj Awasthi** [(2006) 1 SCC 667 : 2006 SCC (L&S) 190]).”

62. While examining the said selections the respondent-University should have been careful and circumspect in their approach and should have followed the procedure and norms. The proceedings conducted by the respondent-University shows its overzealousness to annul the decisions of the former Vice Chancellor which is writ large in the manner they have acted against the petitioners which is not appreciated specially in an educational institution meant for higher learning which

also deals with special students who require much more care, attention and sensitivity. Subsequent to the appointment, the petitioners services were confirmed and after such a long time of 6-7 years the respondent university has initiated the proceedings is clearly illegal and arbitrary, and without there being any fresh material amounts to review of the selections made, which power is not vested either in the Act of 2009 of the statutes of the University and on this ground also the proceedings conducted by the respondent University and the impugned orders are illegal and arbitrary.

63. With regard to the application of principles of natural justice, the respondents have submitted that the very fact that the respondents did not fulfil the minimum eligibility qualifications for recruitment to various posts to which they were appointed, it would have been empty formality to give them due opportunity of hearing, and consequently submitted that even if there is some infraction of the principle of natural justice the same would not vitiate the impugned order of termination.

64. In order to appreciate the argument of the petitioner is imperative to look into the educational qualifications of the petitioners:-

(A) Writ A No. 4293/2022 (Dr Rajendra Kumar Srivastava Vs. State of U.P. and others)

(i) An advertisement was issued by the respondent University on 16/02/2015 inviting applications for

number of disciplines including for Professor of Computer Science and qualifications required by the candidate were mentioned at serial no.07 which were as follows:-

(a) qualifications as above i.e for the post of Associate Professor is applicable.

(b) Post PhD students and guiding PhD students

(c) minimum of 10 year teaching/research/industrial experience with at least 5 years shall be at the level of Associate Professor

or

minimum of 13 year experience in teaching/research/industry

(d) in case of research experience good academic record and books/research paper publication/PR/patents records shall be required as a deemed fit by the expert member of the selection committee.

(e) If the experience in industries considered, the same shall be at managerial level equivalent to associate professor with the active participation record in devising/designing, executing, analysing, quality control, innovating, training, technical books/research paper publication/IPR/patents etc as real fit by the expert member of the selection committee.

(ii) The required qualifications for the post of Associate Professor were provided at serial No. 18 of the said advertisement which are as follows:-

B-E/B-Tech and ME/M tech in relevant branch with 1st class or equivalent either in B-E/B-Tech or ME/M tech

Or

B-E/B-Tech and MCA with 1st class or equivalent in either B-E/B-Tech or MCA

Or

MCA with 1st class or equivalent with 2 years relevant experience

(iii). The qualifications of the petitioner are M.Sc in computer science, M.Sc Physics, MA Maths and PhD computer science. The allegation against the petitioner was that he was not qualified for being appointed on the post of Professor in computer science in as much as he was not holding a degree of MCA. The petitioner on the other, submitted that he was fully qualified in as much as he obtained a Masters degree in maths in 1999 and MSc in computer science in 2001 and as per the decision of the executive committee of AICTE dated 01/06/2016 MSc in computer science is a degree which is held to be equivalent to the degree of MCA. Sri Sudeep Seth Senior Advocate fairly submits that after 2016, when the AICTE has clarified that M.Sc Computer Science would be equivalent to MCA the petitioner would be eligible for appointment but not prior to the said date.

(iv). In the impugned order, the contention of the petitioner has been duly recorded but has been rejected by means of an cryptic order without assigning any reasons. The impugned order does not consider the contention raised by the petitioner, and it indicates that his contention was not even considered and in absence of any reasons it cannot be said that there was any application of mind by any authority while rejecting his contention.

(v). To consider whether the petitioner possessed relevant qualifications

for his appointment to the post of Professor in Computer Science and as to whether MSc in computer science is equivalent to MCA, it is noticed at the very outset that according to the professional body constituted for dealing in the special field has prescribed the norms which are to be followed by all the institutions. In its notification published on 01/06/2016 certain clarifications have been issued including the fact that MSc computer science is equivalent to MCA. The respondents do not dispute this fact stated that the said notification was issued in 2016 while the petitioner was appointed prior to the said date.

(vi). A perusal of the clarifications issued by the AICTE does not leave room for doubt about the equivalence of MCA with a M.Sc computer science. As it is only a clarification, it would relate back to date of initial prescription of the qualifications. Not only has the AICTE issued the clarification, but even prior the same The Indian Institute of Technology Madras recognised the said equivalence when they had published an advertisement for recruitment in the year 2013-2014. This aspect of the matter was also considered by the Supreme Court in the case of **Saurabh Pal Vs The Chancellor, Veer Bahadur and others** Appeal (Civil) 596 of 2008 decided on 22/01/2008

5) *The University which was a respondent in the writ petition filed by the 5th respondent, however, contended that both the appellants possessed the qualification prescribed by it in the recruitment advertisement and the qualification prescribed by it was in accordance with the AICTE Norms. The qualification prescribed in the advertisement was as follows: Lecturer: (For Engineering Branches) Essential:*

First Class Bachelors' Degree in appropriate branch of Engineering Technology.

Desirable: Master's degree in relevant branch.

The University submitted that "M.Sc. (Computer Science)" was treated as equivalent to 'MCA' and, therefore, the appellants were qualified for being appointed as a lecturer-MCA, .

6) The High Court relying on Table-E-2 of AICTE Norms held that the two appellants did not possess the requisite qualification and therefore, set aside their selection. Aggrieved by the same, the present appeal is filed.

7) We heard learned counsel for the appellants and learned counsel for the 5th respondent.

8) Table-E-2 issued by the AICTE when read with Note (2) under Table-E-2 clearly shows that the degree possessed by the appellants was also a requisite qualification for appointment as Lecturers in MCA. The Division Bench of High Court clearly mis-read Table E-2 of AICTE Norms as it failed to notice Note (2) to Table E-2. We are informed that the copy of Table E-2 produced by the 5th respondent in the writ petition was not complete and did not contain the Note. Be that as it may. We are satisfied that the appellants possessed the requisite qualification. As the decision of the High Court setting aside their appointments is erroneous, it is set aside and the challenge to the appointment of the appellants as Lecturers is rejected. Their appointment is upheld. The appeal is disposed of accordingly.

65. The above judgements clearly resolve the dispute that M.Sc. has been held

to be equivalent to M.Sc. Computer Science much prior to issuing of the clarification by the AICTE in 2016 as noticed by the Hon'ble Supreme Court. It indicates that the petitioner was fully eligible and qualified for being appointed on the post of Professor in Computer Science and fulfilled all the eligibility conditions in this regard. The respondents have acted in most illegal and arbitrary manner and did not even consider the contention of the petitioner when he responded to the show cause notice issued by the University.

66. The procedure adopted by the respondents, as well as the decision making process adopted by them where the personal hearing was given by the committee and the decision taken by the executive Council indicates that proper or opportunity of hearing was not given to the petitioners before passing of the impugned order of termination. This aspect of the matter would have been duly considered by the selection committee at the time of selection of the petitioner, and that is why an expert members of the panel is included as per the norms prescribed by the UGC, but the enquiry committee did not have any expert member and therefore could not appreciate the stand taken by the petitioner. It is in this regard the Supreme Court has also held in the case of **Basavaiah (Dr.) v. Dr. H.L. Ramesh, (2010) 8 SCC 372**

20. It is abundantly clear from the affidavit filed by the University that the Expert Committee had carefully examined and scrutinised the qualification, experience and published work of the appellants before selecting them for the posts of Readers in Sericulture. In our

considered opinion, the Division Bench was not justified in sitting in appeal over the unanimous recommendations of the Expert Committee consisting of five experts. The Expert Committee had in fact scrutinised the merits and demerits of each candidate including qualification and the equivalent published work and its recommendations were sent to the University for appointment which were accepted by the University.

21. It is the settled legal position that the courts have to show deference and consideration to the recommendation of an Expert Committee consisting of distinguished experts in the field. In the instant case, the experts had evaluated the qualification, experience and published work of the appellants and thereafter recommendations for their appointments were made. The Division Bench of the High Court ought not to have sat as an appellate court on the recommendations made by the country's leading experts in the field of Sericulture.

67. In light of the above, this Court comes to a conclusion that the petitioner was fully qualified for being appointed and did not lack any qualification as alleged, as such, the impugned order is rendered illegal and arbitrary and liable to be set aside.

68. Writ petition No. 4316 of 2022(Writ A) Vipin Kumar Pandey vs State of U.P. and others)

(i).The petitioner had applied for the post of Assistant Professor (English) and the only ground on which the services of the petitioner was terminated is that

while offering his candidature details given in regard to API score indicated that he did not have score of 300 as prescribed under the UGC Regulations. The allegation was that the petitioner claimed API score of 304.5 points under category III by awarding 50 points in category III sec IIIE (i) whereas a maximum of 30 points can be claimed under this section, and hence the petitioner came down to 284.5 which is less than the minimum required API score. Before the selection committee the petitioner submitted 4 more research papers all of which related to period prior to the issuance of advertisement. The selection committee being satisfied with the documents presented by the petitioner exceeded requirement of the API score, and consequently the petitioner was declared to be selected. The selection committee consisted of experts who after due consideration that the petitioner fulfils eligibility conditions selected him for the said post. Only contention raised by the respondents is that while filling up the application form, the petitioner had granted himself marks much more than permissible in the particular category. It could also not be disputed that the petitioner had produced some other papers authored prior to the date of advertisement for which he was entitled to marks, and after taking the same into consideration he had obtained more marks than were required, and hence there was no infirmity in his selection.

(ii). Sri Sudeep Seth Senior advocate has relied upon judgement of the Supreme Court in the case of show **Ashok Kumar Sonkar vs Union of India and others (2007) 4SCC 54** to canvases his submission that the candidate should possess all the qualifications on the date of the application. In case he does not possesses the qualifications on the last date

fixed for submission of applications he would not be entitled for due consideration for the said selection. In the present case, it is not the case of the respondents that the petitioner did not fulfil the eligibility conditions on the last date of the application inasmuch he had submitted 4 other papers authored by him which were prior to the cut off date. The facts in the case of Ashok Kumar Sonkar are clearly distinguishable from the facts of the present case. Merely cancelling his appointment on the ground that on the date of submission of the form by the petitioner his API score was less than what was required, it is not made out. The petitioner had produced articles authored by an prior to the date of advertisement which were duly accepted by the selection committee. The panel of experts constituting the selection committee are the best to judge the qualifications of a candidate, who after due examination found the petitioner was fully qualified to be selected. There are no allegations of malafidely or bias against the panel of experts, hence their decision could not have been substituted by another body lacking the minimum/basic expertise in the matter. This Court is of the considered view that the petitioner fulfilled all the qualifications and the decision of the respondents authorities to the contrary is arbitrary, illegal and is liable to be set-aside.

69. Writ A No. 4307 of 2022 (Dr Adya Shakti Rai vs State of U.P and others):

(i).The respondent University had published an advertisement on 17/02/2014 inviting applications for various posts including the post of Associate Professor in

Department of Visual Impairment, Faculty of Special Education. The petitioner was already working on the post of Lecture/Assistant Professor in the Department of Visual Impairment since 2009 in the respondent University and was desirous of being appointed on the post of Associate Professor and applied in pursuance of the aforesaid advertisement. Pursuant to her application, her candidature was duly examined by the selection committee appointed by the respondent University and also was interviewed, and other documents were duly examined. She was found qualified and hence duly selected. Recommendations of the selection committee were also approved by the Executive Council, and she was appointed on the post of Associate Professor in Department of Visual Impairment, Faculty of Special Education. The allegation against her is that she only had experience of 4 years and 7 months rather than 5 years which was required for appointment on the said post.

(ii). It has been submitted by the counsel for the petitioner that the said post was also advertised in 2010, and no one had applied for the said post, as they are very few people opting for the said course. Similarly, a fresh advertisement was published on 03/12/2012 where again no candidate applied for the said post. It is when again the advertisement was issued in 2014, that the petitioner who was already working on the post of lecturer/Assistant Professor applied. It also stated that as the respondent University did not have any faculty in the Department of visual impairment, and The Rehabilitation Council of India while giving approval for the said course noticed the shortcomings of the respondent University which to be removed immediately including

appointment of adequate faculty. In order to remove the shortcomings as pointed out by the Rehabilitation Council of India, the post was advertised, and the petitioner was duly appointed. It is stated that the respondent University when it was at the verge of its approval being withdrawn, had appointed the petitioner on the post of lecturer/Assistant Professor. It is stated that even otherwise, while working on the post of Assistant Professor, the petitioner would have been promoted to the post of Associate Professor in due course of time, had she not applied for appointment in 2014, and it is further submitted that now after 7 years working on the post of Associate Professor services cannot be terminated merely on account of the fact that at the time of appointment or experience for short by 5 months.

(iii). Sri Sudeep Seth, Senior Advocate fairly submitted that though the petitioner did not have the requisite experience at the time of the appointment, but in case fresh advertisement is issued then she would be eligible for applying and being appointed on the said post.

(iv). Considering the rival contentions, it is noticed that the petitioner was appointed on the post of Assistant Professor in Department of visual impairment in the faculty of special education in their 2009, and at completed 4 years and 7 months of the said post, when she applied for the post of Associate Professor in the year 2014. Even though at the time of her appointment there was shortfall of certain period of experience, but admittedly she has been working of the said post for last 7 years and there are no complaints against, and she even fulfils all the requisite qualifications as on date. This court has also considered the fact that on 2 previous occasions the respondent

University had advertised the post for appointment to the post of Associate Professor, but no applications were received, which clearly indicates that firstly, there were very few people taking up the said course and due to the paucity of individuals of the required academic qualifications, and secondly, that the approval given by the Rehabilitation Council of India was subject to appointment of adequate faculty. The respondent University more because of their immediate requirement appointed the petitioner on the post of Associate Professor appointed her to the said post after duly considering her experience. It is not a case that the petitioner has misrepresented, as even an application forms clearly indicates that she has experience of four years and seven months on the post of Assistant Professor .They cannot now be permitted to turn back and cancel the selection of the petitioner on the ground of lack of requisite experience. In the case of **Mohd. Abul Lash Vs. State of U.P. and others**, the Hon'ble Apex Court while considering a case where a person was not qualified at the time of appointment, but he acquired the requisite qualification later on, refused to interfere with the appointment and set aside the judgment and order dated 19.12.2014 passed by a Division Bench of this Court in Special Appeal (Defective) No.701 of 2014. In another case of **Nahar Singh and others Vs. State of U.P. and others and Savitri Devi and others Vs. State of U.P. and others**, Hon'ble Supreme Court in Civil Appeal No.3904 of 2013 held that once a person has continued in service for a long period, his continuance should not be disturbed. Following the aforesaid ratio of law laid down by Supreme Court a Division Bench of this Court in Special Appeal No.313 of 2015 had held that after

long continuance in service, the appointment of a person to his service should not be disturbed.

(v). Even otherwise, when the aspect of cancellation of appointment was being considered the relevant facts should have been taken into account that on the date of such consideration the petitioner fulfilled all the educational qualifications including teaching experience. The deficiency if any, stood fulfilled and not taking this into account the respondents have acted in the most arbitrary manner. It is in the aforesaid circumstances this Court is of the considered view that the impugned order cancelling her selection and terminating the services clearly illegal and arbitrary.

70. Writ A No.4310 of 2022 (Dr. Mrityunjay Mishra Vs. State of U.P. and others)

(i).The petitioner had applied in pursuance to the advertisement No.17/2013-14 for the post of Associate Professor, Department of Hearing Impairment, Faculty of Special Education. It has been submitted that even prior to appointment as Associate Professor in the Department of Hearing Impairment, Faculty of Special Education the petitioner was already working on the post of Lecturer in the respondent -University since 25.8.2009 and prior to his joining the respondent University in 2009, he was working as Course Coordinator, a post which is equivalent to the post of Lecturer, in Research Education and Audiology Development Society, which is a society registered under the Societies Registration Act, 1860 and recognized by Rehabilitation

Council of India from 15.9.2003 to 24.8.2009. According to the advertisement No.17 /2013-14 the essential qualification required for the post of is as under:-

i. Master's Degree in any discipline with not less than 50 % of marks

ii. M.Ed. Degree in specific disability area with not less than 55 % of marks or an equivalent grade of B in 7-point scale

or

An Equivalent degree from a foreign university recognized by R.C.I.

iii. Ph.D. in Education with research emphasis on Special Education.

iv. Should have completed at least 5 years of experience as Lecturer in specific disability area

v. Should have completed at least one general orientation course and two refresher courses in education/special education of UGC.

(ii). Desirable Additional Qualification:

a. Publication pertaining to special education in indexed journals and research experience.

(iii). It has been submitted by learned counsel for the petitioner that in her application form she had provided complete details of education/experience and also that she has five years' experience as Lecturer in Specific Disability area. He has further submitted that the respondent-university while issuing show cause notice to the petitioner was of the opinion that the experience of the petitioner with the respondent-university on the post of Lecturer was only 4 years and 7 months and on the said basis had formed an

opinion that the petitioner does not fulfil the requisite qualifications of having experience of 5 years as Lecturer in Specific Disability area. Petitioner's case is that she is fully eligible and qualified to be appointed on the post of Associate Professor in the Department of Hearing Impairment in as much as apart from working as Lecturer with the respondent - university for 4 years and 7 months she had worked as Post Coordinator in D.S.E. (Hearing Impairment) and B.Ed. (SEC) in the Research Education Audiology Development Society, Jaipur which is duly registered under the Societies Registration Act and recognized by the Rehabilitation Council of India. Her experience from 15.10.2003 to 24.8.2009 was supposed to be considered as according to clause 8.01 to 8.03 of the First Statute of 2009 it is provided that in the Faculty of Special Education the educational qualification would be what is prescribed by Rehabilitation Council of India. It has further been submitted that the petitioner had acquired Master Degree in 2008 and has two years' experience on the post of Associate Professor and even if the experience is counted from 2008, the petitioner would have had acquired five years' requisite qualification when she applied in pursuance of the Advertisement No.17/2013-14.

(iv). The candidature of the petitioner was duly considered by five member selection committee comprising of Vice Chancellor and its Chairman and three expert members from outside the university and one expert member from the university and in their collective wisdom the case of the petitioner was duly recommended for appointment on the post of Associate Professor in the Departmental of Hearing Impairment. The recommendations and

qualifications were further duly considered by the Executive Council of the respondent university and after recommendations the petitioner was found to be fully qualified and eligible, offer of appointment was made.

(v). Sri Sudeep Seth has fairly submitted that though the inquiry committee was constituted for scrutinising the qualification of the persons appointed in pursuance of the Advertisement No.17/2013-14, it was of the opinion that the petitioner did not have requisite qualification at the time when the selection was made but subsequently at the time when the selection was sought to be cancelled the petitioner did have the experience in as much as she has continuously worked on the post of Associate Professor in the university since the date of his appointment in 2015 till the date of passing of the impugned order in 2022. It is noticed that even if the case of the respondent-university is accepted the petitioner was duly selected and duly appointed by the selection committee and even if for a moment the arguments of the university are accepted then also the services of the petitioner should not have been terminated on the ground that he fell short of experience of 5 months considering the fact that he has already working on the post of Lecturer in the university since 2009.

71. The petitioners have completed more than 8 years of service after having been appointed as Associate Professor in the University. In the case of **Mohd. Abul Lash Vs. State of U.P. and others**, the Hon'ble Apex Court while considering a case where a person was not qualified at the time of appointment, but he acquired

the requisite qualification later on, refused to interfere with the appointment and set aside the judgment and order dated 19.12.2014 passed by a Division Bench of this Court in Special Appeal (Defective) No.701 of 2014. In another case of ***Nahar Singh and others Vs. State of U.P. and others and Savitri Devi and others Vs. State of U.P. and others***, Hon'ble Supreme Court in Civil Appeal No.3904 of 2013 held that once a person has continued in service for a long period, his continuance should not be disturbed. Following the aforesaid ratio of law laid down by Supreme Court a Division Bench of this Court in Special Appeal No.313 of 2015 had held that after long continuance in service, the appointment of a person to his service should not be disturbed.

72. Considering the aforesaid facts this Court is of the considered opinion that the period the petitioner worked i.e. from 2003 to 2009 as Post Coordinator in READS is required to be counted as his experience as Lecture. The panel of experts having examined the said issue found the petitioner to be possessing the requisite experience. It is not subsequently open for a body not having requisite qualification or expertise in the subject to test the validity of the decision taken by expert body/selection committee and also considering the fact that on the date of passing of the impugned order the petitioner has the requisite qualifications there was no occasion for the respondent-university to have terminated his services after 7 years of his working in the respondent university as Associate Professor.

73. Writ A No.4312 of 2022 (Avanish Chandra Mishra Vs. State of U.P. and others):

The petitioner had applied post of Professor in the Department of history pursuant to the advertisement dated 17/02/2014. The essential qualification criteria of having completed minimum 10 years of teaching experience in university/college, and/or experience in research at the university/national level institutions/industries, including experience of guiding candidates for research at doctoral level. The petitioner submitted that he has worked on the post of Associate Professor from 01/01/2004 till 15/01/2014 which is for a period of more than 10 years at Jagatguru Rambadrachara Handicapped University, Chitrakoot on permanent basis. In this regard he fulfilled all the minimum qualifications. The controversy in the present case is with regard to the fact that while working as Associate Professor in the Jagatguru Rambadrachara Handicapped University, Chitrakoot the petitioner was also given additional charge for the post of Registrar. The respondent university has cancelled the appointment of the petitioner on the ground that when the petitioner worked on the post of Registrar, he could not have been involved in teaching and the period has worked as registrar has been deducted from his teaching experience. The petitioner submitted that only additional charge of the Registrar was given to him along with his teaching assignment which continued without any break. There is no material with the respondent university to indicate as to whether during this period the petitioner functioned as it wholetime registrar or was not involved in any teaching assignment. It is noticed that mainly on the basis of assumption, that while discharging his duties as registrar the petitioner would not have been involved in teaching, the experience so obtained on the said post has been reduced. In absence of any material and considering the fact that

the petitioner was only discharging the functions of Registrar in addition to his teaching assignment as Assistant Professor, it cannot be said that during the period he was only discharging the duties of the registrar, so that his teaching experience cannot be counted. In this regard the contention of the petitioner has force and the arguments to the contrary accordingly rejected.

74. The 2nd ground for cancellation of the appointment is with regard to the publication of the research papers. In the advertisement of 2014 issued by the respondent university the qualifications required for the post of Professor in history was that a candidate should be “an eminent scholar with Ph.D qualifications in the concerned/Allied/relevant disciplines and published work of high-quality, actively engaged in research with evidence of published work with minimum of 10 publications as books and/or research/policy papers”. The petitioner in his application form had claim to have published 8 research papers and authored 3 books. It is stated out of the 8 research papers 5 were already published and the remaining 3 were accepted for publication. The petitioner had mentioned that 2 books were already published and 1 book had been accepted for publication. At the time when the petitioner appeared for verification of documents the research papers and the book which had been accepted for publication had in fact been published and the proof of the same was produced before the selection committee. The petitioner had also submitted the proof with regard to the acceptance for publication along with the application form. He submitted that even if the papers are accepted for publication, the same is

adequate proof of publication as per the norms of the University Grants commission. According to the guidelines for part-time research associate issued by the University Grants commission it is provided

“(a) if yes, please indicate the number of papers published/accepted in standard referred journals (i) Indian (ii) foreign (a list of research papers published – accepted for publication should be attached. If, for e-publication, the title, names of all authors, name of journal, volume, number, year and pages. Enclose copies of papers and accepted papers. Photo copy of letter of acceptance from and it should be enclosed for paper accepted for publication.”

75. It is seen that even according to the University Grants Commission if the research papers have been accepted for publication the same would be counted towards the research papers and due weightage has to be given to the same. In the present case 3 research papers had been accepted for publication, and consequently the same were to be counted towards the published works of the candidate. The respondents, not considering this aspect of the matter have acted arbitrarily and contrary to the guidelines issued by the University Grants commission and even otherwise the perusal of the impugned order does not contain any reason and it is not known whether this aspect was even taken account of either by the committee or by the Executive Council. The research papers authored by the petitioner which have been accepted for publication were required to be considered, which were duly taken into account by the selection

committee but arbitrarily not considered by the inquiry committee and consequently there was no infirmity/deficiency in the qualification of the petitioner in this regard.

76. It has further been contended that even the API score has been wrongly calculated by the respondent university leading to cancellation of his appointment. The petitioner has stated that he has an API score of 469.5 which is more than the required API score. The details of publications have been enclosed by the petitioner which clearly indicate his API score. The selection committee has duly looked into the API score of the petitioner and was satisfied that the same was more than the minimum required to score as per the University Grants commission norms and consequently he was held to be selected. The respondents have not indicated in what manner the API score of the petitioner is below the minimum required. Considering the fact that API score of the petitioner is more than the minimum required, the finding to the contrary recorded by the respondents is clearly illegal and arbitrary.

77. From the aforesaid discussions it is clear that the petitioner was fully qualified, his qualifications were duly looked into by the selection committee recommended his candidature for appointment to the post of Professor in History. There is no reason for a review of his qualifications after a period of 7 years, in absence of any allegations of fraud and misconduct have been having been committed by the petitioner, the cancellation of his selection is clearly illegal and arbitrary and liable to be set aside.

78. The petitioners have assailed the order of termination on the ground that there was violation of principles of natural justice, while the respondent university on the other hand have submitted that as the petitioners do not possess the minimum eligibility qualifications and hence no purpose would have been served by giving an opportunity for hearing. Having duly considered the rival contentions this Court is of the considered view that it is only after giving an opportunity of hearing that the decision can be arrived at as to whether the petitioners fulfilled all the qualifications or not. By declaring that they do not fulfil the qualifications, would amount to prejudging the issue which is not permissible. In the case of **Nisha Devi v. State of H.P., (2014) 16 SCC 392** the Supreme Court held:-

5. Trite though it is, we may yet again reiterate that the principle of audi alteram partem admits of no exception, and demands to be adhered to in all circumstances. In other words, before arriving at any decision which has serious implications and consequences to any person, such person must be heard in his defence. We find that the High Court did not notice the violation and infraction of this salutary principle of law. Accordingly, on this short ground, the impugned judgments and orders require to be set aside, and are so done. The matter is remanded back to the Divisional Commissioner for taking a fresh decision after giving due notice to the appellant and affording her an opportunity of being heard. The Divisional Magistrate, Kullu, shall complete the proceedings expeditiously, and not later than six months from the date on which a copy of this order is served on him."

79. As we have already discussed the individual cases and this Court is of the considered view that all the petitioners are duly qualified and their services could not be terminated. It was mandatory for the respondents to have followed the proper procedure and the rules and to have given them proper opportunity of hearing before terminating their services. As stated by the Supreme Court in the cases referred to above the principle of natural justice do not have any exceptions, and hence, in the present case also proper opportunity of hearing should have been given, and the procedure prescribed should have been followed. It is only where without any inquiry and from bare perusal of the record, it is abundantly apparent that a person does not hold qualifications then in those rare cases the applicability of the principles of natural justice may be dispensed with but where inquiry has to be conducted to determine the issue and it is not apparent from bare perusal of the records as to whether the candidate fulfils the qualifications and the matter is debatable then no order should be passed without giving due opportunity of hearing to the concerned person. In the present case, after examining the individual cases, and also considering the fact that the petitioners have been permitted to continue for 7 years, it cannot be said that principles of natural justice could have been given a go-bye and the arguments of the respondents in this regard are bereft of any reasons and are accordingly rejected. As we have already discussed neither was the procedure followed in as much as neither the Rules of 1999 were followed nor the procedure prescribed in the statutes 9.07 was followed, but a new procedure was devised which is not prescribed anywhere nor was followed. Copy of the enquiry report was not given to the petitioners, and the

authority which finally decided the question regarding the eligibility qualifications never given them an opportunity of hearing, and consequently we have no hesitation in holding that the entire procedure was illegal and arbitrary and in clear violation of principles of natural justice.

80. This Court having looked into the educational qualifications and the eligibility criteria required for appointment of the petitioners for various posts, is of the considered view that there is no deficiency in their educational qualifications or experience coupled with the fact that all these facts were duly inquired into by the expert panel of the selection committee who after being satisfied recommended the case of the petitioners for appointment. There is no allegations against the selection committee of malafide, or of not following the procedures etc. The recommendations of selection committee were duly considered and approved by the Executive Council of the respondent university and subsequently appointment letters were issued. After one year of the working they were confirmed on their respective posts. At this point also the respondents would have looked into all these matters. In the meanwhile, mainly because there were certain allegations against the former Vice Chancellor, all the appointments made under his regime were sought to be scrutinised after a period of 7 years. Mainly because the petitioners were appointed during the period of particular Vice Chancellor, and there were certain allegations against him, cannot itself lead to any conclusion that the appointment made under his regime were illegal and arbitrary. Such a sword of Damocles, that an appointment can be cancelled anytime,

cannot be left hanging at the head of the selected candidates in any institution during their entire tenure. Once an appointment is duly made, then in case there is any shortcomings in the said selection which is of such a nature that the same cannot be condoned, action has to be taken expeditiously soon after the said selections is made in accordance with law. In the present case, there is no allegation that the petitioners had misrepresented about their educational qualifications or were somehow responsible for getting themselves appointed. In absence of any mistake or misrepresentation having been committed by the petitioners, whether the services can be terminated after long period of seven years after the due selection, is a prime issue before this Court in the present writ petitions.

81. To answer this question it would be relevant to go through the judgement of the Supreme Court in the case **Vikas Pratap Singh v. State of Chhattisgarh**, (2013) 14 SCC 494 which has held as under:-

“22. *The pristine maxim of fraud et jus nunquam cohabitant (fraud and justice never dwell together) has never lost its temper over the centuries and it continues to dwell in spirit and body of service law jurisprudence. It is settled law that no legal right in respect of appointment to a said post vests in a candidate who has obtained the employment by fraud, mischief, misrepresentation or mala fide. (See Vizianagaram Social Welfare Residential School Society v. M. Tripura Sundari Devi [(1990) 3 SCC 655 : 1990 SCC (L&S) 520 : (1990) 14 ATC 766] , S.P. Chengalvaraya*

Naidu v. Jagannath [(1994) 1 SCC 1] and Union of India v. M. Bhaskaran [1995 Supp (4) SCC 100 : 1996 SCC (L&S) 162 : (1996) 32 ATC 94] .) It is also settled law that a person appointed erroneously on a post must not reap the benefits of wrongful appointment jeopardising the interests of the meritorious and worthy candidates. However, in cases where a wrongful or irregular appointment is made without any mistake on the part of the appointee and upon discovery of such error or irregularity the appointee is terminated, this Court has taken a sympathetic view in the light of various factors including bona fide of the candidate in such appointment and length of service of the candidate after such appointment (see Vinodan T. v. University of Calicut [(2002) 4 SCC 726 : 2002 SCC (L&S) 606] ; State of U.P. v. Neeraj Awasthi [(2006) 1 SCC 667 : 2006 SCC (L&S) 190]).

23. In *Girjesh Shrivastava v. State of M.P [(2010) 10 SCC 707 : (2011) 1 SCC (L&S) 192]* , the High Court had invalidated the rule prescribing selection procedure which awarded grace marks of 25 per cent and age relaxation to the candidates with three years' long non-formal teaching experiences as a consequence of which several candidates appointed as teachers at the formal education institutions under the said rule stood ousted. This Court while concurring with the observations made by the High Court kept in view that upon rectification of irregularities in appointment after a considerable length of time an order for cancellation of appointment would severely affect economic security of a number of candidates and observed as follows: (SCC p. 714, para 31)

“31. ... *Most of them were earlier teaching in non-formal education centres,*

from where they had resigned to apply in response to the advertisement. They had left their previous employment in view of the fact that for their three-year long teaching experiences, the interview process in the present selection was awarding them grace marks of 25%. It had also given them a relaxation of 8 years with respect to their age. Now, if they lose their jobs as a result of the High Court's order, they would be effectively unemployed as they cannot even revert to their earlier jobs in the non-formal education centres, which have been abolished since then. This would severely affect the economic security of many families. Most of them are between the age group of 35-45 years, and the prospects for them of finding another job are rather dim. Some of them were in fact awaiting their salary rise at the time of quashing of their appointment by the High Court."

Therefore, mindful of the aforesaid circumstances this Court directed non-ouster of the candidates appointed under the invalidated rule.

24. In *Union of India v. Narendra Singh* [(2008) 2 SCC 750 : (2008) 1 SCC (L&S) 547] this Court considered the age of the employee who was erroneously promoted and the duration of his service on the promoted post and the factor of retiring from service on attaining the age of superannuation and observed as follows: (SCC p. 758, paras 35-36)

"35. The last prayer on behalf of the respondent, however, needs to be sympathetically considered. The respondent is holding the post of Senior Accountant (Functional) since last seventeen years. He is on the verge of retirement, so much so that only few days have remained. He will be reaching the age of superannuation by the end of this month

i.e. 31-12-2007. In our view, therefore, it would not be appropriate now to revert the respondent to the post of Accountant for very short period. We, therefore, direct the appellants to continue the respondent as Senior Accountant (Functional) till he reaches the age of superannuation i.e. up to 31-12-2007. At the same time, we hold that since the action of the authorities was in accordance with statutory rules, an order passed by the Deputy Accountant General cancelling promotion of the respondent and reverting him to his substantive post of Accountant was legal and valid and the respondent could not have been promoted as Senior Accountant, he would be deemed to have retired as Accountant and not as Senior Accountant (Functional) and his pensionary and retiral benefits would be fixed accordingly by treating him as Accountant all throughout.

36. For the foregoing reasons, the appeal is partly allowed. Though the respondent is allowed to continue on the post of Senior Accountant (Functional) till he reaches the age of retirement i.e. 31-12-2007 and salary paid to him in that capacity will not be recovered, his retiral benefits will be fixed not as Senior Accountant (Functional) but as Accountant. In the facts and circumstances of case, there shall be no order as to costs."

25. This Court in *Gujarat State Dy. Executive Engineers' Assn. v. State of Gujarat* [1994 Supp (2) SCC 591 : 1994 SCC (L&S) 1159 : (1994) 28 ATC 78] although recorded a finding that appointments given under the "wait list" were not in accordance with law but refused to set aside such appointments in view of length of service (five years and more).

26. In *Buddhi Nath Chaudhary v. Abahi Kumar* [(2001) 3 SCC 328 : 2001

SCC (L&S) 589 : (2001) 2 SCR 18] even though the appointments were held to be improper, this Court did not disturb the appointments on the ground that the incumbents had worked for several years and had gained experience and observed: (SCC p. 331, para 6)

“6. ... We have extended equitable considerations to such selected candidates who have worked in the post for a long period....”

(See M.S. Mudhol v. S.D. Halegkar [(1993) 3 SCC 591 : 1993 SCC (L&S) 986 : (1993) 25 ATC 91 : (1993) 2 LLJ 1159] and Tridip Kumar Dingal v. State of W.B. [(2009) 1 SCC 768 : (2009) 2 SCC (L&S) 119])

27. Admittedly, in the instant case the error committed by the respondent Board in the matter of evaluation of the answer scripts could not be attributed to the appellants as they have neither been found to have committed any fraud or misrepresentation in being appointed qua the first merit list nor has the preparation of the erroneous model answer key or the specious result contributed to them. Had the contrary been the case, it would have justified their ouster upon re-evaluation and deprived them of any sympathy from this Court irrespective of their length of service.

28. In our considered view, the appellants have successfully undergone training and are efficiently serving the respondent State for more than three years and undoubtedly their termination would not only impinge upon the economic security of the appellants and their dependants but also adversely affect their careers. This would be highly unjust and grossly unfair to the appellants who are innocent appointees of an erroneous

evaluation of the answer scripts. However, their continuation in service should neither give any unfair advantage to the appellants nor cause undue prejudice to the candidates selected qua the revised merit list.

29. Accordingly, we direct the respondent State to appoint the appellants in the revised merit list placing them at the bottom of the said list. The candidates who have crossed the minimum statutory age for appointment shall be accommodated with suitable age relaxation.

30. We clarify that their appointment shall for all intents and purpose be fresh appointment which would not entitle the appellants to any back wages, seniority or any other benefit based on their earlier appointment.

31. The order passed by the High Court shall stand modified to the above extent. Appeals disposed of. There shall be no order as to costs.”

82. Applying the principles laid down by the Supreme Court in the case of **Vikas Pratap Singh (supra)** to the facts of the present case this Court of the considered opinion that after permitting a person to continue in service for a long time, the selection cannot be cancelled, or services cannot be terminated due to some infirmities in the selection, and accordingly the case of the petitioners are fully covered by the judgement of the Supreme Court as discussed above.

83. In view of the above, the writ petitions stand **allowed**. The impugned orders dated 06.07.2022 with respect to all the petitioners challenged in all the writ

petitions, forming part of the bunch, are set aside. The respondent University is directed to reinstate the petitioners forthwith. Considering the fact that they have been working for the last 6 to 7 years and the orders of termination have been held to be illegal and arbitrary, they are entitled to all consequential benefits including the back wages from the date of termination of their services.

**(2023) 5 ILRA 1767
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2023**

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Second Appeal No. 795 of 2011

Shanti Swaroop & Ors. ...Appellants
Versus
Onkar Prasad Deceased & Ors. ...Respondents

Counsel for the Appellants:

Sri Vinod Sinha, Sri Arun Kumar Sharma,
Sri Mahesh Sharma, Sri Pradeep Kumar Rai

Counsel for the Respondents:

Sri Sanjali Kr. Dubey, Sri Pramod Kumar Dwivedi, Sri Sanjay Kumar Dubey

**Civil Law- The Limitation Act,1963-Article 59& 113- Article 59 of the Limitation Act is not applicable in cases of testamentary disposition and it is Article 113 which is applicable in such cases.
(Para 26)**

Original Suit was filed within three years of the death of the testator. The Will of testator excluded the plaintiff and the cause of action to institute a suit for cancellation of Will did not accrue in favour of plaintiff till the death of the

testator-The rights of the plaintiff in the suit property were for the first time invaded by the defendants when they got their name mutated in the revenue records on the basis of the Will of the testator- If the plaintiff appellant had instituted a suit for cancellation of Will during the lifetime of the testator himself, a document which could have been revoked by Brij Lal, the said suit would have been a ridiculous- It is unfortunate that the trial court and the lower appellate court have non-suited the plaintiff for not having filed a ridiculous suit. (Para 29 & 35)

The judgments and decrees of the courts below are contrary to law and liable to be set-aside. (E-15)

List of Cases cited:

1. Vundavalli Ratna Manikyam & anr.Vs VSP.P.R.N. Prasada Rao 2020 (3) SCC 289
2. Janki Vashdeo Bhojwani & anr. Vs Indusind Bank Ltd. and ors.(AIR 2005 SC 439)
3. Bondar Singh & ors.Vs Nihal Singh & ors.2003 (4) SCC 161
4. Shri D.M. Deshpande & ors.Vs Shri Janardhan Kashinath Kadam 1998 (8) SC 39
5. Rajasthan St.TPT Corpn. & anr.Vs Bajrang Lal (2014) AIR SCW 2058
6. Thakur Kishan Singh (dead) Vs Arvind Kumar AIR (1995) Supreme Court 73
7. Mathai Samuel & ors.Vs Eapen Eapen (dead) by Lrs. & ors.AIR (2013) SC 532
8. Hubert P. James Vs Gulam Hussain Pakseem AIR (1949) Privy Council 151
9. Badri Vs Niadar and Umrao Kunwar & anr.(1915) XXXVII ILR 422 (Allahabad Series)
10. Mst. Bolo Vs Mst. Koklan AIR (1930) Privy Council 270

11. Annamalai Chettiar Vs A.M.K.C.T. Muthukaruppan Chettiar AIR(1931) Privy Council 9

12. Mst. Rukhmabai Vs Lala Laxminarayan AIR (1960) Supreme Court 335

13. Meda Bibi Vs Imaman Bibi & ors.1884 (6) ILR 207 (Allahabad Series) (Full Bench)

14. Ibad Ali Vs Sajid Ali & ors.1895 ILR 23 P.C

15. Firoz & ors.Vs Sultan Surkhru AIR (1926) Lahore 635

16. Raj Kumar Jain & ors.Vs Smt. Jagwati Devi & ors.AIR (1980) Allahabad 225

17. Rambhajan Kunwar & ors.Vs Gurcharan Kunwar reported in 1905 ILR 27 (Allahabad Series) 14

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

1. This is a plaintiff's second appeal challenging the judgment and decree dated 20.11.1979 passed by the II- Additional Munsif, Hathras, i.e., the Trial Court dismissing Original Suit No. 13 of 1978 as well as against the judgment and decree dated 6.9.2011 passed by the District Judge, Hathras, i.e., the lower appellate court dismissing Civil Appeal No. 23 of 1980 filed against the decree of the trial court.

2. The facts relevant for the present Second Appeal are that Brij Lal, who was the common ancestor of the plaintiff and the **defendants**, was recorded as Bhumidhar of Plot No. 174-Aa (area 24-6-10) which shall hereinafter in short be referred as 'the suit property'. Brij Lal had four sons, namely, Nandan Lal, Babu Lal, Shanti Swaroop (plaintiff) and Onkar (**defendant** / respondent no.1). It is the common case of the parties that Nandan Lal renounced the world and his whereabouts were not known and Babu Lal

died issueless before Brij Lal. Omkar, i.e., **defendant** no. 1 had five sons, namely, Kamlesh, Hridesh, Janki Prasad, Bhagwati Prasad and Lalta Prasad who are respondent nos. 2 to 6 in the present appeal and were **defendant** nos. 2 to 6 in the trial court. The **defendants** claim that Brij Lal executed a registered Will dated 05.08.1972 bequeathing all his movable and immovable properties, including the suit property, to **defendants**/respondent nos. 2 to 6. Hoti Lal Shrama and Shobha Ram were the attesting witnesses of the aforesaid Will. Brij Lal died on 05.11.1976. After the death of Brij Lal, the **defendant** nos. 2 to 6 got their names mutated in the revenue records on the basis of the Will dated 05.11.1976. The plaintiff instituted Original Suit No. 13 of 1978 praying for cancellation of Will dated 05.08.1972 pleading that the Will was a forged document and thus void. Alternatively, the plaintiff also pleaded that the suit property was ancestral property and had devolved on Brij Lal from his father and, therefore, under the U.P. Tenancy Act, 1939 the plaintiff and **defendant** no. 1 were co-tenants of the suit property along with Brij Lal and remained co-tenants under the U.P. Zamindari Abolition and Land Reforms Act, 1950 and, therefore, the plaintiff had 1/3 share in the suit property and the Will regarding his 1/3 share in the suit property was void. The case of the plaintiff is that he came to know about the Will from the Gram Pradhan of the village only six months before the institution of the suit and the suit was within limitation as the cause of action for filing the suit arose when the plaintiff came to know about the Will i.e., six months before the date of filing the suit. The suit was registered in the trial court on 04.01.1978.

3. The **defendants** filed their written statement denying the averments made in

the plaintiff and stated that the Will was executed by Brij Lal out of his free will and volition and that Brij Lal was the sole tenant of the suit property. In their written statement, the **defendants** admitted that Brij Lal had died on 05.11.1976 but denied the averments made regarding the date on which the cause of action for filing the suit arose and stated that the plaintiff knew about the execution of the Will even before the death of Brij Lal. On the aforesaid pleadings, the **defendants** pleaded that the suit was liable to be dismissed on merits as well as on the ground that it was barred by limitation.

4. The issues framed by the trial court and relevant for the present second appeal are as to whether the Will was a forged document and was not executed by Brij Lal, whether Brij Lal was the sole tenant of the suit property and had the right to execute the Will dated 05.08.1972 and the relief to which the plaintiffs were entitled? It is relevant to note that no issue regarding limitation was framed by the trial court in Original Suit No. 13 of 1978.

5. The trial court vide its judgment and decree dated 20.11.1979 dismissed Original Suit No. 13 of 1978. The trial court after holding that Brij Lal was the sole tenant of the suit property and after considering the testimony of Shobha Ram, the attesting witness of the Will and the fact that the Will was a registered document, held that the plaintiff had failed to prove that the Will was a forged document. The trial court held that the plaintiff knew about the execution of the Will from before the date stated by the plaintiff in his plaint and as the suit was not filed within three years from the date the plaintiff came to know about the Will, the suit was barred by Article 59 of the Limitation Act, 1963.

Consequently, the trial court held that the plaintiff was not entitled to any relief.

6. Aggrieved, the plaintiff filed Civil Appeal No. 23 of 1980 which was allowed by the lower appellate court vide its judgment and decree dated 21.09.1983. The lower appellate court held that the plaintiff had 1/3 share in the suit property as he was a co-tenant of the same along with Brij Lal and **defendant** no. 1. In its judgment dated 21.09.1983, the lower appellate court after noticing the fact that the original Will had not been filed in the trial court till the date Shobha Ram, the attesting witness, testified to the execution of the Will, held that the testimony of Shobha Ram cannot be considered to decide the issue regarding the due execution of the Will and, therefore, the due execution of the Will dated 05.08.1972 was not proved. Consequently, the lower appellate court allowed Civil Appeal No. 23 of 1980, set-aside the judgment and decree of the trial court, decreed Original Suit No. 13 of 1978 and cancelled the Will dated 05.08.1972.

7. Aggrieved by the judgment and decree passed by the lower appellate court, the **defendants** filed Second Appeal No. 2281 of 1983 under Section 100 of the Code of Civil Procedure which was dismissed by this Court vide its judgment and order dated 06.02.2006.

8. At this stage, it would be relevant to note that the findings of the trial court that the suit was barred by Article 59 of the Limitation Act was not specifically reversed either by the lower appellate court or by this Court in Second Appeal No. 2281 of 1983.

9. Aggrieved by the judgment and order dated 06.02.2006 passed by this

Court dismissing Second Appeal No. 2281 of 1983, the **defendants** filed Special Leave Petition (Civil) No. 10058 of 2006 before the Supreme Court which was subsequently registered as Civil Appeal No. 2815 of 2008. The aforesaid civil appeal was allowed by the Supreme Court vide its judgment and order dated 16.04.2008 and the case was remanded back to the first appellate court to pass orders on the issue as to whether Original Suit No. 13 of 1978 was barred by time. In its order dated 16.04.2008, the Supreme Court held that because the trial court had dismissed the suit also on grounds of limitation and the said findings had not been reversed by the first and the second appellate court, therefore, the suit continued to remain time-barred. In its order dated 16.4.2008, the Supreme Court further directed that if the question of limitation was decided in favour of plaintiff, the other findings recorded by the lower appellate court in its judgment dated 21.09.1983 shall stand and shall not be disturbed. The relevant portion of the order dated 16.4.2008 passed by the Supreme Court is reproduced below : -

"22. The reasoning behind the said proposition is that certain questions relating to the jurisdiction of a Court, including limitation, goes to the very root of the Court's jurisdiction to entertain and decide a matter, as otherwise, the decision rendered without jurisdiction will be a nullity. However, we are not required to elaborate on the said proposition, inasmuch as, in the instant case such a plea had been raised and decided by the Trial Court but was not reversed by the First Appellate Court or the High Court while reversing the decision of the Trial Court on the issues framed in the suit. We, therefore, have no hesitation in setting aside the judgment and decree of the High Court and

*to remand the suit to the First Appellate Court to decide the limited question as to whether the suit was barred by limitation as found by the Trial Court. Needless to say, if the suit is found to be so barred, the appeal is to be dismissed. **If the suit is not found to be time-barred, the decision of the First Appellate Court on the other issues shall not be disturbed.**"*

(Emphasis added)

10. After remand by the Supreme Court, Civil Appeal No. 23 of 1980 was restored to its original number before the lower appellate court and the lower appellate court vide its judgment and order dated 06.09.2011 dismissed Civil Appeal No. 23 of 1980 holding that Original Suit No. 13 of 1978 was barred by time. The lower appellate court, relying on the testimony of **defendant** no. 1, rejected the plea of the plaintiff that he came to know about the Will six months before the institution of the suit and held that the plaintiff came to know about the Will 3 to 4 days after its execution when the testator, i.e., Brij Lal told him about the Will and as the suit was filed three years after the plaintiff came to know about the Will, the suit was barred by limitation.

11. Hence, the present second appeal.

12. The appeal was heard as fresh case on 26.09.2011 on which date this Court observed that the only question involved in the present appeal was as to from which date the limitation for filing the suit would run, i.e., whether from the date of the execution of the Will or the date of the knowledge of the Will or the date of the death of the executant. However, the appeal was not admitted for hearing on the aforesaid date. On 21.11.2022, this Court observed that ends of justice would be

served if the appeal was decided finally at the admission stage itself by framing substantial question of law on the next date fixed. On 21.02.2023, when the appeal was called out for hearing, this Court observed that the substantial question involved in the present appeal was evident from the observations of the Court in its order dated 26.09.2011 and with the consent of the counsel for the parties, proceeded to frame the substantial question on 21.02.2023 and heard the appeal on the substantial question of law on the same date. The appeal was admitted on 21.2.2023 itself and the following substantial question of law was framed :-

"Whether Original Suit No. 13 of 1978 for cancellation of Will dated 05.08.1972 was barred by limitation in light of Article 59 of the Limitation Act, 1963?"

13. The parties had notice of the substantial question of law on which the appeal was to be argued and the case was heard on the aforesaid substantial question of law on the same date.

14. It was argued by the counsel for the appellant that by virtue of Article 113 of the Limitation Act, 1963, the limitation to file a suit for cancellation of Will starts to run from the date on which the right to sue accrues and the right to sue for cancellation of Will will accrue only on the death of the testator. It was argued that Article 59 of the Limitation Act does not apply on suits for cancellation of Will and the courts below have wrongly held the suit to be barred by limitation because of Article 59 of the Limitation Act, 1963. It was argued that admittedly Brij Lal died on 5.11.1976 and the suit was filed within three years from the date of death of the testator, therefore,

the suit was within limitation. In support of his contention, the counsel for the appellant has relied on the judgment of the Supreme Court reported in ***Vundavalli Ratna Manikyam and Anr. vs. V.P.R.N. Prasada Rao 2020 (3) SCC 289.***

15. Rebutting the argument of the counsel for the appellant, the counsel for the respondents / **defendants** has argued that the Will was a registered document and, therefore, by virtue of Section 47 of the Registration Act, 1908 it would operate from the date of its execution, i.e., 05.08.1972. It was argued that from the evidence on record, it was apparent that the plaintiff came to know of the Will immediately after its execution. It was argued that by virtue of Article 59 of the Limitation Act, 1963, the suit for cancellation of Will had to be filed within three years from the date when the facts entitling the plaintiff to have the Will cancelled first became known to him and as the suit was filed after three years from the date the plaintiff came to know about the Will, the suit was beyond time and was rightly dismissed as barred by limitation. It was further argued that in his plaint instituting Original Suit No. 13 of 1978, the plaintiff had pleaded that the cause of action for filing the suit arose six months before the filing of the suit, i.e., on the date when he came to know about the execution of the Will from the Gram Pradhan of the village and, therefore, in the present case, the plaintiff - appellant cannot plead any other ground to argue that the suit was not barred by limitation and the cause of action for filing the suit accrued on the death of the testator. It was argued that for the aforesaid reasons, the substantial question of law has to be answered in favour of the **defendants** and against the plaintiff. In support of his contention, the counsel for

the **defendants** - respondents has relied on the judgments of the Supreme Court in *Janki Vashdeo Bhojwani & Anr. vs. Indusind Bank Ltd. & Ors.* (AIR 2005 SC 439); *Bondar Singh & Ors. vs. Nihal Singh & Ors.* 2003 (4) SCC 161; *Shri D.M. Deshpande & Ors. vs. Shri Janardhan Kashinath Kadam* 1998 (8) SC 39; *Rajasthan State TPT Corpn. and Anr. vs. Bajrang Lal* (2014) AIR SCW 2058 and *Thakur Kishan Singh (dead) vs. Arvind Kumar* AIR (1995) Supreme Court 73.

16. I have considered the submission of the counsel for the parties and also perused the lower court records.

17. The Will was executed by Brij Lal on 05.08.1972 and the records indicate that the will was registered on 08.08.1972. Brij Lal died on 05.11.1976. Original Suit No. 13 of 1978 filed for cancellation of the aforesaid Will was registered on 04.01.1978. The aforesaid facts are admitted between the parties. The plaintiff in his plaint claimed that he came to know about the Will six months before the institution of suit. The said averment of the plaintiff is denied by the **defendants**. The courts below have also not accepted the plea of the plaintiff regarding the date when he came to know about the Will and the first appellate court has held that the plaintiff came to know about the Will four to five days after its execution when Brij Lal himself informed the plaintiff about the Will. The said findings have been recorded by the court below relying on the testimony of **defendant** no. 1 and are findings of fact based on evidence on record and there is no perversity in the aforesaid findings. In view of the aforesaid, I proceed to decide the case on the findings of the lower appellate court that plaintiff got knowledge of the

Will before the death of Brij Lal and immediately after its execution when Brij Lal told him about the Will.

18. Section 2 (h) of the Indian Succession Act, 1925 defines "Will" as the legal declaration of the *intention* of a testator with respect to his property which he desires to be carried into effect after his death. It is apparent from the definition of a Will that Will is merely a declaration of the *intention* of the testator. The desire of the testator in respect of his property comes into effect after his death. Will by its very nature is revocable and can be revoked by the testator any time before his death. The Will does not affect the properties included in the Will during the life time of the testator and no title in the properties passes to the beneficiaries of the Will during the life time of the testator. In other words, the distribution of property as specified in the Will does not operate in praesenti but comes in operation in future, on the death of the testator.

19. In *Mathai Samuel & Ors. vs. Eapen Eapen (dead) by Lrs. & Ors.* AIR (2013) SC 532, the Supreme Court observed that, "the essential quality of a testamentary disposition is ambulatoriness of revocability during the executants' lifetime and such a **document is dependent upon executants' death for its vigour and effect**. The aforesaid characteristics of a testamentary disposition distinguishes it from gift / settlement of property which is transfer of existing property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. It was observed by the Supreme Court that in case of a Will, the crucial circumstance is the existence of a provision disposing of or distributing the

property of the testator to take effect on his death, while on the other hand, in case of gift, the provision becomes operative immediately and a transfer in praesenti is intended and comes into effect. **It was further observed that in case of Will, no interest is intended to pass during the lifetime of the owner of the property and mere registration of Will will not render the document a settlement. In other words, a mere registration of Will will not make the disposition of property as stipulated in the Will to come into effect in praesenti, i.e., immediately on the execution of the Will and during the lifetime of the testator.**

20. Previously, in **Hubert P. James vs. Gulam Hussain Pakseem AIR (1949) Privy Council 151**, the Privy Council observed that Will had no legal effect whatsoever during the lifetime of the testator and no legal right can be supported on the Will of a living person. The observations of the Privy Council in paragraph nos. 15 and 16 of the judgment in **Hubert P. James (supra)** are reproduced below : -

*"15. It is strange that none of the three Judges who dealt with this case in India, and none of the counsel engaged on behalf of the appellant, nor the counsel who signed the appellant's case before the Board seem to have considered that **the Court was doing anything unusual in acting upon the will of a living person, a will, too, which had been revoked before the commencement of the suit.** The document was throughout referred to as a will and apparently regarded as entitled to the same degree of solemnity and importance as would have attached to it had it been in truth a will, that is the will of a deceased person. **A will takes effect on the death of the executant and during his***

***lifetime is an ambulatory document, revocable at any moment, having no legal effect whatsoever.** It is a secret and confidential document which the executant is never ordered to produce. In India, where a will may be deposited with the Registrar under the Indian Registration Act, the terms of the Act ensure that the contents remain secret until the death of the executant.*

*16. Apart from this case their Lordships know of no case, and the industry of counsel has produced none, in which any Court has founded or supported a legal right on the will of a living person. However the appellant, who might have destroyed his will after revoking it and have resisted, successfully their Lordships think, any attempt to make him disclose its contents, adopted neither of these courses. He allowed the document to be put in evidence without objection. In these circumstances, their Lordships, without expressing any opinion upon the wider question whether the will of a living person can ever be relevant to support a legal claim, will deal with the argument of the respondent on the assumption that the admission contained in the document was proved. The respondent argues that here is a piece of paper containing, over the signature of the appellant, an admission of a fact, and such admission can be proved and acted upon although the document in which it is contained may not have the legal effect which it was intended to have. **Assuming the admission to be proved, its scope must be determined not only, as with all written admissions, with reference to the whole document in which it appears, but also in the light of the fact that document was not intended to take effect until the death of the person making the admission.** The admission relied on in this case is not specific as to the date or terms*

of the partnership, or the circumstances in which it was entered into; it merely admits that the relation of partnership had been formed during the lifetime of the testator. Their Lordships think that the admission goes no further than to admit that on the death of the appellant the respondent was to be treated as his partner, and the estate was to be distributed on that basis unless the will was revoked. In their Lordships' view there is no justification for treating clause 4 of the will as admitting the existence of a partnership effective before the death of the testator with all the consequences which would flow from such a relationship. In their Lordships' view therefore the will of the appellant has no bearing upon his relationship with the respondent."

(Emphasis added)

21. The Will of a living person does not invade the rights of any person and does not create any interest in favour of any person in respect of the properties included in the Will. ***Because the Will of a living person has no legal effect, there is no requirement to get the same cancelled during the lifetime of the testator.*** The right to impeach any instrument accrues only when it becomes operative in law. In ***Badri vs. Niadar and Umrao Kunwar & Anr. (1915) XXXVII ILR 422 (Allahabad Series)*** the issue was whether a reversioner had the right to file a suit for a declaration that the Will in question was void and ineffectual as against his interest on the mere execution of the Will. The Division Bench of this Court held that mere execution of the Will does not afford a cause of action for a declaratory suit on the part of nearest reversioner that the Will was void and ineffectual as against his interest. The observations of the Division Bench of

this Court in ***Umrao Kunwar (supra)*** are reproduced herein below:-

"1. This was a suit by a plaintiff claiming to be the next reversioner under the Hindu Law to the estate of one Dewa. The said Dewa died leaving a widow, Umrao Kuar. This lady has executed a will bequeathing the property in her hands as widow of Dewa to one Tika Ram, son of Niadar, brother of the said Dewa. In the will there is a recital to the effect that the bequest is made in accordance with oral directions given by Dewa. The plaintiff sought a declaration that the will in question is void and ineffectual as against his interest, and that Tika Ram, who was impleaded as **defendant** No. 2, will acquire no rights under the said will. The court of first instance dismissed the suit upon a preliminary point, holding that there had been no alienation by Umrao Kuar of the property in her hands, and that under the circumstances the mere execution of a will would not afford a sufficient reason for granting a declaratory decree. It supported itself by a quotation from Mulla's Principles of Hindu Law. The learned District Judge on appeal has reversed the finding on the preliminary point and remanded the case for trial on the merits. He bases his decision upon the reported case of Jaipal Kunwar v. Indar Bahadur Singh (1904) I.L.R. 26 All. 238. It is obvious that in that case their Lordships of the Privy Council maintained the decision of the courts in India with considerable reluctance, and carefully guarded themselves against being understood to hold that the execution of a will under such circumstances as the present would afford a cause of action for a declaratory suit on the part of the nearest reversioner. ***It is certainly not the practice***

of this Court to encourage such suits, vide Ram Bhajan and Ors. v. Gurcharan (1904) 1 A.L.J.R. 468. The learned District Judge moreover, while purporting to follow the Privy Council ruling quoted by him, has really departed from the spirit of that ruling by interfering with the decision of the court of first instance. We think that the learned Additional Subordinate Judge was right in refusing to grant the declaration sought by the plaintiff and gave good reason for his decision. We set aside the order of the court below and restore the decree of the court of first instance dismissing the suit. The defendants-appellants will get their costs in this Court and in the lower appellate court."

(Emphasis added)

22. It was observed by the Privy Council in **Mst. Bolo vs. Mst. Koklan AIR (1930) Privy Council 270** that there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least clear or unequivocal threat to infringe that right by the **defendant** against whom the suit is instituted. The said principle was followed by the Privy Council in **Annamalai Chettiar vs. A.M.K.C.T. Muthukaruppan Chettiar AIR (1931) Privy Council 9** and subsequently by the Supreme Court in **Mst. Rukhmabai vs. Lala Laxminarayan AIR (1960) Supreme Court 335**. In **Mst. Rukhmabai (supra)**, the Supreme Court after referring to the observations of the Privy Council in **Mst. Bolo (supra)** and while considering Article 120 of the Limitation Act, which corresponds to Article 113 of Limitation Act, 1963, observed that the right to sue under Article 120 of the Limitation Act accrues when the **defendant** has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. It was further

observed that every threat by a party to such a right, however, ineffective and innocuous it may be, cannot be considered to be clear and unequivocal threat so as to compel him to file a suit. The Supreme Court observed as to whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.

23. The observations of the Supreme Court in paragraph nos. 31, 32 and 33 in **Mst. Rukhmabai (supra)** are reproduced here in below:-

"31. The argument on the question of limitation is put thus: The plaintiff, respondent herein, had knowledge of the fraudulent character of the trust deed as early as 1917 or, at any rate, during the pendency of the partition suit between Rukhmabai and Chandanlal instituted in the year 1929, and the suit filed in 1940, admittedly after six years of the said knowledge, would be barred under Art. 120 of the Limitation Act. Article 120 of the Limitation Act reads :

Description of suit	Period of limitation	Time from which period begins to run.
120. Suit for which no period of Limitation is provided elsewhere in this Schedule.	Six years	When the right to sue accrues.

This Article was subject to judicial scrutiny both by the Judicial

Committee as well as by the High Courts of various States. The leading decision on the subject is that of the Judicial Committee in *Mt. Bolo v. Mt. Koklan*, 57 Ind App 325 at p. 331: (AIR 1930 PC 270 at p. 272). Therein, Sir Benod Mitter observed:

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the **defendant** against whom the suit is instituted."

32. The said principle was restated and followed by the Judicial Committee in *Annamalai Chettiar v. Muthukaruppan Chettiar*, ILR 8 Rang 645: (AIR 1931 PC 9), and in *Gobinda Narayan Singh v. Sham Lal Singh*, 58 Ind App 125: (AIR 1931 PC 89). The further question is, if there are successive invasions or denials of a right, when it can be held that a person's right has been clearly and unequivocally threatened so as to compel him to institute a suit to establish that right. In *Pothukutchi Appa Rao v. Secy. of State*, AIR 1938 Mad 193 at p. 198, a Division Bench of the Madras High Court had to consider the said question. In that case, Venkatasubba Rao, J., after considering the relevant decisions, expressed his view thus:

"There is nothing in law which says that the moment a person's right is denied, he is bound at his peril to bring a suit for declaration. The Government beyond passing the order did nothing to disturb the plaintiff's possession. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring a declaratory suit."

He adds at p. 199:

"It is a more difficult question, what is the extent of the injury or infringement

that gives rise to, what may be termed, a compulsory cause of action?"

33. The legal position may be briefly stated thus: The right to sue under Art. 120 of the Limitation Act accrues when the **defendant** has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. **Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said, right."**

(Emphasis added)

24. In *Meda Bibi vs. Imaman Bibi & Ors.* 1884 (6) ILR 207 (Allahabad Series) (Full Bench), the issue before the Full Bench of this Court was as to whether the limitation for filing a suit for cancellation of gift would start running from the date the gift had been executed though possession had not been delivered by the donor to the donee or the right to impinge the gift would accrue after it became operative in law, i.e., after possession of the same was delivered to the donor. In *Meda Bibi (supra)*, the donor remained in possession till his death and, therefore, possession of the property was delivered to the donee after the death of the donor. The Full Bench held that before holding the suit to be barred by limitation, it had to be seen as to whether the alleged gift ever took effect in law during the lifetime of the donor so as to afford the plaintiff a complete cause of action on which to come into court. It was held by the Full Bench of this Court that the right to challenge the gift accrued in favour of the plaintiff only when after receipt of possession by the donee, the gift became operative in law. The

observations of the Full Bench of this Court are reproduced below:-

"It appears to us that the Judge has allowed the plea of limitation without first sufficiently ascertaining the facts material to its determination.

*It was essential for him, before holding the suit barred, to find in terms whether the alleged gift by Ghulam Ghaus ever took effect in law during his lifetime, so as to afford the plaintiff a complete cause of action on which to come into Court. Her case is that Ghulam Ghaus remained in possession of the whole of the property covered by that instrument until his death, and that no possession of it, as required by the Muhammadan Law to render the transaction legal and binding, was ever obtained by the donee as long as he remained living. It does not necessarily follow that because the alleged deed-of- gift was on a particular date, that time at once began to run against the plaintiff under art. 91 of the Limitation Act. **Her title to impeach it could only accrue from the moment when, by receipt of possession, it had become operative in law.** As in this view of the matter the Judge has not only disposed of the suit on a preliminary point, but determined that point upon inadequate materials, we have no alternative but to allow this appeal, and remanding the case to him under s. 562 of the Code, we direct him to restore it to his file of pending appeals and dispose of it according to law. The costs of the appeal to this Court will be costs in the cause."*

(Emphasis added)

25. As noted earlier, the Will of a living person does not infringe the rights of any person and does not create any legal interest in favour of any person. Thus, no right to sue for cancellation of the Will accrues in any person during the lifetime of the testator. Will can be challenged by a person against whom the Will operates after the death of the testator and in the said case, the Will would be defended by the beneficiaries of the Will who obviously would be **defendants** in the suit. A reading of the judgments of the Privy Council and the Supreme Court shows that the cause of action for instituting a suit for cancellation of Will would not arise before the death of the testator. The cause of action for cancelling an instrument would be complete only when the instrument affects the rights of the parties to possession or title. A beneficiary of a Will can assert his right in respect of the properties included in the Will and on the basis of the Will only after the death of the testator and it is only then that the beneficiary would either invade or threaten to invade the right of the plaintiff in respect of the properties included in the Will.

26. Article 59 of the Limitation Act is not applicable in cases of testamentary disposition and it is Article 113 which is applicable in such cases. Article 59 and 113 of Act of Limitation Act are reproduced herein below:-

Description of suit	Period of limitation	Time from which period begins to run.
59. To cancel or set aside an instrument or decree of for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.
Description of suit	Period of limitation	Time from which period begins to run.
113. Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

27. The right to sue, as held earlier, accrues in favour of plaintiff only after the death of the testator and, therefore, Article 113 applies in cases of Will. The knowledge of the execution of the Will before the death of the testator is not relevant to decide as to whether the suit for cancellation of Will was instituted within the limitation prescribed by the statute. At this stage, it would be relevant to refer to the observations of the Privy Council in **Ibad Ali vs. Sajid Ali & Ors. 1895 ILR 23 P.C. 1** in which it was observed that Article 91 of the Schedule 2 of the Limitation Act, 1877 which corresponds to Article 59 of the present Limitation Act, 1963 did not have any application in case of a Will. The observations of the Privy Council in paragraph 9 of the aforesaid judgment are reproduced herein below:-

"9. Upon the hearing of this appeal the appellants' counsel were, in the opinion of their Lordships, well advised in not pressing the plea in bar of action which was suggested for the first time by the District Judge. **Article 91 of Schedule II of**

the Limitation Act 1877 does not appear to their Lordships to have any application to the case of a Will. On the other hand, the respondent did not open or insist on his cross - appeal, which was brought for the purpose of raising the question whether the deceased was precluded from from disposing of his estate by will, in prejudice of his heir-at-law, either by Mahomedan law or by Act I of 1869."

(Emphasis added)

28. The aforesaid observations of the Privy Council were referred by the High Court of Lahore in **Firoz & Ors. vs. Sultan Surkhru AIR (1926) Lahore 635** wherein the High Court held that in case of cancellation of Will, Article 120 of the Limitation Act, 1887 was applicable which corresponds to the present Article 113 of the Limitation Act. The observations of the Lahore High Court made in paragraph 7 of the aforesaid judgment are reproduced hereinbelow:-

"7. The question of limitation remains. **It is clearly laid down in Sajid v. Ibdad (1986) 23 Cal 1 by their Lordships of the Privy Council that Article 91 does not govern a Will. It is true, as pointed by counsel, that this was an obiter dictum in the sense that the question was not contested, but their Lordships say that the plaintiff advisedly refrained from relying on this article as it had no application to the case of a Will.** Apart from this expression of opinion and wording of the Article itself makes the point very clear. Article 91 not being applicable and the suit being one primarily for cancellation of a Will Article 120 applied. The plaintiff here states that he had knowledge of the Will within six years of the institution of the suit but unfortunately for him this contention is rendered impossible by the averments

*contained in the plaint itself where it is stated that on the death of Mehra the applications of the **defendants** to obtain mutation of one-half of his estate was defeated by the objection of the plaintiff's own father, the previous paragraphs in the plaint having recited the factum of the execution of the registered Will, it is clear therefore, on the plaintiff's own showing, that he had knowledge about nine years before the institution of his suit and his suit is therefore barred by time."*

(Emphasis added)

29. Original Suit No. 13 of 1978 was filed within three years of the death of the testator. The Will of Brij Lal excluded the plaintiff and the cause of action to institute a suit for cancellation of Will did not accrue in favour of plaintiff till the death of Brij Lal, the testator. The rights of the plaintiff in the suit property were, for the first time, invaded by the **defendant** nos. 2 to 6 when they got their name mutated in the revenue records on the basis of the Will of Brij Lal. In any case, the cause of action for instituting a suit for cancellation of Will could not have accrued in favour of the plaintiff before 05.11.1976 and the suit for cancellation of Will would have been within the time, under Article 113 of the Limitation Act, till 04.11.1979. The suit was registered on 04.01.1978. Apparently, Original Suit No. 13 of 1978 was filed within time.

30. It was argued by the counsel for the **defendant**-respondent that in his plaint instituting Original Suit No.13 of 1978, the plaintiff had pleaded that the cause of action arose for filing the suit six months before the filing of the suit, i.e., the date on which he came to know about the execution of the Will from the Gram Pradhan of the Village and, therefore, whether the suit was

within limitation had to be considered on the aforesaid pleadings and not on the argument of the plaintiff that the suit was within limitation because the cause of action for filing the suit accrued after the death of the testator.

31. I am unable to agree with the aforesaid contention of the counsel for the **defendant**-respondent. It was held by the Division Bench of this Court in **Raj Kumar Jain & Ors. vs. Smt. Jagwati Devi & Ors. AIR (1980) Allahabad 225** that while computing the period of limitation, the plaint has to be read as a whole with a view to find out the date on which the cause of action accrued and that the plaintiffs cannot be tied down to the date of cause of action mentioned in the plaint. In the aforesaid case, the Supreme Court while discussing the limitation for filing a suit for declaration of rights which were infringed by the Will, held that the limitation for filing such a suit would be counted from the date when the **defendants** obtained probate of the Will. The observations of the Division Bench of this Court in Paragraph nos. 18 and 19 are reproduced herein below:-

"18. It may be that the **defendants** had, to the knowledge of the plaintiffs, asserted on the death of Ram Katori that they were entitled to the property in dispute on the basis of the will executed by Ram Katori and that according to them the plaintiffs were not its owners, **this denial by itself did not amount to an unequivocal threat by them to infringe with the rights of the plaintiffs who admittedly were in possession of the property after Ram Katori's death. As observed by the Supreme Court in Rukhma Bai's case (supra) the threat which results in accrual of a right to file a**

suit must be an unequivocal threat to infringe the right asserted by the plaintiff in the suit. The real threat to infringe the rights of the plaintiffs, in the circumstances of the case, arose when the defendants successfully obtained probate of the will on 26th Oct., 1961 and there was a likelihood that in pursuance of that probate they would take steps to interfere with the rights of the plaintiffs. In the circumstances the suit for declaration filed by the plaintiffs within 6 years of 26th Oct. 1961 was well within the period of limitation.

19. Learned counsel for the appellant then contended that as the plaintiffs themselves had mentioned in the plaint that the cause of action for filing the suit had accrued on 30th Oct., 1955 they should not be permitted to go behind that statement and to claim limitation from the date on which the defendant had obtained the probate from the Court of District Judge, Meerut. We are unable to accept this submission. As held by the Lahore High Court in the case of Fateh Ali Shah v. Mohammad Baksh AIR 1928 Lah 516 that *in computing the period of limitation the plaint has to be, with a view to find out the date on which the cause of action accrued read as a whole and that the plaintiffs cannot be tied down to the date of cause of action mentioned in the plaint.* In the instant case, we find that the plaint read as a whole and specially paras 12 and 13 thereof, indicates that according to the plaintiffs threat of infringement of their rights arose when on 28-10-1961 the **defendants** successfully obtained the probate of the will dated 26th Oct., 1955, executed by Ram Katori, from the Court of the District Judge, Meerut. The suit filed within 6 years of that date was, therefore, clearly within limitation."

(Emphasis added)

32. In light of the observations by the Division Bench of this Court the contention of the counsel for the **defendant**-respondent regarding the cause of action for instituting the suit is not acceptable.

33. It was further argued by the counsel for the **defendant**-respondent that the Will was a registered document and, therefore, in view of Section 47 of the Registration Act, 1908, the Will commenced to operate from the date of its execution and not from the date of the death of the testator. The argument deserves to be summarily rejected without any discussion. The operation of a Will is governed by the Indian Succession Act, 1925 and not by Registration Act, 1908. Registration of Will is not compulsory under Section 17 of Registration Act, 1908. It is sufficient to state that Section 47 of the Registration Act is not applicable on testamentary dispositions. The counsel for the **defendant**-respondent wants the Court to believe in the existence of a ludicrous situation where the disposition of property by testamentary instruments which state that the property included in the Will shall devolve on the beneficiaries after the death of the testator will be operative from the date of the execution of the Will, i.e., before the death of the testator and thus the devolution of property would take place before the death of the testator. If the argument of the counsel for the respondents is accepted, then a registered Will will be effective from the date of its execution and an unregistered Will will be effective from the date of the death of the testator. The absurdity of such a situation is self evident and does not require any more elaboration.

34. In 1902, a suit was instituted in a Civil Court within the jurisdiction of Allahabad High Court for cancellation of a

Will during the life time of the testator. A Division Bench of this Court in **Rambhajan Kunwar & Ors. Vs. Gurcharan Kunwar reported in 1905 ILR 27 (Allahabad Series) 14** referred the suit as a ridiculous one. The observations of the Division Bench of this Court are reproduced herein below:-

"The suit of from which this appeal has arisen is a ridiculous one. It is brought by the plaintiff to have a will of the defendant no. 1, a living person, cancelled. In the written statement the defendants pointed attention to the fact that a suit claiming such relief could not be maintained. The will of a living man does not come into operation when it has been executed, but only upon his death. So long as a testator is living he may at any moment cancel his will and make a totally different disposition of his property. This power he possesses up to the hour of his death, provided he be competent then to execute a valid will. It is idle to contend that a party can come into Court and successfully claim to have the will of a living person set aside. Unfortunately the learned Subordinate Judge was of a different opinion. In his judgment he finds that a suit for cancellation of a will may be maintained. In this we are wholly unable to agree with him. It is said by the learned vakil for the plaintiff respondent, who has obtained a decree in the court below, that this question was not raised in the memorandum of appeal. It is a matter, however, which the Court is bound to take notice of, and which is apparent, or ought to be apparent, to any lawyer. We allow the appeal, set aside the decree of the Court below, and dismiss the suit with costs in all Courts."

(Emphasis added)

35. If the plaintiff appellant had instituted a suit for cancellation of Will during the lifetime of Brij Lal himself, a document which could have been revoked by Brij Lal, the said suit would have been a ridiculous one as observed by the Division Bench of this Court in **Rambhajan Kunwar (supra)**. The plaintiff - appellant cannot be non-suited for not having instituted a ridiculous suit. The judgment was delivered by the Division Bench of this Court in 1904, i.e., almost 120 years back. It is unfortunate that the trial court and the lower appellate court have non-suited the plaintiff for not having filed a ridiculous suit. The judgments and decrees of the courts below are contrary to law and liable to be set-aside.

36. In light of the reasons given above the judicial precedents referred by the counsel for the **defendants** / respondents are not relevant in the present case and require no discussion.

37. The appeal is **allowed**. The substantial question of law is answered accordingly.

38. The judgment and decree dated 20.11.1976 of the trial court dismissing Original Suit No. 13 of 1978 as well as the judgment and order dated 06.09.2011 of the lower appellate court dismissing Civil Appeal No. 23 of 1980 are, hereby, set aside.

39. In view of the observations of the Supreme Court in its judgment dated 16.04.2008 passed in Civil Appeal No. 2815 of 2008, the judgment and decree dated 21.09.1983 passed by the lower appellate court in Appeal No. 23 of 1980 is

of St. of Rampur which could be converted as bhumidhari or other right under U.P. Z.A. & L.R. Act. (Para 14, 19 & 20)

Appeal dismissed. (E-15)

List of Cases cited:

Mohsin Ali Vs St.of M.P. & ors.(1975) 2 SCC 122.

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Ms. Nitya Ramakrishnan, learned Senior Advocate assisted by Sri Ashwath Sitaraman, Ms. Pragya Pandey, Mr. Mehul learned counsel for the appellant, Sri Sanjay Kumar Singh Additional Chief Standing Counsel along with Sri Rishi Kant, Standing Counsel and perused the record.

2. The facts of the case, as per the plaintiff averments are that 20 Bighas, 10 Biswas (Pukhta) of Bagh Huzoor Pasand situated in village-Thotar, Tehsil Sadar. District Rampur was given as a grant to Farooqi Begum, defendant-appellant, one of the begums of H.H. Nawab Hamid Ali Khan, Nawab of Rampur State, by a deed dated 17.04.1924. Similar grants were made in favour of other begums of Nawab. The said grants were resumable at pleasure and after death of Nawab Hamid Ali Khan in 1930, his successor Nawab Raza Ali Khan resumed all grants in favour of all widows of his father, including that in favour of Farooqi Begum. The possession was taken over by the State authorities and the same was duly recorded in the relevant papers and thus, the grove concerned stood recorded in the name of State (Shamil Khalasa). Farooqi Begum and her servants, through collusion with revenue officers, got her name entered in the Patwari's record, though, she was out of possession and an

Sri Sunil Gupta, Sri Amit Krishna, Sri Anil Krishna, Sri K.P. Upadhyaya, Sri M.K. Pandey, Sri Murlidher, Sri R.P. Singh, Sri Ravi Kant, Sri S.C. Agarwal, Sri S.P. Gupta, Sri S.P. Singh, Sri V.D. Ojha, Sri Ashwath Sitaraman, Ms. Pragya Pandey, Sri Mehul, Ms. Nitya Ramakrishnan (Sr. Advocate)

Counsel for the Respondents:
S.C.

Civil Law-The Uttar Pradesh Zamindari Abolition and Land Reforms Act,1950-Suit for declaration that it is the owner of the disputed grove and for a permanent injunction restraining the defendant-appellant from interfering in its possession-the grant was made only for the user and benefit of Farooqi Begum and only for the life time of Farooqi Begum and was not heritable-Defendant-appellants have not filed any record of rights duly maintained in their favour under the revenue laws or rules of erstwhile St.of Rampur noting their names as intermediary-Farooqi Begum had user and enjoyment right only for her life and nothing more- She is not found to be having any rights under old revenue laws

entry thereof was already effected in the register muafiat, specially maintained by erstwhile Rampur State for this purpose. The land ultimately got vested in State of U.P. at the time of merger and horticulture department of the State of U.P. has been selling its *bahar*. The defendant-appellant, on the basis of her name illegally entered in the revenue record, started interfering in the possession of the State and was claiming its ownership. The State of U.P. took steps for correction of the revenue records but it was declined on the ground that it is not possible in summary proceedings as it is a long standing entry. Thus, the State of U.P. filed the present suit for declaration that it is the owner of the disputed grove and for a permanent injunction restraining the defendant-appellant from interfering in its possession. It also claimed damages/mesne profit and in the alternate it prayed for possession, if it is found out of possession. Farooqi Begam, the sole defendant, filed written statement denying the plaint allegations, except that proceedings before the Revenue Court culminated in her favour and claimed that she is continuously in possession since 1924. She also claimed ownership prior to extension of U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Z.A. & L.R. Act) on the basis of deed of 1924. Further, after its extension to Rampur State she claimed to have acquired rights of a bhumidhar. She also claimed that proceedings for ejectment against Laddan Khan were initiated by her, and since State was a party, thus is barred by estoppel from filing the said suit. She also raised other formal pleas. The suit was decreed by the Trial Court. The appeal filed against the same was remanded for fresh trial by the appellate court, by order dated 08.09.1971, after allowing application to amend the written statement. The Trial Court again heard the suit and decreed the

same on 01.05.1973. Civil Appeal filed against the same was dismissed by judgment dated 06.03.1975. Second Appeal No.813 of 1975 filed by the defendant-appellant before this Court was also dismissed by judgment dated 21.07.2006. Against the same an SLP was filed in Supreme Court which was granted and converted in Civil Appeal No.1534 of 2009, and finally the second appeal was remanded back to the High Court by the Supreme Court by its judgment dated 12.07.2022. Thus, the present second appeal is before this Court. Farooqi Begum expired during pendency of second appeal and her only daughter, who was substituted, also expired and now daughter's sons are appellants before this Court.

3. Ms. Nitya Ramkrishnan, learned Senior Advocate for the appellant has raised three legal submissions before this Court for challenging the judgments of Trial Court and Appellate Court. The same are:-

(i) The deed dated 17.04.1924 is a gift-deed under Mohamman Law (Hibanama) executed by a husband in favour of his wife, and is irrevocable.

(ii) Even presuming the deed is a grant by the State of Rampur, since the same was never resumed, the suit is liable to fail.

(iii) After U.P. Z.A. & L.R. Act was extended to State of Rampur, Farooqi Begum became Bhumidhar with transferable rights of the grove in dispute and thus appellants, having inherited bhumidhari rights, cannot be acquitted thereafter.

4. Since, first and second submissions of defendant-appellant relate to the nature of deed dated 17.04.1924, hence, they are

being considered together. Learned counsel for the defendant-appellant emphatically argued that the deed dated 17.04.1924 is in fact a gift-deed under Mohammadan Law (Hibanama) executed by a husband in favour of his wife and is an irrevocable document. In the alternative, she submits that presuming that the first submission is not accepted and the deed is treated to be a grant, even then, the same was never revoked by any of the Nawabs or the State Government and, hence, continues to be in force till date.

5. The defendant-appellant initially had filed the written statement on 13.02.1964. At that time, no case of the deed being a Hibanama was setup. Later the written statement was amended vide order dated 08.09.1971 and following paragraphs were added in the written statement:-

“5-A That the property in dispute was mafi La Khira ‘revenue free grant’ of the defendant. The allegations in the plaint that the defendant was the rent free grantee of the grove was not correct.

5-B. That the grove in suit was gifted to the defendant absolutely by the then Ruler of the erstwhile Rampur State on 17.4.1924 through the Sanad Mafi without imposing any restriction or condition for its resumption or otherwise. Therefore, it was not resumable and could not be resumed, and it was not resumed at any time.

5-C. That in case the court is of opinion that the grove in suit was rent free grant (which the defendant does not admit), even in such case the grant was not resumable under the law by the successors of the grantor and as such could not be resumed, the right to resume if any being lost long before 1930. The suit of the plaintiff is not maintainable.”

6. A perusal of the written statement, as it stood initially or even after amendment, shows that no case of the said deed being a Hibanama is pleaded by the defendant-appellant. The best case pleaded in the amended paragraph-5B by the defendant-appellant is that it was a gift to the defendant-appellant by the then ruler of erstwhile Rampur State through Sanad Mafi without imposing any restriction or condition and was thus not resumable, and it was not resumed at any time. There is no pleading that the deed was a Hibanama under personal law or a gift by a husband to his wife under personal law. In absence of such a pleading it is not open for the defendant-appellant to argue at this stage that the deed is a Hibanama. Even otherwise following issues were framed between the parties:-

“1. Whether the grant in favour of the defendant was resumed in 1930 as alleged in para no.3 of the plaint?

2. Whether the plaintiff’s predecessor, the Rampur State entered into possession of the grove in suit after resuming the grant?

3. Whether the suit is within time?

4. Whether the suit has been over-valued?

5. Whether this court has jurisdiction to try this suit?

6. Whether the suit is barred by order 21 rule 103 CPC?

7. Whether the suit is barred by Section 42 of Specific Relief Act?

8. What is the correct amount of damages, if any, recoverable from the defendant?

9. Whether the defendant acquired Bhumidari rights in the grove in suit on enforcement of the U.P. Zamindari

Abolition and Land Reforms Act in this area, and is not liable to ejectment?

10. To what relief, if any, is the plaintiff entitled?

11. Whether the property in suit was revenue free grant (Muafi Lakheraj) of the defendant?

12. Whether the grove in suit was gifted to the defendant absolutely on 17.4.24 by the then ruler of Rampur State through Sanad Muafi without imposing any restriction or condition for its resumption?

13. Whether the grant in any case was not resumable under the law by the successor of the grantor and the right to resume if any, has been lost before 1930.

14. Is the suit barred by estoppel?" (emphasis added)

7. There is no issue framed with regard to any gift deed under Personal Law. Nearest issue on gift framed is issue no.12. The same is not claiming a gift under Personal Law but a gift by the ruler through Sanad Muafi. Further, only evidence given by defendant-appellant with regard to hibanama is in her second oral statement made on 29.03.1973, after amendment of written statement, wherein she states -

"ब्यान किया कि मुकदमें वाले बाग की मैं मालिक हूँ। मेरे शौहर हामिद अली खां ने हिबा किया। मैंने अपने बहनोई करनल मुहम्मद अली खां से कहा कि आप इसका इन्तेजाम करें। नवाब साहब ने नूर जहाँ बेगम को अब्बास वाला बाग दिया था। हमने कहा आपने हमें कुछ नहीं दिया तो कहा कि हम हुजूर पसंद बाग आपको हिबा करते हैं। मैंने हिबा कबूल किया और अपने बहनोई के इन्तेजाम में दे दिया। नवाब साहब ने कुछ तहरीर लिख कर दी जो फाइल में दाखिल कर दी। नूर जहाँ बेगम हमारी सौत थी जिनका इन्तकाल हो गया। जब से बाग पर मेरा कब्जा रहा मैं खेती कराती रही और कराती हूँ। जब तक कर्नल मुहम्मद अली खां हयात रहे मेरी तरफ से इन्तेजाम करते रहे। उनके इन्तकाल के बाद से मैं इन्तेजाम कर रही हूँ। बाग में मेरा डेरा बना हुआ है।

जिस वक्त नवाब साहब ने कहा कि हमने बाग हुजूर पसंद तुम्हारे नाम हिबा किया उस वक्त ना कुछ कहा, फरमान जारी किया गया। नवाब साहब के फरमान गजट में होते थे। यह फरमान गजट में नहीं छपा इसकी वजह मैं कुछ नहीं बता सकती।"

8. In the oral statement it is claimed by defendant-appellant that an oral gift was made by a husband to his wife, followed by deed executed by the husband, which was filed. As already found above, neither any case of oral gift is setup in the pleadings nor any such issue is framed. Law does not permit any evidence beyond the pleadings and issues. The oral statement is also incorrect and unreliable, as the deed dated 17.04.1924 is executed by the chief secretary of Rampur State and not by Nawab Sahab, as claimed in the oral statement. No other hibanama executed by Nawab Sahab is filed. Relevant portion of the deed dated 17.04.1924 in vernacular along with its english translation as produced by the appellant and not disputed by the State reads:-

"Bagh Huzur Pasand Farooqui Begum Sahiba ko ata kiya jata hai. Qubza bagh par karnel commandant Mohammad Ali Khan Bahadur Brigade commander ko dila diye jaye kyonke ye bagh unke zere intezaam rahega. Is bagh me 130 bigha aarazi khaam hai magar Farooqui Begum Sahiba ko 82 bigha aarazi khaam us men se di jata hai. Ye is liye ke baagh Abbas khan wala ke masaawi rahe jo haal men Nur Jahan Begum Saahiba ko ata hua hai. Baqiya aaraazi Baaghe-e mazkur ki ba intezaam sarishta-e-baaghaat ba dastur rahe gi. Sanad Daarul Insha se di jaye. Ahkaam-e-zaabita jaari hon.

By Order Sd/- Chief Secretary"

Its English Translation reads:

“Bagh Huzur Pasand is bestowed upon (ata) Farooqui Begum Sahiba. Col Commandant Mohammad All Khan is handed over this orchard so that this orchard will be under his management. The orchard consists of 130 bigha Kham land. However, Farooqui Begum Sahiba is given 82 bigha Kham land from the same in order to keep it at par with Bagh Abbas Khan which has been granted to Noor Jahan Begum Sahiba recently. The remaining land of the said orchard will remain under the management of Horticulture department as usual. Certificate may be issued as per rule from the record office.

By Order Sd/- Chief Secretary”

9. A perusal of the same demonstrates that it is an order passed and signed by the Chief Secretary of the state in file number 3/28, in a Ijlas (Court or Sitting of respectable persons). The deed states that the Bagh Huzoor Pasand is given (*ata*) to Farooqi Begum Sahiba and possession is to be given to Colonel Commandant Mohd. Ali. Out of 130 Beegha (kham) of Bagh, 82 Beegha (kham) is given and the remaining land was kept under the management of Horticulture Department. The deed further states that the certificate may be issued as per rule from the record office. The same cannot by any stretch of imagination be called a gift deed by a husband to his wife under personal law. It is an official document executed by the Chief Secretary of the state in official proceedings, making a grant on part of State of Rampur in favour of Farooqi Begum Sahiba. Claim in the oral statement that possession of the Bagh was given after making an oral hiba and the management of the same was given by the appellant-defendant to her brother in law is contrary to the deed, which is admitted and relied upon by both the parties, and cannot

be believed. Thus, submission of defendant-appellant with regard to any oral or written gift under any personal law is not found sustainable.

10. The next question is the nature of the deed dated 17.04.1924. It is already held above the same cannot be termed as a Hibanama under the Mohammadan Law. As already noted above, the deed grants (*ata*) 82 Bheegas (kham) out of 130 Bighas (kham) of grove Huzoor Pasand to Farooqi Begam Sahiba. The same is signed by the Chief Secretary of the State in ijas. The reason for the grant provided is to maintain parity, as another grove, namely, Abbas Khan Wala, was granted (*ata*) to Noor Jahan Begum Sahiba. From perusal of the deed, it appears that for the status of begum sahibas of Nawab Sahab, (the then ruler of Rampur State), the Chief Secretary of the then Rampur State granted different Baghs to his Begums. The nature of a grant made by an erstwhile Indian State or its ruler is considered by a three Judges' Bench of the Supreme Court in case of *‘Mohsin Ali Vs. State of M.P. and Others’*, reported in (1975) 2 SCC 122. Even the language of the document executed in the said case is quite parallel to the present case. In the said case, Firman dated 24.10.1934 was issued by the Nawab of Bhopal State, in appreciation of life and distinguished service of Sir Liyakat Ali, by which he gave to the later, in addition to grant of pensions, the residential use of house in question as ‘Inayat Ata’. The dispute was of interpretation of the said document. Hence, it is necessary to have a closer look to the facts and findings of the said judgment. Relevant paragraphs of the said judgment reads:-

“9. The original firman is in Urdu. As rendered into English by the courts below, it reads:

“Hon'ble Motamid-u-Sultan Nasir-ul-Mulk Syed Sir Liaqat Ali.

Looking into considerations with gratitude your valuable services and faithful sacrifices which you have rendered for more than 30 years and considering the economic condition of the State you have served without remuneration for the last 2 years, your application (for pension) is granted. You are granted permission to retire in lieu of your valuable services from 1st October, 1934. You should hand over charge of Mushir-ul-Muhami Rubkari Khas to Honourable Shoeb Qureshi.

Besides that pension you are entitled to receive under the Pension Rules of the State Treasury, you are also entitled to receive a sum of Rs 400 as monthly pension from Treasury of Deorhi in lieu of valuable services of Deodhi Khas and you are (further) granted your residential house situated at Bara Mahal Shahjahanabad, as gift.”

10. The original of the crucial sentence, which has been underlined (in bold type) reads:

“Aur aapka sakoonti makan waqya Bara Mahal Shahjahanabad apko inayat ataa kiya jata hai.”

11. The firman was by order published in the Bhopal Government Gazette, dated October 31, 1934, under the heading: “Pension to Aali Mortabat Sir Syed Liaqat Ali Saheb”. Rendered into English, its material part runs thus:

“Now the said Hon'ble again requests for grant of his previous application on account of rendering service for more than thirty years. Hence His Highness the Ruler of Bhopal Khuld-Allah-Mulkahum considering his valuable services and his faithful sacrifices that he had served without remuneration for the last two years, taking into consideration the economic condition of the State.

Considering (all his valuable services) with gratitude (His Highness the Ruler of State) grants him permission to retire from 1st November, 1934 and also grants him his residential house situated at Bara Mahal Shahjahanabad as gift.”

His Highness the Ruler of Bhopal State further orders that Hon'ble Syed Sir Liaqat Ali Saheb be paid Rs 400 monthly pension from the Treasury of Deorhi Khas in respect of services of Deorhi Khas besides his regular pension under the Rules of the State Treasury for which he is entitled to receive from the Treasury of State.”

12. The original of the underlined sentence (in bold type), in the Gazette Notification reads:

“Aur unko sakoonti makan waqya Bara Mahal Shahjahanabad inayat marhmat pharmate hain.”

13. It is to be noted that the disposition evidenced by the firman, Ext. P-1, is a tripartite grant made by an autocratic ruler to his subject in recognition of long, meritorious services rendered by the latter. This grant belongs to the category of dispositions, which under the English Common Law are known as “Crown grants”

14. The tenor and language of the Firman, particularly the words “aapko inayat ataa kiya jata hai” unmistakably mark it out as a sovereign grant. According to Steingass' Persian-English Dictionary “inayat” (Noun) signifies “a favour, a gift, a present, a bounty”; and “ataa” (Verb) means “to give, to confer a benefit or present with”. “Ataa” (Noun) implies “giving, a present, gift, donation, favour, a grant, endowment, concession; consideration”.

15. In the widest sense, “grant” may comprehend everything that is granted or passed from one to another by deed. But

commonly, the term is applied to rights created or transferred by the Crown, e.g., grants of pensions, patents, charters, franchise (See Earl Jowtt's Dictionary of English Law).

16. In England, contrary to the ordinary rule applicable to grants by a subject, grants by the Crown are usually construed most favourably for the Crown. The Rule in case of Royal Grants is that general words will not pass prerogative rights by implication.

17. This general rule is, however, capable of important relaxations in favour of the subject. If the intention of the Sovereign is obvious from the document which in precise, unequivocal terms defines the extent and nature of the benefit conferred, it must take effect. No question of seeking extrinsic aid to its construction arises. If the grant is for valuable consideration it must be construed strictly in favour of the grantee, for the honour of the Sovereign and where two constructions are possible, one valid and the other void, that which is valid ought to be preferred, for the honour of the Sovereign ought to be more regarded than the Sovereign's profit. Where, however, two interpretations may be given to the grant, both of which are good, that which is most favourable to the Crown is in many cases preferred. (See Halsbury's Laws of England, 3rd Edn., Vol. 7, paras 669 and 670, pp. 314-316).

18. These rules of interpretation have been applied to sovereign grants in India, also. (See Raja Rajinder Chand v. Sukhi [AIR 1957 SC 286 : 1956 SCR 889 as per S.K. Das, J. at p. 902] ; Gulabdas Jugjivandas v. Collector of Surat [6 IA 54 : ILR 3 Bom 186 (PC)] ; Shekh Sultan Sani v. Shekh Ajmodin [20 IA 50 : ILR 17 Bom 431 (PC)] ; Aziz-un-nissa v. Tassadduk Husain Khan [28 IA 65 : ILR 23 All 324 (PC)] ; Ram Narayan Singh v. Ram Saran Lal [AIR

1918 PC 203 : ILR 46 Cal 683 (PC) : 46 IA 88])

19. It is in the light of the above principles that we have to determine whether by the firman, Ext. P-1, the Ruler intended to grant a life-estate or an absolute estate in the suit house."

11. The appellant in the said case were heirs of Sir Liaqat Ali who claimed the said document to be gift under Muslim Law and, thus, an absolute transfer. The same was strongly disputed by the other side and it was claimed, amongst other, that the last sentence of the Firman read along with the preamble shows that the same created a right of residence for life and not an absolute and heritable ownership. Considering the submissions, the Court held:-

"23. We are not persuaded to accept the appellant's contention that the firman conveys, in precise and unequivocal terms, full and absolute ownership of the suit house to the grantee. In our opinion, the language of the last sentence of the firman, which is the sheet-anchor of this contention, even by itself, does not indubitably and unequivocally indicate that the intention of the Ruler was to grant an absolute estate. The firman is conspicuous by the non-employment of any words declaring that thenceforth the grantee would have a heritable estate in the house or that the grantor had transferred all his rights in the property, absolutely in favour of the grantee. There is no use of such words that the grant would take effect as "nasalan-dar-nasalan", "from generation to generation" "to warsan, kaiaam u qaman" "to grantee and his heirs" etc. pointing towards the creation of a heritable estate. Even the use of such terms by itself, has been held to be an inconclusive

indication of the grantor's intention to confer absolute, heritable rights. Thus in *Gulabdas Jugjivandas* case [6 IA 54 : ILR 3 Bom 186 (PC)] , despite a reference in the sanad to the children or descendants' of the grantee, the Judicial Committee held that the grant had not been made "on terms which would make them hereditary".

24. Again, in *Shekh Sultan v. Shekh Ajmodin*, delivering the judgment of the Board, Lord Hannen quoted with approval, a minute dated March 15, 1922, recorded by Sir Thomas Munro

"in which he states that the terms in such document (sunnuds) 'for ever' from generation to generation or in Hindu grants, 'while the sun and moon endure', 'are mere forms of expression', and were never supposed either by the donor or receiver to convey the durability which they imply or any beyond the will of the Sovereign".

On the authority of another minute recorded by Sir Thomas Munro, it was further observed

"that while the seizure of private property by the native princes would have been considered unjust by the country, Jagir grants were not regarded by the people in the light of private property".

25. It is not necessary to multiply authorities with regard to the construction of such customary terms which could possibly be indicative of the grantor's intention to make a heritable grant, because the firman Ext. P-1, is bereft of all such terms. It will be sufficient to say that the language of the firman does not in clear and unambiguous terms express an intention to create an absolute estate in favour of the grantee and his heirs. The firman has therefore to be construed in accordance with the well established rule of construction applicable to sovereign grants.

26. Another cardinal canon of interpretation to be borne in mind is, that in order to ascertain the real intention of the grantor, the firman has to be read as a whole. It will not be correct — as the appellants want us to do — to dissect the firman into three water-tight compartments or to read the last sentence of the firman out of the context. It is also permissible to consider the surrounding circumstances and the occasion on which this grant was made, as legitimate aids to construction of the firman [see *Gulabdas Jugjivandas v. Collector of Surat* [6 IA 54 : ILR 3 Bom 186 (PC)]].

27. The occasion for the grant as apparent from the preamble of the firman, Ext. P-1, (reproduced in the Notification Ext. P-2) was that the grantee Sir Liaquat Ali, having attained the age of superannuation, was retiring with the permission of the grantor, after putting in "valuable" and "faithful" service for more than thirty years including two years for which he served without remuneration, in view of the poor economic condition of the State. An analysis of the firman will show that it confers three-fold benefits on the grantee. Firstly, it grants him such pension as would be admissible under the Service Rules. This he would draw from the State Treasury. Secondly, in addition to the first, it grants him pension at the rate of Rs 400 per month which the pensioner would be entitled to draw from the Deodhi Treasury i.e. the Privy Purse of the Ruler. Thirdly, it grants him a beneficial interest in the residential house, in these terms: "Aur aapka sakoonti makan waqya Bara Mahal Shahjahanabad apko inayat ataa kiya jata hai".

28. As is indicated in the firman (Ex. P-1), Notification (P-2) in making this tripartite grant the Ruler was actuated by considerations of gratitude for the valuable

services rendered by the grantee. The object of conferring these three-fold benefits was the same, namely, to secure to the retiring servant a handsome maintenance and comfortable residence for the rest of his life. In other words, all the three benefits granted under this firman were cognate benefits, arising out of the same occasion, and made with the same object in view viz. to enable the grantee to live comfortably in retirement. These related benefits could be compendiously described as “retirement benefits”. The first two benefits were indisputably pensionary benefits enuring only for the lifetime of the grantee. All the three kindred benefits, including the one in question, were expressly meant for the person of the grantee. This is clear from the word “aapko” which means “to you” in the phrase “aapko inayat ataa kiya jata hai”. The conjunction “aur” (and) at the commencement of the last sentence of the firman inextricably links the grant of interest in the residential house, with the pensionary benefits conferred in the foregoing parts of the firman. In short, all the three-fold benefits granted under this firman are off-spring of the same genus. The language of the firman relating directly to the grant in question, therefore, takes its colour from the preceding parts of the firman relating to the pensionary benefits conferred on the grantee for life. Thus, if the crucial words quoted above, are construed in the context of the akin grants, and according to the general tenor of the firman as a whole, it becomes clear that the intention of the Ruler was to grant only a right of residence limited to the lifetime of the grantee, and not an absolute estate in the house.

29. The surrounding circumstances also confirm the interpretation adopted by us. The first such

circumstance was that at the time of the grant, the grantee had no issue, nor any near relation. Indeed, he died widowless and issueless. In this context, coupled with the omission of any words such as to “grantee and his heirs” or “nasalan-dar-nasalan” indicating the grant to be heritable, it would be reasonable to hold that the grant was intended to be for life only.

30. There is yet another circumstance which points towards the same conclusion. It is that at the time of the grant the grantee was already residing in the suit house. In this context, the word “sakoonti” (residential) in the last part of the firman used in association with “makan” (house) assumes significance. It suggests that the intention of the grantor was to convey to the grantee no more than a right of residence in the house which the latter was already enjoying.

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33. The argument advanced on behalf of the appellants: that the grant in question was a “hiba” made in accordance with Mohammedan law by one Muslim to another, has been stated only to be rejected. To all intents and purposes, it was a grant made by an absolute Ruler to his subject who had rendered long, meritorious services, on the eve of his retirement. Reference to Muslim law is therefore misconceived. We may, however, say in passing that even according to the observations of the Privy Council relied upon by the counsel, creation of an interest limited in point of time, in the usufruct of the property is not necessarily repugnant to Muslim law.”

12. As in the aforesaid case of **Mohsin Ali (supra)**, the Bagh in the present case was also granted by the State of Rampur to Farooqi Begum. There is no term used in

the entire grant which may show that the State had withdrawn all its rights over the Bagh or any such word which can be construed as grant with heritable interest. The grant notes that it is made to Farooqi Begum as similar grant is also made to another begum. The grant at best is for the user and benefits of Begum Sahiba and nothing more. There is nothing in the document which can be read as withdrawal by the Rampur State of all its right from the said Bagh and/or surrender of all its rights in favour of Farooqi Begum or creation of any heritable interest in favour of Farooqi Begum and her children. Therefore, as already settled by Supreme Court in case of **Mohsin Ali (supra)**¹ that such a grant can always be resumed by the State, as all rights and powers of State, including the power to resume the same, continued. Farooqi Begum had right to enjoy the Bagh for her life only, or till the will of the sovereign.

13. Next submission of learned Senior Counsel for the appellant is that the grant was never resumed by the State of Rampur or State of U.P. and there is no such document on record. Learned counsel for the appellant claims that the secondary evidence, register and list submitted before the Court to prove resumption, were not properly proved and were not reliable evidences. The said fact is strongly disputed by the counsel for the State of U.P. Learned counsel for the State of U.P. claims that both the courts have given a finding that the fact of resumption is proved from the secondary evidence filed and the same, being a concurrent finding of fact, can not be disputed at the stage of second appeal.

14. Before considering the said submission of parties, suffice is to say that, as already held above, the grant was made

only for the user and benefit of Farooqi Begum. The same was only for the life time of Farooqi Begum and was not heritable. Admittedly, Farooqi Begum expired during pendency of the present second appeal and thereafter, her daughter was substituted as her legal heir who also expired and, now, appellants before this Court are sons of the said daughter. Neither the daughter nor the present substituted heirs of late Farooqi Begum have any right in the Bagh in dispute. Therefore, no relief in their favour can be granted. This fact was put during course of argument to the senior counsel for the appellant and disputing the same she raised her third submission and claimed that after extension of U.P. Z.A. & L.R. Act on Rampur State, late Farooqi Begum became a bhumidhar and her rights became absolute. Thus, now heirs of late Farooqi Begum are having absolute rights as bhumidhars and they cannot be evicted from the Bagh in dispute. This submission will be considered later and first this Court considers the submissions of appellant with regard to secondary evidence filed by the State of U.P. to prove resumption of bagh by the next Nawab of Rampur.

15. For disputing the findings of the original and appellate Courts with regard to the secondary evidence submitted to prove resumption of grant in 1930, Senior Counsel for the defendant-appellants submits that the Muafiat register filed by the State of U.P. was having loose papers with entries made in different inks. For the said purposes she has relied upon the oral statement of Roop Kishore, arranger, revenue records, who has stated that normally on the first and last pages of such register, a stamp is put and signature of officer is made which is not found in the register deposited before this Court. He further states that register does not contain

page numbers. Thus, the same cannot be taken into account as it is not a reliable document.

16. Admittedly, a fire had taken place in which revenue records of former Rampur State were destroyed. Therefore, original orders of resumption of grant are lost. A perusal of the register shows that all the Muafiat grants of Rampur State and their resumptions are noted in the said register. It is not that the entry of resumption with regard to disputed Bagh Huzoor Pasand alone is made at the end of the register. There are number of resumption entries, before and after the entry of Bagh Huzoor Pasand, of same period (1930), with regard to other Baghs given to different begums also noted in the said register. A mere fact that the entries are made with different inks or some of its pages are loose itself cannot be a reason to disbelieve the register. The statement of witness Roop Kishore that normally a stamp is placed at the beginning and end of the register or absence of page numbers in itself is not a sufficient ground to disbelieve the register as no other register containing such stamps and signatures was filed before the Court to prove any such prevalent procedure. No rule was referred to under which any such stamp or signatures was required to be put. Even otherwise, witness Roop Kishore only brought the register as he was a clerk in the revenue department. He also proved list of Munshi Gopinath. He claimed that he was engaged in 1926 in Muhafizkhana Mal of Rampur State. He was removed in July, 1930 and re-engaged in October, 1931 and is thus unaware of developments of said period (July, 1930-October, 1931). Till 1930 he was working as extra weeder and did not perform any other work. His re-engagement was with garden department. Therefore, he was

never in charge of maintaining the disputed register, rather of any revenue record. His engagement in revenue department was only as a weeder and he performed work of making bundles of weeding files. Therefore, his statement with regard to manner of preparation and maintenance of Muafi register being outside his domain of work is not reliable. He was not even aware as to which office maintained the said register as he states that Muafi register might be kept in early times in darulnisha or Muhafizkhana. Therefore, he is only a witness who brought record/register from revenue department of State of U.P. and his evidence can only be read to that extent. He never maintained records of State of Rampur and can not give evidence on manner in which they were maintained. Therefore, this Court does not find any reason to disbelieve the finding of facts given by both the original as well as appellate Courts. An old register containing details of all Muafiats of the State of Rampur, including that of defendant, cannot be disputed only on such flimsy grounds, when contents of resumption of other grants in favour of all such persons, including other begums, is duly and correctly noted.

17. Now for considering merit of the submission of appellant-defendant with regard to her bhumidhari rights, it is necessary to go into the applicability of U.P. Z.A. & L.R. Act to the Rampur State. U.P. Z.A. & L.R. Act itself came into force w.e.f. 24.01.1951. At that time, it was not applied on State of Rampur. The same was made applicable to the territories of the former Rampur State by notification no. 3168/IA-599-1951, dated 30.06.1954 and estates were vested in State by notification no. 3169/IA-599-1951, dated 01.07.1954 respectively. Relevant portions of the said notifications read as follow:-

“Gazette Notification No.3168/I-A-559-1951

Dated Lucknow, June 30, 1954

IN exercise of the powers conferred by sub-clause (ii) of clause (e) of sub-section (1) of section 2 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No.1 of 1951), hereinafter referred to as the said Act, the Governor, Uttar Pradesh is pleased to direct that the said Act shall apply, subject to the modifications and amendments specified in the Schedule hereto annexed, to the territories of the former Rampur State as defined in the Rampur (Administration) Order, 1949.

The Governor is further pleased to order under sub-section (3) of section I of the said Act, that this Act shall come into force in the aforesaid territories with effect from the date of this notification.”

“Gazette Notification No.3169/I-A-559-1951,

Dated Lucknow, July 1, 1954.

IN exercise of powers conferred by sub-section (1) of section 4 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No.1 of 1951), as applied to the territories of the former Rampur State, as defined in the Rampur (Administration) Order, 1949, by notification no.3168/IA-559-1951, dated June 30, 1954, all estates situate in the aforesaid territory excluding estates owned by the State Government, and the land allotted to His Highness the Nawab of Rampur under Article 4 of the Agreement between the Governor-General and His Highness the Nawab of Rampur dated May 15, 1949, read with item (xviii) of the Collateral letter dated May 15, 1949, from the Ministry of States, Government of India, to His Highness the Nawab of Rampur, and mentioned in the list of his private properties, shall vest in the State of

Uttar Pradesh, and as from the beginning of that date, all such estates shall stand transferred to and vest, except as provided in the said Act, in the State free from all encumbrances.” (emphasis added)

18. The term ‘Estate’ was modified from time to time in the U.P. Z.A. & L.R. Act itself as well as one provided in the notifications by which U.P. Z.A. & L.R. Act was made applicable to Rampur and other States. The definition of word ‘Estate’ was finally provided and settled by U.P. Act No.XIV of 1958 by which U.P. Z.A. & L.R. Act was amended. The aforesaid U.P. Act No.XIV of 1958, being a short Act, is quoted below:-

“U. P. Act No. XIV of 1958.

An Act to amend the U. P Zamindari Abolition and Land Reforms Act, 1950, (U. P. Act 1 of 1951).

WHEREAS it is expedient to amend the U. P. Zamindari Abolition and Land Reforms Act, 1950, for the purpose hereinafter appearing:

It is hereby enacted in the Ninth Year of the Republic of India as follows:

1. Short title and commencement.-(1) This Act may be called the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1958.

(2) It shall be deemed to have come into force from the first day of July, 1952.

2. In section 3 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, for clause (8), the following shall be and be deemed to have always been substituted:

“(8) Estate, means and shall be deemed to have always meant the area included under one entry in any of the registers described in clause (a), (b), (c) or (d) and, in so far as it relates to a permanent tenureholder, in any register

described in clause (e) of section 32 of the U. P. Land Revenue Act, 1901, as it stood immediately prior to the coming into force of this Act, or subject to the restriction mentioned with respect to the register described in clause (e), in any of the registers maintained under section 33 of the said Act or in a similar register described in or prepared or maintained under any other Act, Rule, Regulation or Order relating to the preparation or maintenances of record-of-rights in force at any time and includes share in, or of an 'estate'. Explanation.-The Act, Rule, Regulation or Order referred to in this clause shall include, Act, Rule, Regulation, or Order made or promulgated by the erstwhile Indian States whose territories were merged or absorbed in the State of Uttar Pradesh prior to the date of vesting notified under section 4 of this Act."

19. A bare perusal of the provisions of U.P. Z.A. & L.R. Act and the aforesaid notifications shows that estates owned by Rampur State never vested under the said Act as the same vested in State of U.P. on merger. It is only the estates belonging to land holders and intermediaries, duly noted in the register prepared and maintained under the revenue laws as applicable in the erstwhile Indian States which vested under the provisions of U.P. Z.A. & L.R. Act and the said land holders or intermediaries were given different rights under the U.P. Z.A. & L.R. Act. There is nothing on record to show that the grants given by the erstwhile State of Rampur were treated as estates belonging to land holders or intermediaries. It is already held above that grants given by State of Rampur always remained property of Rampur State, resumable at will. Land and properties owned by Rampur State vested in State of U.P. on

merger and no contrary submission with regard to the same is made before this Court. The said land falls within exception carved out by 'excluding estates owned by the State Government' in vesting notification no.3169/I-A-559-1951 dated 01.07.1954. Defendant-appellants have not filed any record of rights duly maintained in their favour under the revenue laws or rules of erstwhile State of Rampur noting their names as intermediary. In absence of the same, claim of defendant-appellant that they ought to be treated as land holders/intermediaries under the revenue laws of erstwhile State of Rampur and, thus, having earned bhumidhari or other revenue rights under U.P. Z.A. & L.R. Act can not be accepted. They have also not filed order of any competent revenue authority under U.P. Z.A. & L.R. Act declaring Farooqi Begum as having bhumidhari rights also goes to show that name of Farooqi Begum was wrongly/illegally recorded as bhumidhar. It goes without saying that there cannot be any bhumidhari or other rights under the U.P. Z.A. & L.R. Act on lands belonging to the State Government. It is already held that the bagh in dispute was a State land in which Farooqi Begum had user and enjoyment right only for her life and nothing more. Therefore, she is not found to be having any rights under old revenue laws of State of Rampur which could be converted as bhumidhari or other right under U.P. Z.A. & L.R. Act. Hence, the said submission of defendant-appellant also does not have any force and the same is rejected.

20. Thus, this Court does not find any force in the present second appeal and the same is **dismissed.**

(2023) 5 ILRA 1795
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.05.2023

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE ABDUL MOIN, J.
THE HON'BLE MANISH MATHUR, J.

Writ-A No. 2001647 of 2015

Anukul Prakash ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:

Ramesh Pandey, Amrendra Nath Tripathi,
Ashutosh Shahi

Counsel for the Respondent:
C.S.C.

Service Law- Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991-To be covered by the Government Order dated 10.07.1998, the employee should have come into Government service by way of transfer or direct recruitment or deputation and thereafter should have been absorbed. Unless this condition is fulfilled, the Government Order dated 10.07.1998 would not apply in his case- there is nothing in the said Rules which may permit counting of past services rendered by the petitioner in ATL for the purposes of calculating his qualifying service for pensionary benefits payable by the Government consequent to his retirement from Government service after absorption therein- Government Order dated 11.11.1993 also does not permit counting of services rendered by the petitioner in ATL for the purposes of determining his seniority viz-a-viz direct recruits in the absorbed department. (Para 20, 24 & 25)

Petition dismissed. (E-15)

List of Cases cited:

1. Writ A 49126 of 2016 (Pooran Singh Manral & anr. Vs St.of U.P. & ors.
2. Hridayesh Dayal Srivastava Vs St.of U.P. & ors.(Writ Petition No. 410 (SB) of 2010)
3. Keshav Ram Pandey Vs St.of U.P. & ors.(Writ Petition No. 65 (SB) of 2011)
4. St.of U.P. & ors. Vs Shankatha Prasad Mishra (Special Appeal Defective No. 645 of 2016)
5. St.of U.P. & ors. vs Amar Pal Singh (Special Appeal Defective No. 646 of 2016)
6. Narendra Narain Mishra Vs St.of U.P. & ors.
7. St.of U.P. & ors.Vs Mirtunjay Pratap Singh (Special Appeal No. 121 of 2015)
8. St.of U.P. & ors.Vs Ram Shanker Gupta (Special Appeal Defective No. 553 of 2015)
9. St.of U.P. & ors.Vs Sunil Kumar Verma & ors.; 2010 (10) ADJ 125 (DB)
10. Sunil Kumar Verma & ors.Vs St.of U.P. & ors., (2016) 1 SCC 397
11. R. Muthukumar & ors.Vs The Chairman and Managing Director Tangedco & ors.; 2022 SCC OnLine SC 151.

(Delivered by Hon'ble Rajan Roy, J.)

1. A Single Judge of this Court noticed conflicting opinions rendered by different Division Benches on the question of counting of past services rendered by the concerned in the erstwhile Auto Tractors Limited (hereinafter referred as 'ATL') for the purposes of pensionary benefits payable by the State Government consequent to their absorption therein and referred the matter for consideration by a Larger Bench. Accordingly, by order of Hon'ble the Chief Justice this Full Bench was constituted.

2. We considered the questions referred by the learned Single Judge to us and rephrased/reframed the same as under:

"(i) Whether the Division Bench judgments in the case of Shankatha Prasad Mishra (surpa); Hridayesh Dayal Srivastava (surpa); Mirtujanjay Prasad Singh (surpa); Keshav Ram Pandey (supra) and State of U.P. and others versus Amar Pal Singh, [Special Appeal (Defective) No.646 of 2016 decided on 25.10.2016] have correctly held that the benefit of past services rendered by retrenched employees of Auto Tractors Limited, who have been subsequently absorbed in government service, such as the petitioner, would count towards their qualifying service for purposes of calculation of retiral dues payable by the State Government?

(ii) Whether a retrenched employee of Auto Tractors Limited such as the petitioner, who got absorbed in State Government Service subsequently as per the relevant rules known as the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules 1991 are entitled to count their previous services rendered by them under the erstwhile employer i.e. the Auto Tractors Limited, for calculation of qualifying service for purposes of retirement benefits under the U.P. Retirement Benefit Rules 1961 and other ancillary rules and Government Orders in this regard as also Government Orders dated 11.11.1993 and 10.07.1998 as modified vide Government Order dated 28.12.2001? "

3. In addition to the above, we framed the following question:

"(iii) Whether Division Bench judgment of this Court in the case of State

of U.P. versus Ram Shanker Gupta passed in Special Appeal (Defective) No. 553 of 2015 decided on 27.11.2015 is in conflict with the earlier decisions by Coordinate Benches rendered in the case of Shankatha Prasad Mishra (surpa); Hridayesh Dayal Srivastava (surpa); Mirtujanjay Prasad Singh (surpa); Keshav Ram Pandey (supra) and State of U.P. and others versus Amar Pal Singh, [Special Appeal (Defective) No.646 of 2016 decided on 25.10.2016] or not? If so, which of the two sets of Division Bench judgment lays down the law correctly with regard to question No.2 as rephrased by us herein above."

4. We have heard Mr. Amrendra Nath Tripathi along with Mr. Ashutosh Shahi, learned counsel for the petitioner, Mr. I.M. Pandey and Mr. Arun Kumar Pandey, learned Advocates Members of the Bar, as also, Mr. Kuldeep Pati Tripathi, learned Additional Advocate General assisted by Mr. Alok Kumar Pandey, Mr. Vivek Shukla and Mr. Prafull Yadav, learned counsel for the State, at length.

5. Briefly stated the facts relevant to the questions before us are that the petitioner was appointed in erstwhile ATL on the post of Executive (Personnel & Administration) on 17.10.1984 and worked in the said Company till 20.11.1990 i.e. till its closure. The petitioner was appointed in a Government Cell of ATL as Executive (Personnel & Administration) on 21.11.1990 and continued to work in the said Cell till 06.03.1998. He was paid salary regularly from the State Exchequer. This Cell, it appears, was created for the retrenched employees such as the petitioner till their matters are considered for absorption which was proposed at the relevant time. Ultimately, the State Government in exercise of its powers under

the proviso to Article 309 of the Constitution of India made Rules known as Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 (hereinafter referred as '1991 Rules'. The said 1991 Rules applied to posts under rule making power of the Governor of Uttar Pradesh under the proviso to Article 309 of the Constitution.

6. It is not out of place to mention that at the relevant time as many as 11 Public Corporations were closed or wound up and their employees retrenched.

7. As would be evident from the nomenclature of the 1991 Rules they were applicable to all such retrenched employees whether they be of the Government or Public Corporations who had been absorbed in Government service. After notification of the 1991 Rules, the State Government issued a Government Order dated 11.11.1993 on the subject of eligibility and permissibility of retrenched employees of ATL for the purposes of Government service. Ultimately, the petitioner herein was absorbed in the Government service on 07.03.1998 under the aforesaid 1991 Rules and Government Order dated 11.11.1993. He was absorbed in the Directorate of Pichhra Varg Kalyan, U.P. Under the 1991 Rules and the Government Order referred hereinabove. The last pay drawn by him in ATL was protected on the date of his entry in the Government service. Ultimately, the petitioner retired from Government service on 31.10.2014 while working on the post of Officer-on-Special Duty in the aforesaid Directorate i.e. a Class II Post. After his retirement, he filed a writ petition bearing No.182 (SB) of 2015 (Anukul Prakash Vs. State of U.P.) claiming benefit of past

services rendered by him in ATL for pensionary benefits by the Government. In pursuance to an order dated 18.05.2015 passed in the said petition for consideration of his representation, the same was considered and rejected by the Director on 19.08.2015. This order was put to challenge before this Court by means of the instant petition i.e. Writ Petition No. 1647 (SB) of 2015 (now Writ A No. 1001647 of 2015) which was filed on 15.10.2015 and it is during course of hearing in this petition that the learned Single Judge noticed conflict of opinion amongst different Division Benches and referred the matter to the Larger Bench. It is against the aforesaid background that the reference came up before us and has been heard.

8. 1991 Rules referred hereinabove are as under:

*"THE UTTAR PRADESH
ABSORPTION OF RETRENCHED
EMPLOYEES OF GOVERNMENT OR
PUBLIC CORPORATIONS IN
GOVERNMENT SERVICE RULES, 1991*

1. (1) *Those rules may be called the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991.*

(2) *They shall come into force atonce.*

(3) *They shall apply to the posts under the rule making power of the Governor of Uttar Pradesh under the proviso to Article 309 of the Constitution.*

2. *Unless there is anything repugnant In the subject or context, tho expression-*

(a) *"appointing authority" in relation to any post for which an employee was retrenched means the authority empowered to make appointment to such post;*

(b) *"Public corporation" means a body corporate established or constituted by or under any Uttar Pradesh Act except a University or local authority constituted the purpose of Local Self Government and includes a Government Company within the meaning of section 617 of the Companies Act, 1956 In which the State Government has prepondering Interest:*

(c) *"retrenched employee" means a person who was appointed on a post under the Government or a public corporation on or before October 1, 1986 in accordance with the procedure laid down for recruitment to the post and was continuously working in any post under the Government of such corporation upto the date of his retrenchment due to reduction in, or winding up of, any establishment of the Government or the public corporation, as the case may be and in respect of whom a certificate of being a retrenched employee has been issued by his appointing authority.*

(d) *"service rules" means the rules made under the proviso to Article 309 of the Constitution, and where there are no such rules, the executive instructions issued by the Government, regulating the recruitment and conditions of service of persons appointed to the relevant service.*

3. (1) Notwithstanding anything to the contrary contained in any other service rules for the time being in force, the State Government may by notified order require the absorption of the retrenched employees in any post or service under the Government and may prescribe the procedure for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employee.

(2) The provisions contained in relevant service rules shall be deemed to have been modified to the extent of their inconsistency with the provisions made in

the notified order referred to in sub-rule (1)"

9. The terms 'Public Corporations' and 'Retrenched Employees' are defined in the said Rules. As per sub-Rule (1) of Rule 3 of 1991 Rules, notwithstanding anything to the contrary contained in any other service rules for the time being in force, the State Government may by notified order require absorption of retrenched employees in any post or service under the Government and may prescribe the procedure for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employees. As per sub-Rule (2) of Rule 3 of 1991 Rules, the provisions contained in relevant service rules shall be deemed to have been modified to the extent of their inconsistency with the provisions made in the notified order referred to in sub-rule (1).

10. The term 'Notified' is defined in Section 4 (29A) of the U.P. General Clauses Act, 1904 as under:

"(29-A) "notification" or "public notification" shall mean a notification published in the Gazette of the State and the word "notified" shall be construed accordingly."

11. Neither of the parties have placed before us any notified order referable to Rule 3 of 1991 Rules. They have, however, brought on record a Government Order dated 11.11.1993 which, according to them, is referable to 1991 Rules and it is this Government Order which governs the conditions of service of the retrenched employees of ATL who were absorbed in the Government. Even though the said order is not a notified order, nevertheless, it

appears that it is this Government Order which has held the field so far as conditions of absorption of retrenched employees of ATL are concerned, therefore, we proceed on the said premise.

12. The Government Order dated 11.11.1993 reads as under:

"संख्या: 3/3/3/91-का0-2/93

प्रेषक,
कालिका प्रसाद,
सचिव,
उत्तर प्रदेश शासन।
सेवा में,

1. समस्त प्रमुख सचिव/सचिव, उ0प्र0 शासन।
2. समस्त विभागाध्यक्ष एवं प्रमुख कार्यालयाध्यक्ष,
उ0प्र0।

3. समस्त मण्डलायुक्त/जिलाधिकारी, उ0प्र0।
कार्मिक अनुभाग-2

विषय: आटो ट्रेक्टर्स लिमिटेड (ए0टी0एल0) के छटनीशुदा कर्मचारियों/अधिकारियों को सरकारी सेवा हेतु अर्हता एवं अनुमन्यता।

महोदय,

उपरोक्त विषय पर मुझे यह कहने का निर्देश हुआ है कि मानवीय दृष्टिकोण अपनाते हुये शासन ने आटो ट्रेक्टर्स लिमिटेड (ए0टी0एल0) के छटनी शुदा कर्मचारियों/अधिकारियों को निम्नांकित शर्तों के अधीन सरकारी सेवा हेतु अर्हता एवं अनुमन्यता प्रदान करने का निर्णय लिया है:-

1. सरकारी सेवा हेतु केवल वे ही कर्मचारी पात्र होंगे, जो दिनांक 1 अक्टूबर 1986 या उसके पूर्व ए0टी0एल0 की सेवा में नियुक्त हुये हों तथा ए0टी0एल0 के बन्द होने की तिथि तक निरन्तर कार्यरत हो।

2. लोक सेवा आयोग की परिधि के बाहर, अधीनस्थ सेवा चयन आयोग की परिधि के भीतर या बाहर के पदों पर "उपयुक्तता" के आधार पर नियुक्ति हेतु अर्हता मानी जायेगी। ऐसी सेवाओं/पदों हेतु जिनके लिये भर्ती/चयन के निमित्त किसी सेवा नियमावली/कार्यकारी आदेश में कोई प्रक्रिया विद्यमान हो, छटनीशुदा कार्मिकों के विषय में उक्त प्रक्रिया से शिथिलता बरतते हुये "उपयुक्तता" आंकने के लिए अलग से उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छटनीशुदा कर्मचारियों का सरकारी सेवा में आमेलन नियमावली, 1991 प्रख्यापित की गयी है।

3. सरकारी सेवा में भर्ती हेतु निर्धारित न्यूनतम शैक्षिक अर्हता, अनुभव तथा आयु विषयक शर्तें पूरा करने वाले ए0टी0एल0 के कर्मचारी/अधिकारी ही उक्त

सेवायोजन हेतु पात्र होंगे। यदि ऐसे कर्मचारी ए0टी0एल0 में ऐसे पद पर नियुक्त हुये थे जिनका कर्तव्य तथा उत्तर दायित्व उस पद के सम्बन्धित है जिस पद के लिये ये अब अभ्यर्थी हैं और अपनी नियुक्ति के समय उपरोक्त पद के लिये निर्धारित शैक्षिक योग्यता रखते थे, तो यह समझा जायेगा कि वे वर्तमान पद के लिये निर्धारित शैक्षिक अर्हता पूर्ण करते हैं।

4. ए0टी0एल0 के अधिकारी/कर्मचारी के लिये सरकारी सेवा में पद विशेष पर लागू अधिकतम आयु सीमा का प्रतिबन्ध लागू नहीं होगा।

5. सेवा में लिये जाने के दिनांक से राज्य कर्मचारियों पर लागू समस्त नियम जैसे भविष्य निर्वाह निधि, अवकाश, पेंशन आदि उन पर स्वतः लागे होंगे।

6. ए0टी0एल0 की सेवा में कार्मिकों को आहरित अन्तिम वेतन को संरक्षण प्रदान किया जायेगा जिसके विषय में वित्त विभाग की सहमति से प्रशासनिक विभाग द्वारा पृथक से आदेश जारी किये जायेंगे।

7. उक्त सेवायोजन सीधी भर्ती के उपलब्ध पदों के विरुद्ध ही किया जायेगा तथा सम्बन्धित पद पर सीधी भर्ती से नियुक्त कार्मिकों की ज्येष्ठता निर्धारित रहने विषयक लागू नीति के अनुसार उक्त सेवायोजन की तिथि से ज्येष्ठता प्रदान की जायेगी।

8. ए0टी0एल0 में तैनात समूह "ग" तथा "घ" के जिन कर्मचारियों की सेवायें समाप्त की जायेगी उन सभी के नाम सम्बन्धित सेवायोजन कार्यालयों में एक अलग पूल में ए0टी0एल0 में उनकी वरिष्ठता क्रम में, व्यवस्थित किये जायेंगे और सेवायोजकों से मांग प्राप्त होने पर तदनुसार नाम प्रेषित किये जायेंगे।

9. यह नियुक्तियाँ करते समय आरक्षण सम्बन्धी नियमों का अनुपालन किया जायेगा।

10. मितव्ययिता के दृष्टिकोण से 5 प्रतिशत पद रिक्त रखे जाने

सम्बन्धी प्राविधान इन पर लागू न होंगे।

11. उपरोक्त दिशा निर्देशों के अतिरिक्त यह भी कहना प्रासंगिक न होगा कि ए0टी0एल0 के कर्मचारियों के संदर्भ में समय-समय पर जो माननीय न्यायालयों के आदेश हुये हैं उनका समादर करते हुये अग्रसर कार्यवाही की जाये।

भवदीय
ह0 अपठनीय
(कालिका प्रसाद)
सचिव।"

13. The Government Order refers to eligibility and permissibility of absorption of retrenched employees of ATL. Para 1 of the Government Order mentions that only such employees would be eligible for

absorption who had been appointed in the service of ATL on or prior to 01.10.1986. This date corresponds to the date mentioned in the definition of retrenched employees contained in 1991 Rules. As per para 2 of the Government Order entitlement of such retrenched employees for appointment in Government service would be determined on the basis of their fitness/utility and the service rules of the concerned department where they are to be appointed would be treated as relaxed for the purposes of such appointment. It refers to 1991 Rules regarding their entitlement for such appointment. Now, the 1991 Rules speak of absorption, therefore, the Government Order dated 11.11.1993 is also to be understood as prescribing the procedure for such absorption which is referable to 1991 Rules. The term 'absorption' is mentioned in Para 3 of the aforesaid Government Order dated 11.11.1993 also. Such absorption was proposed to be made against the post of direct recruitment, obviously so. Para 5 of the said Government Order mentions that from the date of being taken into Government service all the Rules applicable to the Government employees such as GPF, Leave, Pension, etc. would automatically be applicable to such retrenched employees. As per Para 6 of the Government Order, the last pay drawn by such employees in ATL would stand protected and a separate Government Order would be issued in this regard. As per para 7 of the said Government Order, the said retrenched employees on absorption against the post of direct recruitment would be given seniority viz-a-viz the direct recruits from the date of their absorption, meaning thereby, the benefit of past services rendered by them in ATL would not be counted for the purposes of determining their seniority in the Government

department. Rules of reservation were also to be applicable while absorbing. There is no dispute between the parties that it is this Government Order which has governed their conditions of absorption.

14. The claim of the petitioner for counting the past services rendered by him in ATL for calculating the qualifying service for purposes of pension on his retirement while working in the Government is a Government Order dated 10.07.1998 and certain judgments of this Court wherein the said benefit has been given.

15. This Government Order dated 10.07.1998 is the only document relied upon by the petitioner in support of his claim and there is no such specific provision in the 1991 Rules, unless, of course, we find that the Government Order dated 10.07.1998 is referable to Rule 3 or even if it is not a notified order in terms thereof we find it to be applicable to the facts of the case just as the Government Order dated 11.11.1993 is applicable. The judgments relied by the petitioner would, of course, be considered by us thereafter, but, first of all we have to consider applicability of Government Order dated 10.07.1998. Government Order dated 10.07.1998 reads as under:

"संख्या सा-3-728/दस-98-901-98

प्रेषक ,

श्री आलोक रंजन ,

सचिव,

उत्तर प्रदेश शासन।

सेवा में,

समस्त विभागाध्यक्ष/प्रमुख कार्यालयाध्यक्ष, उत्तर प्रदेश।

लखनऊ: 10 जुलाई, 1998

विषय:- राज्य सरकारों के अधीन स्वायत्तशासी निकायों में संविलियन मांगने वाले केन्द्रीय सरकारी तथा केन्द्रीय स्वायत्त निकायों के कर्मचारियों तथा केन्द्रीय

सरकार के तथा केन्द्रीय स्वायत्त निकायों में संविलियन मांगने वाले राज्य सरकार के कर्मचारियों की पेंशन के प्रयोजन से सेवा का गिना जाना।

महोदय,

उपर्युक्त विषय पर मुझे यह कहने का निर्देश हुआ है कि इस राज्य सरकार में यह व्यवस्था विद्यमान है कि केन्द्र सरकार का कर्मचारी राज्य सरकार में सेवा स्थानान्तरण के आधार पर आता है या उन्हीं परिस्थितियों में राज्य सरकार का कर्मचारी भारत सरकार के कार्यालय में जाता है, तो जहाँ से वह सेवानिवृत्त होगा वही सरकार उसके नैवृत्तिक लाभों का भुगतान करेगी। काफी समय से यह मांग की जा रही है कि केन्द्र सरकार के स्वायत्तशासी निकाय का कर्मचारी राज्य सरकार के स्वायत्तशासी निकाय में राज्य सरकार में प्रतिनियुक्ति पर आए या सीधे सेवा ग्रहण करें या उन्हीं परिस्थितियों में केन्द्र सरकार के स्वायत्तशासी निकाय का कर्मचारी भारत सरकार के स्वायत्तशासी निकाय में प्रतिनियुक्ति पर या सीधी भर्ती से जाये तो उसकी सम्पूर्ण सेवा अवधि के आधार पर नैवृत्तिक लाभ दिये जायें। इसके अतिरिक्त **राज्य सरकार के अन्तर्गत ही राज्य सरकार का कर्मचारी राज्य सरकार के ऐसे उपक्रम/निगम में स्थानान्तरण/सीधी भर्ती/प्रतिनियुक्ति के आधार पर जाता है या उन्हीं परिस्थितियों में राज्य सरकार के उपक्रम/निगम का कर्मचारी राज्य सरकार में आता है तो प्रश्नगत सुविधा उन्हें भी उपलब्ध करायी जाये।**

2- शासन द्वारा सम्यक विचारोपरान्त निम्नलिखित शर्तों के अधीन यह निर्णय लिया गया है कि राज्य सरकार का कर्मचारी भारत सरकार के उपक्रम/निगम में स्थानान्तरण/प्रतिनियुक्ति के आधार पर जाता है और संविलीन हो जाता है या उसी परिस्थिति में भारत सरकार का कर्मचारी राज्य सरकार के उपक्रम/निगम में आता है और संविलीन हो जाता है तो यदि दोनों पद पेंशनेबुल हैं तो उसके द्वारा दोनों पदों पर की गई अर्ह सेवा के योग पर नैवृत्तिक लाभ अनुमन्य होंगे। इसके अतिरिक्त **राज्य सरकार के अन्तर्गत ही राज्य सरकार का कर्मचारी राज्य सरकार के उपक्रम/निगम में स्थानान्तरण/सीधी भर्ती/प्रतिनियुक्ति के आधार पर जाता है या राज्य सरकार में आता है, जहाँ राज्य सरकार के संबंधित उपक्रम/निगम में पेंशन की सुविधा उपलब्ध हो एवं संबंधित कर्मचारी का संविलियन सेवानिवृत्त होने वाले उपक्रम/निगम/सरकार में हो गया हो, तो यदि दोनों ही पद पेंशनेबुल हों, तो उसके द्वारा दोनों पदों पर की गई अर्ह सेवा पर नैवृत्तिक लाभ अनुमन्य होंगे और दोनों अवधियों को जोड़कर सेवा नैवृत्तिक लाभों का भुगतान उसी संस्थान/सरकार द्वारा किया जायेगा जहाँ से वह अन्तिम रूप से सेवानिवृत्त हो रहा है। इस प्रकार के मामलों में कर्मचारी पर वही पेंशन**

नियम लागू होंगे जैसी कि उस सरकार/उपक्रम/निगम में लागे हों।

(1). जब किसी पेंशनयुक्त संगठन में कार्य कर रहे राज्य सरकार के किसी कर्मचारी को किसी स्वायत्त निकाय में संविलियन की अनुमति दी जाती है तो उसके द्वारा सरकार के अधीन की गयी सेवा को स्वायत्त निकाय के अधीन पेंशन के लिए आगणित कराने की अनुमति होगी चाहे उक्त कर्मचारी सरकार में अस्थायी रहा हो अथवा स्थायी। किन्तु पेंशन संबंधी सुविधायें केवल तभी मिलेंगी जबकि अस्थायी सेवा के बाद उनका स्थायीकरण हो गया हो। यदि वह स्वायत्तशासी निकाय में अस्थायी कर्मचारी के रूप में सेवानिवृत्त हो जाता है तो उसे सेवान्त प्रसुविधायें उसी प्रकार मिलेंगी जो सामान्यतः सरकार के अधीन अस्थायी कर्मचारियों को उपलब्ध हैं। स्वायत्त निकायों के जो कर्मचारी राज्य सरकार के अधीन स्थायी तौर पर संविलीन हो जाते हैं उनके मामलों में भी वही क्रियाविधि लागू होगी।

स्वायत्त निकाय/सरकार में जैसा भी मामला जो संविलियन की तारीख तक की सेवा के लिए अनुपातिक दरों पर पेंशन/सेवा उपादान/सेवान्त उपादान तथा मृत्यु और सेवानिवृत्ति प्रसुविधाओं का भुगतान करके सरकार/स्वायत्त निकाय अपने पेंशन दायित्व को पूरा करेगी। अनुपातिक दरों पर पेंशन की राशि समय-समय पर यथा संशोधित शासनादेशों को ध्यान में रखकर निश्चित की जायेगी।

2. अंशदायी भविष्य निधि प्रसुविधाओं का हकदार कर्मचारी यह विकल्प देगा कि यह या तो स्वायत्तशासी निकाय से मिलने वाली अंशदायी भविष्य निधि प्रसुविधायें प्राप्त करेगा अथवा उसे राज्य सरकार के राजकोष में जमा करेगा और राज्य सरकार में पेंशन के लिए अर्ह सेवा के रूप में गिने जाने का विकल्प देगा। इसी प्रकार से सरकारी सेवक स्वायत्त निकाय की सेवा में योगदान करने पर शासन के अधीन सामान्य भविष्य निधि खाते में जमा धनराशि संबंधित स्वायत्त निकाय को भुगतान कर दी जायेगी। ऐसा विकल्प संविलियन की तारीख से एक वर्ष के भीतर दिया जा सकेगा। यदि निर्धारित अवधि के भीतर विकल्प नहीं दिया जाता है तो यह मान लिया जायेगा कि कर्मचारी ने अंशदायी भविष्य निधि/सामान्य भविष्य निधि प्रसुविधायें प्राप्त करने के लिए विकल्प दे दिया है। एक बार दिया गया विकल्प अन्तिम होगा।

3. जब किसी स्वायत्तशासी निकाय के किसी कर्मचारी को केन्द्रीय सरकार/राज्य सरकार के अधीन स्थायी तौर पर संविलीन कर दिया जाता है तो उसके सामने दो विकल्प रहेंगे अर्थात् या तो यह स्वायत्तशासी निकाय द्वारा देय अंशदायी भविष्य निधि प्रसुविधायें प्राप्त कर लें और सरकार में नये सिरे से नौकरी शुरू करे या अंशदायी भविष्य निधि में नियोक्ता के अंशदान और उस देय ब्याज सहित, सम्पूर्ण राशि राज्य सरकार के खाते में जमा कर दें और सरकार के अधीन पेंशन प्रयोजनों हेतु

अर्ह सेवा के रूप में जुड़वाने का विकल्प दे दे। यह विकल्प संविलियन की तारीख से एक वर्ष के भीतर दिया जायेगा। यदि निर्धारित अवधि के भीतर कोई विकल्प नहीं दिया जाता है तो यह समझ लिया जायेगा कर्मचारी ने अंशदायी भविष्य निधि/ सामान्य भविष्य निधि प्रसुविधायें प्राप्त करने का विकल्प दिया है। एक बाद दिया गया विकल्प अन्तिम होगा।

3. राज्य सरकार के अधीन भारत सरकार द्वारा निर्गत आदेश दिनांक 7-2-1986 से प्रभावी माने जायेंगे।

भवदीय,
आलोक रंजन,
सचिव, वित्त।"

16. The aforesaid Government Order dated 10.07.1998 was modified/amended vide subsequent Government Order dated 28.12.2001 and it was clarified that Government Order dated 10.07.1998 was applicable to autonomous bodies and term 'undertakings/corporations' was incorrectly mentioned in the Government Order dated 10.07.1998. Accordingly, Government Order dated 10.07.1998 was clarified/modified, meaning thereby, reference to 'undertakings/corporations' therein had to be understood as reference to autonomous bodies. Further, the term 'autonomous bodies' was to mean such bodies which were financially funded entirely or 50% of their expenses was met by the Government and services under such bodies was pensionable. Petitioner claims that ATL was wholly owned by State Government, but, has not proved that his services in ATL were pensionable.

17 On a bare perusal of the subject of the above quoted Government Order, it would be evident that it was supposed to address the demand of Central Government employees and the employees of autonomous bodies under the control of Central Government as also demand of State Government employees seeking absorption in Central Government or

autonomous bodies under the control of Central Government for counting their services, however, when we peruse the body of the Government Order, we find, it also deals with such claims of employees of autonomous bodies who may have been absorbed in the State Government.

18. In the said Government Order dated 10.07.1998 there is a caveat for counting of past services rendered in the erstwhile department/autonomous bodies i.e. services in both the establishment should be pensionable only then past services under the autonomous body would be countable for pensionary benefits. In the case at hand though in para 7 of the writ petition a bald assertion has been made that services in ATL were pensionable, but, no documentary proof has been filed in support thereof. In fact, by means of supplementary affidavit dated 22.02.2026, petitioner realizing his incorrect averment in third line of paragraph 7 of the writ petition and 3rd line of Ground (D) of the writ petition has stated as under:

"It is further stated that in the 3rd line of paragraph 7 of the writ petition and 3rd line of ground (D) of the writ petition it has wrongly been stated that the post on which petitioner was working in the erstwhile Auto Tractors Limited was pensionable. The said mistake was not intentional but due to some inadvertence. It is clarified that petitioner's post in the erstwhile Auto Tractors Limited was not pensionable."

19. The order impugned in the writ petition by petitioner's representation claiming counting of past services rendered in ATL for pensionary benefits also says that services in ATL were not pensionable, therefore, Government Order dated 10.07.1998 was not applicable. Same

avermment has been made in para 3(a) of counter affidavit of State which has been baldly denied by petitioner in his rejoinder affidavit without any proof in support thereof. Thus, the services of petitioner in ATL were not pensionable.

20. Most important, we find that the Government Order applies to only such employees of autonomous bodies who had come into the service of Government by way of transfer/direct recruitment/deputation and thereafter had been absorbed prior to their retirement. Thus, in order to be covered by the said Government Order dated 10.07.1998, the employee should have come into Government service by way of transfer or direct recruitment or deputation and thereafter should have been absorbed. Unless this condition is fulfilled, the Government Order dated 10.07.1998 would not apply in his case.

21. In the case at hand, the petitioner did not join the service of the Government either by transfer of service or direct recruitment nor did he come on deputation to it. He was a retrenched employee of erstwhile ATL and on this basis he was absorbed.

22. ATL was closed on 20.11.1990 and as absorption of retrenched employee was to be considered, but, there was no provision at that time, therefore, a Cell was created in the Government wherein such employees were allowed to join. Thus, even this engagement from 21.11.1990 to 06.03.1998 was in a Cell separately created for retrenched employees of ATL and it was not as if the petitioner had been appointed in Government service by way of transfer of service or direct recruitment or deputation. While working in the said Cell,

before his regularization in Pichhra Varg Kalyan, petitioner was not a member of service in any Department of the Government. It was only an interim arrangement, therefore, the said period was not a substantive service rendered under the Government. The arrangement was made only to facilitate the ultimate absorption of petitioner and other retrenched employees like him.

23. The subsequent absorption of the petitioner in the Directorate of Pichhra Varg Kalyan on 07.03.1998 was in terms of 1991 Rules and the Government Order dated 11.11.1993 referred hereinabove. Both, the 1991 Rules and Government Order 11.11.1993 were in respect of absorption of retrenched employees. They were not in respect of absorption of employees who have joined Government service either on the basis of transfer of service or direct recruitment or deputation. The services of petitioner in ATL were not pensionable whereas Government Order dated 10.07.1998 in cases where services/post in both the establishments were pensionable. The fact that petitioner was absorbed against a post of direct recruitment is not relevant for the purpose of applicability of Government Order dated 10.07.1998. Thus, the petitioner and other retrenched employees of ATL who were absorbed formed a different class viz-a-viz those governed by the Government Orders dated 10.07.1998 and 28.12.2001. The Government Order dated 11.11.1993 itself mentions that absorption was being done on humanitarian consideration. The petitioner was absorbed as a retrenched employee. Thus, on the face of it, the Government Order dated 10.07.1998 does not apply in his case.

24. We have perused the 1991 Rules and there is nothing in the said Rules which may permit counting of past services

rendered by the petitioner in ATL for the purposes of calculating his qualifying service for pensionary benefits payable by the Government consequent to his retirement from Government service after absorption therein. We have also perused the Government Order dated 11.11.1993 and we do not find any provision therein permitting the said benefit.

25. Paragraph 7 of the Government Order dated 11.11.1993 also does not permit counting of services rendered by the petitioner in ATL for the purposes of determining his seniority viz-a-viz direct recruits in the absorbed department.

26. Paragraph 5 of the Government Order dated 11.11.1993 merely says that all the Rules applicable to the Government servants would apply to such retrenched employees from the date of their entry into Government service.

27. Now, in this context, we find that the pensionary entitlements of Government servants are regulated by rules known as U.P. Retirement Benefits Rules, 1961 (hereinafter referred as '1961 Rules') and Civil Service Regulations (hereinafter referred as 'CSR') so far as they are not inconsistent with the aforesaid 1961 Rules. These Rules are applicable to all Offices under the rule making power of the Governor other than those who retired before the date of coming into force of the said Rules. Sub-Rule (2) of Rule 2 says that pension provisions contained in CSR shall continue to apply to the Officers governed by these Rules, except so far as they are inconsistent with any of the provisions of these Rules. Rules 3 (8) of 1961 Rules defines the term 'qualifying service', which is to be calculated for the purposes of

determination of pensionary benefits and it reads as under:

"3 (8) Qualifying service means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except

(i) periods of temporary or officiating service in a non-pensionable establishment;

(ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contingencies shall also count as qualifying service.

Note. If service rendered in a non-pensionable establishment work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service."

Regulation 368 of the CSR reads as under:

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment."

28. The proviso to Rule 3(8) clearly mentions inter alia that service under the Government shall count as qualifying service. We may in this context refer to Regulation 361 which reads as under:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions-

First-The service must be under Government.

Second-The employment must be substantive and permanent.

Third-The service must be paid by Government.

These three conditions are fully explained in the following section."

29. All the above quoted three conditions are required to be satisfied. Thus, as per the aforesaid provision of the CSR also, service of an Officer would qualify for pension only if the service is under the Government and it is paid by the Government, apart from the fact that employment must be substantive and permanent. The services rendered by the petitioner in ATL was not a service under the Government nor was it paid by the Government and there is nothing on record to establish otherwise. The ATL was a Government company having separate entity as a Government company incorporated under the Companies Act, 1956. Thus, as per pensionary Rules applicable in the Government as the service had to be under the Government and also paid by the Government, to qualify for pensionary benefits, which was not so in the case of petitioner, therefore, in view of these Rules also, it cannot be counted for the aforesaid purpose.

30. The amendment in the 'qualifying service' defined in Rule 3(8) of the Rules 1961 by the U.P. Qualifying Service for Pension and Validation Act, 2021 does not change the legal position so far as the questions before us are concerned. Thus, Rules of the Government applicable in this regard also do not support the claim of the petitioner for counting of services rendered in the ATL for purposes of grant of pensionary benefits by the Government.

31. We, thus, do not find any provision in the Rules or any Government Order referable to the 1991 Rules which could entitle a retrenched employee of ATL for counting of his services rendered in the said concern for grant of pensionary benefits by the Government.

32. We may at this very stage refer to a Division Bench judgment of this Court dated 06.10.2016 rendered in **Writ A 49126 of 2016 (Pooran Singh Manral and another vs. State of U.P. and others)** wherein a similar view has been taken and which we find as laying down the law correctly on the subject, although it was in the context of a claim by an employee of another Corporation absorbed in another department, but, in the said case also a Government Order on the same lines as the Government Order dated 11.11.1993 and the same Rules 1991 were considered.

33. The 1991 Rules were subsequently rescinded by the Retrenched Employees of Government or Public Corporations in Government Service (Rescission of Rules), 2003. By the said Rules, the 1991 Rules were rescinded w.e.f. 08.04.2003. Only two things were protected; one is the benefit of absorption already granted and secondly; the last pay protection in this very context. All Government Orders referable to Rule 3 were also annulled w.e.f 08.04.2003 subject, of course, to the benefit already granted. In addition to it, those retrenched employees whose services had not been absorbed till promulgation of the said Rules i.e. till 08.04.2003, they were given relaxation in age for the purposes of recruitment on Group 'C' and 'D' posts outside the purview of U.P. Public Service Commission. Subsequently, a legislative enactment known as Retrenched

Employees of Government or Public Corporations in Government Service (Rescission of Rules) Act, 2009 was promulgated by which the 1991 Rules were rescinded w.e.f. 09.05.1991 i.e. from the very date they were promulgated. This enactment, thus, gave retrospective effect to the rescission of Rules 1991 from 09.05.1991. While rescinding the said Rules with retrospective effect from 09.05.1991 again two things were protected, one the benefit of absorption already granted prior to 08.04.2003 and secondly; the last pay drawn by such retrenched employee who had been absorbed. In addition, it was provided that those retrenched employees who had not been absorbed till 08.04.2003, they would be given relaxation in upper age limit for direct recruitment to such Group 'C' and 'D' posts which are outside the purview of U.P. Public Service Commission to the extent he has rendered his continuous service in substantive capacity in the concern Government department or Public Corporations/Companies. Thus, these Rules of 2003 and 2009 also do not provide for counting of past services rendered by the retrenched employees of ATL, after their absorption in a Government service for pensionary benefits.

34. Now, coming to the decisions on the subject and conflicting opinions expressed by different Division Benches of this Court.

35. So far as judgment dated 04.04.2012 passed in the case of ***Hridayesh Dayal Srivastava vs. State of U.P. and others (Writ Petition No. 410 (SB) of 2010)*** is concerned, the question no. 2 which we have framed was not at all involved therein nor was it argued nor considered. The only question involved

therein was counting of past services for the purposes of pay protection and, as, the Government Order dated 11.11.1993 itself protected the last pay drawn, therefore, there could be no qualm about the claim raised in *Hridayesh Dayal Srivastava* (supra), but, the said judgment cannot be understood as laying down any precedent so far as the question before us is concerned. Even otherwise in view of the enunciation of law by us hereinabove, any opinion expressed therein contrary to it is not good law.

36. There is one aspect which we need to consider in this context and that is reliance placed by the Division Bench in ***Hridayesh Dayal Srivastava*** (supra) upon the stand of the State Government in an SLP filed by the latter against the judgment rendered in the earlier petition filed by *Hridayesh Dayal Srivastava*. The stand of the State Government before the Supreme Court was only with regard to prior services of retrenched employees being liable to be counted for purposes of fixation of their pay scale in another employment and there was no such averment before the Supreme Court that it was liable to be counted for pensionary benefits, therefore, the Division Bench in *Hridayesh Dayal Srivastava* (supra) erred by misreading the said stand basing its judgment upon it for the purposes of counting of said services for other benefits also, even if, cryptically. The said judgment, therefore, does not entitle the employees retrenched under the 1991 Rules to benefit of past services for purposes of pensionary benefits.

37. An SLP bearing No. CC NO. 22538-22539 of 2015 against the judgment in ***Hridayesh Dayal Srivastava*** (supra) was preferred by the State Government and the same was dismissed in limine on

22.01.2016 leaving the question of law open, therefore, this dismissal of SLP also does not persuade us to answer the reference in any other manner as the question of law was left open which has now been considered by us.

38. As regards Division Bench judgment dated 26.04.2013 passed in **Keshav Ram Pandey vs. State of U.P. and others (Writ Petition No. 65 (SB) of 2011)**, it merely relied upon the decision rendered in **Hridayesh Dayal Srivastava (supra)** and did not itself consider the relevant Rules and the Government Orders, therefore, it does not lay down any principle of law and is of no precedentiary value. Even otherwise being contrary to law enunciated by us it cannot be termed as a good law or a binding precedent. The fact that the SLP against the said judgment in Keshav Ram Pandey (supra) was dismissed in limine also does not change the legal situation.

39. As regards Division Bench judgment dated 25.10.2016 passed in **State of U.P. and 2 Others vs. Shankatha Prasad Misrha (Special Appeal Defective No. 645 of 2016)** the fact that the SLP against the said judgment of **Shankatha Prasad Mishra (supra)** was dismissed in limine also does not change the legal position as discussed by us hereinabove as it does not amount to affirmation of the judgment rendered in **Shankatha Prasad Mishra (supra)**. In view of the legal enunciation by us hereinabove, the said judgment does not lay down the law correctly and is based on misreading of Government Order dated 11.11.1993. It is, therefore, not a good law. On the same date i.e., 25.10.2016, the same Division Bench decided another case of **State of U.P. and others vs Amar Pal Singh (Special**

Appeal Defective No. 646 of 2016) giving the same reasons, therefore, it is also not good law.

40. As regards another judgment dated 13.02.2018 rendered by a Division Bench in **Narendra Narain Mishra vs. State of U.P. and others**, we find that even in the said judgment it has been held that Government Order dated 10.07.1998 is not applicable, however, for other reasons, the petition was allowed, but, in view of the clarification of law on the subject by us the said judgment does not lay down the law correctly on other issues except the non-applicability of Government Order dated 10.07.1998 and to this extent it is not good law.

41. As regards judgment dated 06.11.2017 passed in **State of U.P. and others vs. Mirtunjay Pratap Singh (Special Appeal No. 121 of 2015)** by a Division Bench also does not consider relevant aspects of the matter as discussed by us hereinabove, but, merely refers to earlier judgments passed by the Coordinate Benches and accordingly the benefit of past services for pensionary benefits was granted. In view of what has already been discussed hereinabove, apart from the fact that it does not contain any discussion on relevant aspects, it cannot be treated as laying down correct law.

42. In the case of **State of U.P. and others vs. Ram Shanker Gupta (Special Appeal Defective No. 553 of 2015)** a Division Bench of this Court vide judgment and order dated 27.11.2015 considered the provisions of the 1991 Rules and clearly opined that the said Rules do not contain any such provision as to calculate the period of service of the retrenched employee rendered in the erstwhile

department for the purposes of pensionary benefits, therefore, in the absence of any specific provision in the Rules, it was of the view that no such benefit can be provided by the Court. It accordingly declined the relief sought by the respondent before it to calculate his previous services rendered in Auto Tractors Limited, Pratapgarh from 01.10.1980 to 20.11.1990 for pensionary benefits and it accordingly modified the judgment of learned Single Judge to this extent.

43. The fact that in the said judgment another judgment of Coordinate Bench rendered in the case of ***State of U.P. and others vs. Sunil Kumar Verma and others; 2010 (10) ADJ 125 (DB)*** was referred which was set aside by the Supreme Court vide decision reported in ***(2016) 1 SCC 397 Sunil Kumar Verma and others vs. State of U.P. and others***, as claimed by the petitioner's counsel, does not have much relevance in view of the fact that the issue involved therein was with regard to right of absorption after coming into force of Rules 2003 and 2009 whereas the questions before us are different. No doubt, in the said judgment in ***Ram Shanker Gupta (supra)*** the Government Orders dated 11.11.1993 and 10.07.1998 were not considered, but, this non-consideration does not affect the opinion expressed therein as it is in consonance with what we have held hereinabove.

44. It was also the contention of petitioner's counsel that other retrenched employees of ATL have been given the benefit of past services in other department i.e. departments other than those where the petitioner had been absorbed, therefore, it would be highly unjust and unreasonable to deny the petitioner the said benefit. We are not persuaded by this argument as we have

explained the law on the subject. It is well settled that merely because somebody-else has been incorrectly granted the benefit, it cannot be made a ground for claiming similar benefit. There is no question of parity in illegality. We may in this regard refer to the decision of Hon'ble the Supreme Court in the case of ***R. Muthukumar and others vs. The Chairman and Managing Director Tangedco and others; 2022 SCC OnLine SC 151***. It is for the State Government to find out as to how such benefits were extended to others, if at all they were extended.

45. In view of the above discussion, we answer the questions rephrased/ reframed by us as under:

(i) *The Division Bench judgments in the cases of Shankatha Prasad Mishra (surpa); Hridayesh Dayal Srivastava (surpa); Mirtuyanjay Prasad Singh (surpa); Keshav Ram Pandey (supra) and State of U.P. and others versus Amar Pal Singh do not lay down the law correctly on the question of counting of past services rendered by retrenched employees of ATL who have been subsequently absorbed in Government service, for the purposes of qualifying service for calculation of retiral dues payable by the State Government. They are not good law.*

(ii) *Retrenched employees of ATL such as the petitioner who got absorbed in the Government service subsequently as per the Rules known as Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 are not entitled to count their previous services rendered by them under the erstwhile employer i.e., Auto Tractors Limited for computation of qualifying service for*

purposes of retirement benefits under the U.P. Retirement Benefits Rules 1961 and other ancillary rules and Government Orders in this regard as also the Government Order dated 11.1.1993 and in fact the Government Order dated 10.07.1998 as modified on 28.12.2001 is not applicable to such employees.

*(iii) The Division Bench judgment in the case of **Ram Shanker Gupta** (supra) is in conflict with the earlier decisions by Coordinate Benches in the cases of **Shankatha Prasad Mishra** (surpa); **Hridayesh Dayal Srivastava** (surpa); **Mirtuyanjan Prasad Singh** (surpa); **Keshav Ram Pandey** (supra) and **State of U.P. and others versus Amar Pal Singh**. It is the decision in **Ram Shanker Gupta** (supra) which lays down the law correctly and for the reasons already discussed, the other decisions do not lay down the law correctly*

46. Reference is answered accordingly.

47. Ordinarily after answering the questions before us, we remit the matter back to the writ Court, but, it would be a futile exercise in the facts of this case, as nothing survives for further adjudication by the writ Court. The very basis of the claim of petitioner having been found to be non-existent on facts as also in law, we do not see as to why we should send the matter back to the writ Court for passing final orders. In our view, as all the issues have already been decided by us, we *dismiss* the writ petition.

(2023) 5 ILRA 1809
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2023

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Civil Revision No. 114 of 2022

Smt. Laxmi Devi & Ors. ...Revisionists
Versus

State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionists:

Prabhash Pandey, Vishnu Shankar Jain, Sri Pradeep Kumar Sharma, Sri Hari Shanker Jain (Sr. Advocate)

Counsel for the Opposite Parties:

C.S.C., Amitabh Trivedi, Fatima Anjum, Sri Manoj Kumar Singh, Sri Saurabh Tiwari, Sri Syed Ahmed, Sri Vineett Sankalp, Sri Zaheer, Sri Syed Ahmed Faizan, Sri Syed Farman Ahmad Naqvi (Sr. Advocate)

Civil Law – Civil Revision- Code of Civil Procedure, 1908- Order dismissing the application seeking scientific investigation of the structure(in the shape of Shivlingam)-challenged-report sought from Archaeological Survey of India-regarding feasibility of scientific investigation- scientific investigation of the Shivlingam / site, under able guidance of the Archaeological Survey of India assisted by the experts, scientists, archaeologist, can be done conveniently-subject to the rider that the site / Shivlingam in question shall not be damaged and it shall be preserved and protected in its present shape-impugned order based on reasoning alone minus relevant material on record-arbitrary and erroneous-cannot be sustained- trial Judge / District Judge, Varanasi will proceed further with the case and scientific investigation of the site / Shivlingam shall be directed to be done under aegis and guidance of the Archaeological Survey of India.- revision allowed. (Paras 20, 21, 23, 26 and 27)

HELD:

Now insofar as the above observation of the District Judge, Varanasi in regard to direction being issued for carrying out scientific

investigation is concerned, it is admitted fact that before passing the order (14.10.2022), due diligence was not exercised by the District Judge, Varanasi for the specific reason that the finding reached by the District Judge, Varanasi regarding damage being caused to the structure in issue is assumptive and presumptive and the same is not based upon any relevant material on record as such not supported by record. If the trial Judge had any apprehension of damage being caused to the site in case scientific investigation of the site is directed in that event it was obligatory on his part to have sought expert opinion of the persons well versed in carrying out such type of enterprises like the present one. The learned trial Judge, without collecting specific data / material from the able agency jumped upon the conclusion that scientific investigation of the site / Shivlingam if directed to be done will in all probability result in destruction of the site / Shivlingam itself. (Para 20)

This Court has no hesitation in observing that the report forwarded by the Superintending Archaeologist, ASI Sarnath Circle, Sarnath, Varanasi, would make it feasible and convenient that scientific investigation can be made to the extent and purport without causing harm to the site / Shivlingam in issue. That way, the natural premise that would follow, would proceed on theme that the actual site of the Shivlingam would remain preserved and protected. It being a factual reality, the technical and scientific report of the Archaeological Survey of India has opened ways for carrying out scientific investigation of the site / Shivlingam without causing any damage to the structure in question. (Para 21)

For the reasons aforesaid, the order impugned dated 14.10.2022 passed by the District Judge, Varanasi is found to be without merit, for the reason that the finding to the import that any scientific investigation would have impact of causing harm to the structure is a finding not supported by the relevant material on record. (Para 23)

It is trite law that any finding recorded by a court of law must be supported by relevant material on record, whereas, any finding recorded by a court of law on the strength of

reasoning alone minus relevant material on record would be on the face arbitrary and erroneous (finding). Therefore, the aforesaid finding of the District Judge, Varanasi, recorded vide order dated 14.10.2022 being erroneous cannot be sustained. (Para 24)

It is directed that the trial Judge / District Judge, Varanasi will proceed further with the case and scientific investigation of the site / Shivlingam shall be directed to be done under aegis and guidance of the Archaeological Survey of India to the extent and import as observed hereinabove in this order and the entire exercise shall be done under direction and supervision of the trial court and all consequential necessary directions shall be passed / issued in that regard by it. (Para 27)

Revision allowed. (E-14)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Pursuant to the order of this Court dated 04.11.2022, Director General, Archaeological Survey of India, New Delhi was directed for expressing opinion on the point whether scientific investigation of the 'structure' found at the site - subject matter of original suit no.18 of 2022, can be done through the method of carbon dating, ground penetrating radar (GPR), excavation and other scientific methods to be adopted to determine its age, nature and other relevant information without causing damage to it?

2. In that regard, the report has been submitted by the learned Additional Solicitor General of India – Sri Shashi Prakash Singh assisted by learned counsel Sri Manoj Kumar Singh.

3. Noticeable that the aforesaid report was produced in a sealed envelope by the

Additional Solicitor General of India for perusal of the Court on 11.05.2023 whereupon the sealed envelope was opened in Court and copy of the report was sought to be made available to the counsel for the revisionists as well as the contesting respondents whereupon the copy was supplied to them so that the parties may come to know about the substance and contents of the report submitted by the Archaeological Survey of India, Sarnath Circle, Sarnath, Varanasi. At this juncture this was considered appropriate to give at least one day time to both the sides to peruse the copy of the report and to state their respective stand so that the matter may be finally considered for disposal and the proceeding of this case was adjourned for the next following day i.e. 12.05.2023.

4. This Court carefully perused the original report which has been submitted to this Court by the covering letter of the Superintending Archaeologist, ASI, Sarnath Circle, Sarnath, Varanasi, dated 17.04.2023, thus communicating to this Court about the report which runs in as many as 52 pages and the learned Additional Solicitor General of India explained the various contents and aspects of this report - as submitted.

5. The learned Additional Solicitor General described the report by summing up that the opinion of the Archaeological Survey of India is based upon views/opinions of various renowned IITs (Indian Institutes of Technology) located in various regions of India, also about the scientific analysis of various methods and approach likely to be adopted for carrying out survey of the structure in question on the site.

6. Heard Sri Hari Shanker Jain, learned Senior Advocate, through virtual-mode, assisted by Sri Vishnu Shanker Jain, Sri Prabhash Pandey, Sri Pradeep Kumar Sharma, learned Counsel for the revisionists through hybrid mode, Sri Shashi Prakash Singh, Additional Solicitor General of India, assisted by Sri Manoj Kumar Singh, Advocate appearing for Archaeological Survey of India, Sri Mahesh Chandra Chaturvedi, learned Additional Advocate General assisted by Sri Bipin Bihari Pandey, learned Chief Standing Counsel, Sri Ramanjay Singh, learned Additional Chief Standing Counsel, Sri Ankit Gaur, Sri Shravan Kumar Dubey, Sri Gyanendra Singh, Sri Hare Ram Tripathi, learned Standing Counsel for the respondent nos. 1,2 and 3. Sri Syed Farman Ahmad Naqvi, learned Senior Advocate assisted by Sri Syed Ahmed Faizan, learned counsel for the respondent no.4, Sri. Vineet Sankalp, learned counsel for the respondent No.5. No one appears on behalf of the respondent no.6 in spite of repeated calls, also perused the record as available.

7. By way of the instant revision, challenge has been made to the impugned order dated 14.10.2022 passed by the trial Judge / District Judge, Varanasi, in Original Suit No.18 of 2022 Rakhi Singh Vs. State of U.P. and others, whereby the application numbered 250 C moved by the plaintiff-revisionist and objection 255 C and 262 C were considered and the application aforesaid was dismissed by observation that the prayer made for scientific investigation of the structure (in the shape of Shivlingam) cannot be ordered as that would be in violation of the order dated 17.05.2022 passed by the Hon'ble Apex Court directing the site / Shivlingum to be preserved and protected. The trial court

also observed that in view of above, there is no need for calling any report from the Archaeological Survey of India.

8. Learned counsel for the revisionists has vociferously claimed that the entire report on the point in issue for scientific investigation of the site by the Archaeological Survey of India when taken into consideration would reflect connotation, expressed and implied, that scientific survey of the site / Shivlingam can be managed and done without causing harm to the site in question. In support of his claim, learned counsel has engaged attention of this Court to the various pages of the aforesaid report to be specific page nos.1, 6, 8, 17, 18, 19, 21 and claimed that opinion / report submitted by the Archaeological Survey of India comes out with all the options available for conducting scientific survey of the site with possible outcome of the scientific investigation and it elaborates those methods by adopting which some data regarding age of the site / carbon dating of the site can be done without causing damage to the site and he proceeded to conclude that opinion submitted by the scientists from the various IITs is based upon scientific analysis of the 'modus operandi' to be applied in this case. Learned counsel also suggested that those methods by adopting which site might be damaged may be discarded and the one which helps in carrying out scientific investigation / survey of the site without damaging it should be adhered to and given green signal by this Court so that actual age of the Shivlingam / site may be ascertained.

9. At the very outset, learned Senior Counsel appearing for the respondent no.4

has raised preliminary objection regarding the proceeding of this Court in view of the order dated 17.05.2022 passed by the Hon'ble Apex Court. Learned Senior Counsel has read out the directions of the Hon'ble Apex Court that the structure in issue is required to be protected/preserved, therefore, it cannot be disturbed and any order passed for carrying out survey or scientific investigation of the site would be violative of the aforesaid order.

10. Learned counsel for the revisionists intervened and in reply to the aforesaid contention, submitted that insofar as the order dated 17.05.2022 passed by Hon'ble Apex Court is concerned that would not deter this Court from considering the aspect of the scientific investigation to be done in the manner that it is done without causing damage to the site in question and the site remains protected and preserved.

11. In support of his submission, Sri Vishnu Shanker Jain, learned counsel for the revisionists engaged attention of this Court to the very order dated 20.05.2022 passed by the Hon'ble Apex Court and read out the same in its entirety and claimed that in the order itself, the Hon'ble Apex Court has directed the trial Judge / District Judge, Varanasi to proceed with the trial touching upon ancillary matter. It is noticeable that during course of proceeding of this suit in question, application 250 C was moved (by the plaintiff-revisionist) calling for carrying out scientific investigation of the site which was considered more on technical grounds than on merits and perfunctorily rejected the application under garb of the aforesaid order dated 17.05.2022 that the site / Shivlingam has been directed to be

protected and preserved, therefore, the trial Judge was of the opinion that there is no need for calling any report on the point under consideration from the the Archaeological Survey of India for determining the age, nature and structure of the Shivlingam. He repeated his claim that conduction of the scientific investigation for determination of the age of the site in question would not in all probability damage and destroy the site / Shivlingam and would not change its nature as existing on date.

12. At this stage, Mr. Syed Farman Ahmad Naqvi, learned Senior Counsel for the respondent no.4 was posed specific query as to whether the report of the Archaeological Survey of India as submitted by the learned Additional Solicitor General of India, inescapably connotes to the import that order for any scientific investigation of the site / Shivlingam if made, would have the effect of destroying the site itself then learned Senior Counsel tried to hammer on certain points by reading out contents of page no.4 of the aforesaid report. However, he was intercepted by the learned counsel for the revisionists by clarifying the factual situation by reading out the contents of page nos.6 and 8 of the aforesaid report, which gesture was ostensibly not opposed by the learned Senior Counsel for the respondent no.4. It may be observed that the learned Senior Counsel for the respondent no.4 drew blank on the point of specific query by this Court that any sort of scientific investigation will in all probability cause damage to the structure.

13. As the Court proceeded further and asked the learned Additional Solicitor

General of India, Sri Shashi Prakash Singh assisted by Sri Manoj Kumar Singh to express his views about the express and implied connotations emerging from the aforesaid report by the Archaeological Survey of India whereupon he elaborated various details of the report and brought to the notice of this Court that the ground penetrating radar technique / method will be helpful towards identifying the remains of the ancient structures buried if any at the site and he proceeded to explain that as per advice and various opinions subsurface stratigraphic section would be ideal to study the different culture level at the site. He claimed that IIT Kanpur has specific suggestion on the point in that regard. After lot of discussion on the various methods suggested in the report of the Archaeological Survey of India, the learned Additional Solicitor General suggested that scientific investigation of the site can be ably done without causing harm to the Shivlingam / site. He was innocuous on point while claiming that a cumulative reading of the report submitted by the Archaeological Survey of India does not make it a point that any scientific investigation of the Shivlingam / site, if carried out, would damage it.

14. Learned Additional Advocate General, Sri Mahesh Chandra Chaturvedi, appearing for the State also dittoed the line of argument and suggestion advanced by the Additional Solicitor General of India and claimed that there is nothing in the entire report which may cause damage to the Shivlingam / site if scientific investigation of the site is directed to be done. Therefore, to claim that the nature of the property of the site / Shivlingam would not be protected / preserved in case of scientific investigation is baseless argument without any rationale.

15. In the wake of the above discussed rival contentions and the fact position in the light of the report of the Archaeological Survey of India as submitted by the Additional Solicitor General of India, the solitary issue that crops up for consideration of this Court pertains to fact whether scientific investigation of the site / Shivlingam, without harming and damaging the site / Shivlingam, can be directed or not?

16. While proceeding in the matter and viewing the things from that angle, the overall impression that trickles out from the careful perusal of the report of the Archaeological Survey of India indicates, to all intents and purposes, that scientific investigation of the site can be suitably carried out without causing harm to the site / Shivlingam in issue as such it can be concluded that the Shivlingam / site would remain preserved and protected even after the scientific investigation for determining the age, nature and status of the site / Shivlingam is done. The various reports of the scientific institutions do indicate to the same purport that scientific investigation can be carried out without causing harm to the site / Shivlingam. Since the entire report submitted by the Archaeological Survey of India has been made part of the record of this case, there is no need of describing the various extracts of these reports / opinion contained in the report itself.

17. In view of above discussion, natural conclusion emerges that scientific investigation of the Shivlingam / site, under able guidance of the Archaeological Survey of India assisted by the experts, scientists, archaeologist, can be done conveniently

subject to the rider that the site / Shivlingam in question shall not be damaged and it shall be preserved and protected in its present shape.

18. At this juncture, proper scrutiny of the impugned order dated 14.10.2022 passed by the District Judge, Varanasi need be done both on legal as well as factual aspects.

19. Bare perusal of the order impugned dated 14.10.2022 passed by the District Judge, Varanasi reveals that an application numbered 250 C was moved by the plaintiff-revisionists under Order 26 Rule 10 A read with 151 Civil Procedure Code, 1908 was moved with the prayer that the nature, age and status of the Shivlingam discovered on the site on 16.05.2022 in the survey done by Advocate Commissioner (of the site) be directed to be scientifically investigated by the Archaeological Survey of India by resorting to scientific techniques and technique for carbon dating. The contents of the order impugned proceeds further with the elaboration of the background of the original suit no.18 of 2022 and takes note of fact that some structure in the shape of Shivlingam was found by the Advocate Commissioner while survey of the site was made and a detailed discussion regarding nature and age of the substance of the Shivlingam was exhaustively taken into consideration by the trial Judge. Apart from that, objection 255 C filed by the defendant side was also taken into consideration and contents thereof discussed. After discussing factual aspect of the case, the trial Judge was of the view that the Hon'ble Apex Court vide its order dated 17.05.2022 has directed that the Shivlingam that was found on the spot in

the survey commission should be protected and preserved and in case any direction for using carbon dating technique or ground penetrating radar is made there is possibility of causing harm to the Shivlingam itself and that would be in derogation of the order dated 17.05.2022 passed by the Hon'ble Apex Court. Apart from that, it would adversely affect religious feeling of the masses at large. Therefore, the prayer made in the aforesaid application by the plaintiff- revisionist was disallowed. Consequently the application numbered 250 C was rejected.

20. Now insofar as the above observation of the District Judge, Varanasi in regard to direction being issued for carrying out scientific investigation is concerned, it is admitted fact that before passing the order (14.10.2022), due diligence was not exercised by the District Judge, Varanasi for the specific reason that the finding reached by the District Judge, Varanasi regarding damage being caused to the structure in issue is assumptive and presumptive and the same is not based upon any relevant material on record as such not supported by record. If the trial Judge had any apprehension of damage being caused to the site in case scientific investigation of the site is directed in that event it was obligatory on his part to have sought expert opinion of the persons well versed in carrying out such type of enterprises like the present one. The learned trial Judge, without collecting specific data / material from the able agency jumped upon the conclusion that scientific investigation of the site / Shivlingam if directed to be done will in all probability result in destruction of the site / Shivlingam itself.

21. This Court has no hesitation in observing that the report forwarded by the Superintending Archaeologist, ASI Sarnath Circle, Sarnath, Varanasi, would make it feasible and convenient that scientific investigation can be made to the extent and purport without causing harm to the site / Shivlingam in issue. That way, the natural premise that would follow, would proceed on theme that the actual site of the Shivlingam would remain preserved and protected. It being a factual reality, the technical and scientific report of the Archaeological Survey of India has opened ways for carrying out scientific investigation of the site / Shivlingam without causing any damage to the structure in question.

22. It being civil revision against the order impugned dated 14.10.2022 passed by the District Judge, Varanasi, merits of the original suit is not to be touched by this Court.

23. For the reasons aforesaid, the order impugned dated 14.10.2022 passed by the District Judge, Varanasi is found to be without merit, for the reason that the finding to the import that any scientific investigation would have impact of causing harm to the structure is a finding not supported by the relevant material on record.

24. It is trite law that any finding recorded by a court of law must be supported by relevant material on record, whereas, any finding recorded by a court of law on the strength of reasoning alone minus relevant material on record would be

on the face arbitrary and erroneous (finding). Therefore, the aforesaid finding of the District Judge, Varanasi, recorded vide order dated 14.10.2022 being erroneous cannot be sustained.

25. Consequently the order impugned dated 14.10.2022 passed by the District Judge, Varanasi, in Original Suit No.18 of 2022 Rakhi Singh Vs. State of U.P. and others is hereby set aside.

26. Therefore, the application numbered 250 C moved by the plaintiff-revisionist before the trial Judge is allowed to the effect and import that scientific investigation of the site / Shivlingam shall be carried out without causing damage to the site / Shivlingam and it shall be preserved in its present form. All objections moved against the aforesaid application 250 C is hereby disallowed.

27. It is directed that the trial Judge / District Judge, Varanasi will proceed further with the case and scientific investigation of the site / Shivlingam shall be directed to be done under aegis and guidance of the Archaeological Survey of India to the extent and import as observed hereinabove in this order and the entire exercise shall be done under direction and supervision of the trial court and all consequential necessary directions shall be passed / issued in that regard by it.

28. In order to facilitate further course of action by the trial court of Varanasi pertaining to original suit no.18 of 2022 Rakhi Singh Vs. State of U.P. and others,

learned Additional Solicitor General of India is directed to issue suitable directions to the concerned authority of the Archaeological Survey of India to appear before the trial Judge / District Judge, Varanasi on 22.05.2023, and the authority so present would after seeking suitable direction from the court of the District Judge, Varanasi, will render assistance to the trial Judge and will do the needful for carrying out the scientific investigation of the structure in the light of the observations made in this order. Both the parties present before this Court have also been apprised of this specific date and all have agreed to abide by it. Therefore, the parties are required to appear before the trial court on 22.05.2023.

29. In order to ensure proper scientific investigation as directed, let a copy of the entire report of the Archaeological Survey of India be transmitted forthwith to the trial Judge / District Judge, Varanasi. It is made clear that this report of the Archaeological Survey of India which runs in as many as 52 pages forwarded by Superintending Archaeologist, ASI Sarnath Circle Sarnath, Varanasi, would form part/record of the suit.

30. This revision is allowed in terms aforesaid.

31. Before parting with the judgment, this Court records high appreciation for the valuable assistance extended by the Additional Solicitor General of India, Sri Shashi Prakash Singh, assisted by Sri Manoj Kumar Singh appearing for ASI who took pains in elaborating the various

contents of the report of the Archaeological Survey of India, thus assisting the Court to a great extent in disposal of this case. Likewise, this Court accords appreciation for the services rendered by the learned Additional Advocate General, Sri Mahesh Chandra Chaturvedi – State of U.P.- and learned Chief Standing Counsel – Sri Bipin Bihari Pandey – in disposal of this case. Learned Senior Counsel for the respondent no.4 Mr. Syed Farman Ahmad Naqvi and his assisting counsel also deserve appreciation for rendering useful help to this Court in disposal of this case.

32. Let a copy of this order be transmitted to the trial Judge/District Judge, Varanasi, forthwith for ensuring compliance as above.

33. Costs easy.

(2023) 5 ILRA 1817
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2023

BEFORE

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

Civil Revision No. 126 of 2022

Sheshnath Singh ...Revisionist
Versus
Devendra Pratap Singh ...Opposite Party

Counsel for the Revisionist:

Sri Shailendra Kumar Singh, Sri Ashok
Kumar Upadhyay

Counsel for the Opposite Party:

Sri Tej Bhan Singh, Sri Meraj Ahmad Khan

Civil Law – Order rejecting defendant-revisionist's application for leave to defend in a summary suit- under challenge- Civil Revision- Code of Civil Procedure, 1908- Summary suit under

Order XXXVII of the Code- Rules 2 and 3 of Order XXXVII of Code-Course of summary suit after service of summons-Rule 3(5) provides the manner in which the leave to defend is to be granted-Leave to defend cannot be sought by the defendant at the stage when he enters appearance in response to summons-next step must be taken by plaintiff-obtain summons for judgement-hence, defendant's application for leave to defend was premature-order of learned trial judge rejecting the application for leave to defend on merits-ought to be substituted by an order rejecting that application as premature-application for leave to defend to be considered again-revision allowed. (Paras 8, 9, 10, 11, 12 and 13)

HELD:

A reading of Rule 3 of Order XXXVII of the Code shows that once the defendant enters appearance in response to the summons issued in Form 4 of Appendix B to the Code, notice of appearance is to be given by the defendant to the plaintiff's Counsel, or if the plaintiff appears in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter, directed to the address of the plaintiff's pleader or the plaintiff, as the case may be. Sub-rule (4) of Rule 3 of Order XXXVII of the Code postulates that after the defendant enters appearance, the plaintiff is obliged to serve on the defendant, summons for judgment in Form 4A set out in Appendix B to the Code. The summons for judgement are to be made returnable, not less than ten days from the date of service. The summons for judgment are required to be supported by affidavit, verifying the cause of action and the amount claimed to be due from the defendant. The statute also requires the plaintiff to St.that in his belief, there is no defence to the suit. It is upon service of the said summons for judgment that within the time period of ten days, the defendant can apply for leave to defend the suit. Sub-rule(5) of Rule 3 postulates that the leave prayed by the defendant to be granted by the Court is unconditional or upon such terms as the Court may consider just. The two provisos appended to sub-rule (5) are further guidance in the matter to the Court how leave is to be granted

and subject to what conditions. Those provisos are not the subject matter of consideration in this revision. (Para 8)

The crux of the issue here appears to be that the learned Trial Judge refused the application for leave to defend, made by the defendant at a time when the stage for that kind of an application had not yet arrived. This is so because the plaintiff had not taken out any summons for judgment. A reading of sub-rule (4) and sub-rule (5) of Rule 3 of Order XXXVII of the Code makes it evident that an application for leave to defend can be made by a defendant only when the plaintiff takes out summons for judgement, complying with the conditions of sub-rule (4) of Rule 3 of Order XXXVII of the Code. It brooks little doubt that leave to defend cannot be sought by the defendant at the stage when he enters appearance in response to the summon for appearance. The next step is to be taken by the plaintiff by obtaining summons for judgment. It is, thereafter, that the defendant may, within the time permissible and in the manner prescribed, apply for leave to defend. Therefore, in this case the defendant's application for leave to defend was premature. (Para 9)

The learned Trial Judge in refusing leave to defend, acted without jurisdiction. If at all an application for leave to defend had been made at that stage by the defendant, it ought to have been dismissed as premature, rather than on merits, as done in the present case. (Para 10)

In the opinion of this Court, therefore, the impugned order of the learned Trial Judge, to the extent that she has proceeded to reject the application for leave to defend the suit on merits, is not sustainable. In the opinion of this Court, the order of the learned Trial Judge rejecting the application for leave to defend on merits, ought to be substituted by an order rejecting that application as premature. (Para 13)

Revision allowed. (E-14)

List of Cases cited:

Sewa Ram Vs Firm Modaram Tulsiram, 2001 SCC OnLine Raj 424

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

This civil revision is directed against an order of Ms. Diksha Shree, learned Additional Civil Judge (Senior Division)-03, Allahabad dated 21.11.2022 rejecting the defendant-revisionist's application for leave to defend in a summary suit.

2. Heard Mr. Ashok Kumar Upadhyay, learned Counsel appearing for the revisionist and Mr. Tej Bhan Singh, learned Counsel appearing on behalf of the plaintiff-respondent.

3. The summary suit here instituted under Order XXXVII of the Code of Civil Procedure, 1908 (for short, 'the Code') is one to recover money due on several cheques, said to have been issued by the defendant in the plaintiff's favour, that were dishonoured on presentation. The summary suit was instituted on 13.09.2022. On 14.09.2022, summons in Form 4 of Appendix B to the Code were issued to the defendant for appearance. The summons were made returnable on 29.09.2022.

4. A perusal of the order sheet shows that on 29.09.2022, the Presiding Officer was not available because she was away on training. On the next date, i.e. 10.10.2022, the Presiding Officer was on leave. On 17.10.2022, the plaintiff filed a copy of the postal track along with an affidavit, showing that the defendant had been served on 23.09.2022 with the summons. The suit was directed to come up on 29.10.2022 vide order dated 17.10.2022. Vide order dated 29.10.2022, service upon the defendant was held sufficient and the suit was adjourned to 07.11.2022. Later on, on 29.10.2022, the defendant put in

appearance through Counsel and moved an application bearing paper no. 11C, saying that the learned Counsel had got information from his client over telephone, instructing him in the present suit. The learned Counsel urged that he needs a copy of the plaint, so that he can file a reply. The suit was then adjourned to 01.11.2022 by the subsequent order that was passed on 29.10.2022. On 01.11.2022, the defendant moved an application marked as paper no. 12C along with an affidavit 13C, to which was attached a *vakalatnama* from the defendant, authorizing the learned Counsel to appear and defend. The application 12C sought leave to defend the suit. The grounds on which leave was sought were mentioned in the accompanying affidavit paper no. 13C. The affidavit largely disclosed for grounds the fact that the defendant was undergoing treatment at the District Hospital, Mau and advised bed rest. Some papers relating to the treatment were enclosed with the affidavit. The defendant denied the service of summons at his address and said that after coming to know about the institution of this suit, he had informed his learned Counsel, on the basis of which the learned Counsel had moved the application bearing paper no. 11C, the day he appeared.

5. It was further said in the affidavit that the defendant came over to Allahabad from Mau and moved the application bearing paper no. 12C seeking leave to defend. The plaintiff objected to both the applications bearing paper no. 11C and 12C. It was made out that the defendant was served with the summons on 23.09.2022. The plaintiff urged that on 29.10.2022, the defendant had appeared much beyond ten days of the service of summons for appearance, and, therefore,

the suit ought to be decreed. It was also said that the application paper no. 11C was filed without a *vakalatnama* and beyond the statutory period of ten days, rendering it liable to be rejected. The suit was adjourned on 01.11.2022 to 07.11.2022 and it is on that date that the defendant applied for leave to defend. The plaintiff also said that the affidavit does not disclose any ground for leave to defend at all. The defendant has not denied the issue of the cheques in question that are the basis of the suit. The prayer, therefore, was that the application for leave to defend in any case ought to be rejected.

6. The learned Trial Judge, while dealing with the defendant's applications 11C and 12C, held that the defendant had not disclosed grounds for leave to defend in his application 12C, nor anything about the merits of the plaintiff's claim was said there. It was not disclosed as to what was the substantial defence to the plaintiff's claim, on the foot of which leave to defend may be granted. The affidavit filed in support of the application 12C made out a case for the defendant's absence. Therefore, the learned Trial Judge, considering the prayer in the application 11C, seeking permission to appear in the suit in response to the summons for appearance, decided to exercise discretion conferred under sub-rule (7) of Rule 3 of Order XXXVII to condone the delay in the matter of appearance and permitted the defendant to appear. However, the learned Trial Judge, finding that there was no dependable cause indicated in the affidavit 13C filed in support of the application 12C, rejected the same, denying the defendant leave to defend. It is against the order refusing leave to defend that the defendant-revisionist has come up.

7. Rule 3 of Order XXXVII of the Code discloses the precise course that a summary suit takes, after summons for appearance have been instituted under Rule 2 of Order XXXVII of the Code. Rule 3 of Order XXXVII of the Code reads:

"3. Procedure for the appearance of defendant--(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action

and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,--

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the

plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit."

8. A reading of Rule 3 of Order XXXVII of the Code shows that once the defendant enters appearance in response to the summons issued in Form 4 of Appendix B to the Code, notice of appearance is to be given by the defendant to the plaintiff's Counsel, or if the plaintiff appears in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter, directed to the address of the plaintiff's pleader or the plaintiff, as the case may be. Sub-rule (4) of Rule 3 of Order XXXVII of the Code postulates that after the defendant enters appearance, the plaintiff is obliged to serve on the defendant, summons for judgment in Form 4A set out in Appendix B to the Code. The summons for judgement are to be made returnable, not less than ten days from the date of service. The summons for judgment are required to be supported by affidavit, verifying the cause of action and the amount claimed to be due from the defendant. The statute also requires the plaintiff to state that in his belief, there is no defence to the suit. It is upon service of the said summons for judgment that within the time period of ten days, the defendant can apply for leave to defend the suit. Sub-rule(5) of Rule 3 postulates that the leave prayed by the defendant to be granted by the Court is unconditional or upon such terms as the Court may consider just. The two provisos appended to sub-rule (5) are further guidance in the matter to the Court

how leave is to be granted and subject to what conditions. Those provisos are not the subject matter of consideration in this revision.

9. The crux of the issue here appears to be that the learned Trial Judge refused the application for leave to defend, made by the defendant at a time when the stage for that kind of an application had not yet arrived. This is so because the plaintiff had not taken out any summons for judgment. A reading of sub-rule (4) and sub-rule (5) of Rule 3 of Order XXXVII of the Code makes it evident that an application for leave to defend can be made by a defendant only when the plaintiff takes out summons for judgement, complying with the conditions of sub-rule (4) of Rule 3 of Order XXXVII of the Code. It brooks little doubt that leave to defend cannot be sought by the defendant at the stage when he enters appearance in response to the summon for appearance. The next step is to be taken by the plaintiff by obtaining summons for judgment. It is, thereafter, that the defendant may, within the time permissible and in the manner prescribed, apply for leave to defend. Therefore, in this case the defendant's application for leave to defend was premature.

10. The learned Trial Judge in refusing leave to defend, acted without jurisdiction. If at all an application for leave to defend had been made at that stage by the defendant, it ought to have been dismissed as premature, rather than on merits, as done in the present case.

11. This issue came up for consideration before the Rajasthan High Court in **Sewa Ram v. Firm Modaram**

Tulsiram, 2001 SCC OnLine Raj 424,
where it has been observed:

"11. Thus, on a bare reading of this language it is clear that one part of the procedure envisaged is the one under Rule 2 wherein after receipt of summons for appearance the defendant shall not defend the suit unless he enters appearance and in the event of his not entering appearance the allegations in the plaint are to be deemed to be admitted and the plaintiff is entitled to a decree. In this view of the matter if the defendant enters appearance as per Order 37 Rule 2, then this one stage of the plaintiff to be entitled to decree is lost. Obviously, therefore, thereafter the plaintiff has to proceed further and after the defendant so enters appearance, the plaintiff is to serve on the defendant a summon for judgment which has to be returnable after a particular length of time, it is to be supported by affidavit, verifying the cause of action, and the amount claimed, and also stating that in his belief there is no defence to the suit. It is only and only after the plaintiff does all this, that the defendant attracts any obligation to apply for leave to defend. Otherwise in absence of any such service of summons for judgment, in the scheme of things, the defendant is very much entitled to forget about the suit and just lie low. Not only this in my opinion until and unless the defendant is served with summons for judgment in accordance with Order 37 Rule 3(4), the defendant even does not get any right to even apply for leave to defend, much less can such application at all be considered on merits, by the learned trial court. Until and unless the defendant is served with the necessary papers including affidavit of the plaintiff verifying the cause of action and the amount claimed and also

deposing that in his belief there is no defence to the suit, the defendant is not required, rather even not entitled, to apply for leave to defend, as until all this is done, in the set up of things it cannot be said that the defendant is at all even supposed to defend any action."

(emphasis by Court)

12. It must be remarked at this stage that Order XXXVII is a salutary procedure that could curtail much avoidable criminal litigation and bring quick justice, where necessary. However, for some reason in the State of Uttar Pradesh, this procedure has historically been under-utilized, and, if this Court may dare say, hardly ever utilized. It is for this reason that the Presiding Officers of the Subordinate Courts and the members of the Bar are not very well acquainted with the few basic technicalities of procedure, that govern suits under order XXXVII. This case is a classical example of lack of that acquaintance on both sides.

13. In the opinion of this Court, therefore, the impugned order of the learned Trial Judge, to the extent that she has proceeded to reject the application for leave to defend the suit on merits, is not sustainable. In the opinion of this Court, the order of the learned Trial Judge rejecting the application for leave to defend on merits, ought to be substituted by an order rejecting that application as premature.

14. This Court is informed that the plaintiff has already applied for summons for judgment, which have been served upon on 02.12.2022, regarding which he has taken steps for service through registered post on 03.12.2022. Additionally, learned Counsel appearing for the defendant has also been served with the summons for

judgement in Form 4A before the Trial Court.

15. Learned Counsel for the defendant appearing before this Court has made a statement at the Bar that the defendant has been served with summons for judgment. Accordingly, the defendant will have ten days time from the date of production of a certified copy of this order before the Trial Court to apply for leave to defend.

16. The application for leave to defend, when made, as directed above, shall be heard and disposed of by the learned Trial Judge, in accordance with provisions of sub-rule (5) of Rule 3 of Order XXXVII of the Code. Needless to say that the application for leave, if made, shall be decided with all promptitude and the suit shall not be adjourned on any pretext. The impugned order dated 21.11.2022 is set aside to the extent it refuses leave to defend and it is ordered in the terms indicated hereinabove.

17. This revision is **allowed**. Costs easy.

(2023) 5 ILRA 1823
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.04.2023

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 55033 of 2022

Shahil	Versus	...Applicant
State of U.P. & Ors.		...Respondents

Counsel for the Applicant:

Sri Inder Pal Singh Tomar, Anjali Singh Tomar,
Sri Gaurav Singh Tomar

Counsel for the Respondents:

G.A.

Criminal Law – Criminal Procedure Code, 1973- Section 439 - Indian Penal Code, 1860 -Sections 328, 341, 363, 376 & 506 – -The Protection of Children from Sexual Offences Act, 2012 - Section 3/4 - The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(5)– victim and her mother declared hostile during trial- victim did not support the prosecution case under Section 137 of the Indian Evidence Act- conclusion or inference from evidence shall be drawn- after considering the evidence and attending circumstances-in entirety- hostility of the victim in her cross-examination in heinous offences like rape, murder, etc.- no ground for bail- Bail Application rejected.

HELD: It is well settled that the conclusion or inference from the evidence of the witness shall be drawn considering his/her examination-in-chief, cross-examination as well as re-examination in its entirety in the light of attending facts and circumstances of the case and not by picking out one or two sentence from here and there. This Court in exercise of power under Section 439 Cr.P.C. at this mid-stage of the trial which is going on does not deem it appropriate to discuss and evaluate the evidence of the victim and other prosecution witnesses in detail as the allegation and defence of the accused-applicant is still open to be urged before the trial Court. However, this Court is of the view that hostility of the victim in her cross-examination in heinous offences like rape, murder, etc. is no ground for bail.

Bail application rejected. (E-14)

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

1. Heard Mr. Indra Pal Singh Tomar, learned counsel for the applicant and Mr. Virendra Kumar Maurya, learned Additional Government Advocate representing the State. As per office report dated 21.02.2023, notice issued vide order of this Court dated 24.01.2023 to the victim as well as Child Welfare Committee has

been served, but none appears on their behalf.

2. By means of this application under Section 439 of Cr.P.C., applicant Shahil, who is involved in Case Crime No. 341 of 2021, under Sections 328, 341, 363, 376, 506 IPC, Section 3/4 POCSO Act and Section 3(2)(5) SC/ST Act, police station Bhojpur, district Ghaziabad, seeks enlargement on bail during the pendency of trial.

3. As per prosecution case, in brief, victim lodged a first information report on 07.06.2021 under Sections 341, 506 IPC against present applicant Shahil and his parents Ismail and Noori with the allegation inter alia that they used to extend threat for her abduction. During investigation, on 14.09.2021, after four months of the F.I.R., statement under Section 161 Cr.P.C. of the victim was recorded in which, she has stated inter alia that on 05.05.2021 at 06:45 P.M., when she was returning from her farm, two persons out of whom, one was the present applicant Shahil came there and they took her to forest after getting her to smell some intoxicated substance where they committed rape on her. At that time, she was feeling pain, but she was in a state of intoxication. Thereafter, applicant took her to a school situated in Kalchina by foot. Other boy was driving the motorcycle slowly. On the way seeing them, some boys of the village created rucks and also made videos. The applicant was also assaulted by the villagers then he informed his parents on which his family members reached there and they took the applicant as well as the victim to the police station where Shahil was arrested and the victim was allowed to go to her house. It is next submitted that statement under Section 164 Cr.P.C. of the

victim was recorded on 27.05.2021 after 04 months 22 days, in which also, she has narrated the same story. After culmination of investigation, charge-sheet under Section 328, 341, 363, 376 and 506 IPC, Section 3/4 POCSO Act and Section 3(2)(5) SC/ST Act has been submitted against the applicant only.

4. Main substratum of argument of learned counsel for the applicant is that before the trial Court, statement of the victim and her mother have been recorded as PW-1 and PW-2 on 22.05.2022 and 15.03.2023, respectively, but they have been declared hostile. With regard to statement of victim, much emphasis has been given by contending that the victim has not supported the prosecution case under Section 137 of Indian Evidence Act, then prosecution has re-examined the victim under Section 138 of Indian Evidence Act, in which, same story has been narrated by the victim, hence, the victim shall deemed to be declared hostile. The applicant does not have any criminal history to his credit and is languishing in jail since 21.10.2021, therefore, applicant may be released on bail.

5. Per contra, learned A.G.A. for the State vehemently opposed the prayer for bail of the applicant by contending that date of birth of the victim is 27.02.2005 and on the day of the incident, she was minor child. The victim in her statements under Section 161 Cr.P.C. and 164 Cr.P.C. has made allegation of rape against the applicant. Bail application of the applicant has been rejected twice on 15.11.2021 and 18.01.2022 by the trial Court. Thereafter applicant has filed Criminal Appeal No. 2519 of 2022 before this Court but learned counsel for the applicant after some argument did not press the appeal and at his

request, the same was dismissed as withdrawn vide order dated 11.11.2022. It is also submitted that the victim has not been declared hostile by the trial Court and in this regard, it is pointed out that the examination-in-chief of the victim in part was recorded on 26.05.2022, in which she has made allegation of rape against the applicant, thereafter she was again examined on 21.07.2022, in which she has proved her statement under Section 164 Cr.P.C. which was exhibited as Exhibit Ka-1, thereafter her cross-examination has been done after five months on 01.03.2023, in which she has given contradictory statement. Under the circumstances, due to long gap of five months between the examination-in-chief and cross-examination of the victim, possibility of winning over the victim from the accused side cannot be ruled out. It is also submitted that in the cases where rape victim does not support the prosecution case in her cross examination after long gap after her examination-in-chief, many secrets are hidden behind it. Lastly, it is submitted that under the facts of the case, bail application of the applicant in such a heinous crime is liable to be rejected.

6. Having heard learned counsel for the parties and examined the matter in its entirety, I find substance in the submission of learned A.G.A. that the victim in her examination-in-chief has clearly made allegation of rape against the applicant and also proved her statement under Section 164 Cr.P.C. supporting the prosecution case and she has not been declared hostile by the Court. Right from beginning of the case till the completion of victim's examination-in-chief, her stand was intact but later on when she was cross-examined and re-examined after about five months of her examination-in-chief, she did not support

the prosecution case. Thereafter mother of the victim who has been examined as PW-2 on 15.03.2023 before the trial Court has been declared hostile. These circumstances prima-facie indicate the external influences over the victim.

7. It is well settled that the conclusion or inference from the evidence of the witness shall be drawn considering his/her examination-in-chief, cross-examination as well as re-examination in its entirety in the light of attending facts and circumstances of the case and not by picking out one or two sentence from here and there. This Court in exercise of power under Section 439 Cr.P.C. at this mid-stage of the trial which is going on does not deem it appropriate to discuss and evaluate the evidence of the victim and other prosecution witnesses in detail as the allegation and defence of the accused-applicant is still open to be urged before the trial Court. However, this Court is of the view that hostility of the victim in her cross-examination in heinous offences like rape, murder, etc. is no ground for bail.

8. In the light of above discussion, considering the overall facts and circumstances of the case as well as keeping in view the submissions advanced on behalf of parties as noted above, gravity of offence, role assigned to applicant and severity of punishment, I do not find any good ground to release the applicant on bail.

9. Accordingly, the bail application is **rejected**.

10. It is made clear that the observation contained in the instant order is confined to the issue of bail and shall not affect the merit of the trial. Trial Court is

expected to conclude the trial of the applicant expeditiously without granting any unnecessary adjournment to either of the parties.

11. Let a copy of this order be sent to the victim through Child Welfare Committee, Ghaziabad as well as to the Trial Court for information within two weeks.

(2023) 5 ILRA 1826
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2023

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Misc. II Bail Application No. 53377 of 2022

Rajkaran Patel		...Applicant
	Versus	
State of U.P.		...Respondent

Counsel for the Applicant:

Sri Ram Autar Verma, Sri Vivek Mishra, Sri Amarjeet Singh

Counsel for the Respondent:

G.A., Sri Sukhvir Singh, Sri Vinod Kumar Sahu

Criminal Law – Criminal Procedure Code, 1973 - Section 439 - second bail application- Indian Penal Code, 1860 - Sections 366, 376, 354-A, 328, 323, 504 & 506 - second bail application of accused is not barred and is maintainable- second bail application is always considered-on fresh grounds available to the accused after rejection of bail application- fresh argument in second bail application not allowed-if available at the time of moving and rejection of first bail application- no fresh and new ground available in the present second bail application- substantial change in the circumstance so far as merit of the case is concerned- Bail application rejected. (Paras 13, 16, 17, 19 and 24)

HELD: Although a second bail application on behalf of the accused is not barred and is maintainable but considerations of the grounds of bail are the factors to be taken into account in it. A second bail application is always considered on fresh and new grounds available to the accused after rejection of the first bail application. It cannot be said that a second bail application would not be maintainable. The maintainability of such bail application is there but consideration of the prayer for bail is subject to the availability of fresh and new grounds which if not available would render reviewing the earlier order rejecting the bail application. In the case of Babu Singh (supra), the Court was considering a bail application of an accused who was acquitted by the Sessions Court against which the St.had filed an appeal against acquittal in the High Court which was successful and the findings of the Sessions Judge were reversed holding the accused persons guilty and sentencing them for the offences. Against the said judgment and order of the High Court, a statutory appeal was carried to the Apex Court. Before the Apex Court, a second bail application was filed which was the consideration in which the said judgment and order has been passed. The Apex Court with regards to the maintainability of a second bail application held that an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. (Para 13)

In so far as the part of the maintainability of a second bail application is concerned, it is no more res-integra that the same is maintainable. The question which arises is whether without any fresh new and changed circumstances, a Court should consider a subsequent bail application ignoring its previous order rejecting the previous bail application or not. (Para 16)

In the opinion of the Court, the same would not be possible. A subsequent bail application is maintainable but consideration of the prayer of bail would depend on the facts as to whether fresh and new grounds have been pleaded and are available or not. (Para 17)

Considering the arguments of learned counsels for the parties, perusing the records and the law

on the issue, there is no fresh and new ground available in the present second bail application. This Court does not find any substantial change in the circumstance so far as merit of the case is concerned. This Court does not find it a fit case for bail. (Para 19)

Bail Application rejected. (E-14)

List of Cases cited:

1. Babu Singh & ors.Vs St.of U.P.: AIR 1978 SC 527
2. Dal Chand & ors.Vs St.of U.P.: 2000 Cri LJ 4579
3. St.of Mah. Vs Buddhikota Subha Rao: 1989 Supp (2) SCC 605
4. Satya Pal Vs St.of U.P.: 1998 SCC OnLine All 1224: (1998) 37 ACC 287
5. St.of M.P. Vs Kajad: (2001) 7 SCC 673
6. Kalyan Chandra Sarkar Vs Rajesh Ranjan: (2005) 2 SCC 42

(Delivered by Hon'ble Samit Gopal, J.)

1. List revised.
2. Heard Sri Ram Autar Verma, Sri Vivek Mishra and Sri Amarjeet Singh, learned counsels for the applicant, Sri Vinod Kumar Sahu, learned panel counsel for the High Legal Service Committee and Sri U.P. Singh, learned Additional Government Advocate for the State of U.P. and perused the records.
3. This second bail application under Section 439 of Code of Criminal Procedure, 1973 has been filed by the applicant Rajkaran Patel, seeking enlargement on bail during trial in connection with Sessions Trial No. 31 of 2022 (State Vs. Rajkaran Patel and others) arising out of Case Crime No. 198 of 2021,

under Sections 366, 376, 354-A, 328, 323, 504, 506 IPC, registered at P.S. Civil Lines, District Prayagraj, pending in the court of learned Additional Sessions Judge-II/FTC, Allahabad.

4. The first bail application of the applicant was rejected by this Court vide order dated 26.05.2022 passed in Criminal Misc. Bail Application No. 48511 of 2021 (Rajkaran Patel Vs. State of U.P.).

5. Learned counsels for the applicant argued that the present second bail application has although been filed on behalf of the applicant without any change in circumstances but there are fresh and new grounds which have been pleaded and are to be argued. It is submitted that a second bail application is maintainable in view of the judgment of the Apex Court in the case of **Babu Singh and others Vs. State of U.P. : AIR 1978 SC 527** and also in view of the judgment of a Division Bench of this Court in the case of **Dal Chand and others Vs. State of U.P. : 2000 Cri LJ 4579**. It is submitted that the Apex Court has held that a second bail application on a later occasion would be maintainable giving more material, further developments and different considerations. It is submitted that the Division Bench of this Court has while following the said judgment of the Apex Court in the case of **Babu Singh (supra)** held the same while answering a question referred to it.

6. It is next argued while placing para 20(q) of the affidavit in support of the bail application that the applicant has been falsely implicated in the present case. The reason for false implication is a matrimonial dispute which has turned into the present dispute out of proportion. Karuna Pati Patel the father of the victim

used to bring cases of his area to the applicant for being filed in the High Court. The victim as per her statement recorded under Section 164 Cr.P.C. has stated that she has come to the chamber of the applicant for the first time on 03.01.2020 at Chhota Baghara, Prayagraj so that she may start her legal practice after getting her degree of LL.B. After her admission in the 1st year on 28.12.2020, the victim started to mount pressure on the applicant to marry Shivraj Patel the son of the applicant with herself and keep her with him as his junior after which she would attend the High Court as an Advocate even though she was not holding a degree and was not registered in the Bar Council to which the applicant did not agree and in so far as the proposal for marriage is concerned, the same was discussed by the applicant with his wife and his son after which it was rejected which caused bitterness in the relationship between him and the victim and her father, after which her father asked for return of all the professional files for engaging another counsel which would be managed through the victim to which the applicant refused by stating that he would return them only after the consent of the clients. Her father threatened the applicant of dire consequences including false implication in criminal cases and as such the applicant has been implicated in the present case.

7. It is further argued that in so far as the co-accused Sipahilal Shukla, Advocate is concerned, he has also been falsely implicated in the present case due to the fact that he had tried to persuade the victim and her father not to take such extreme steps in such a petty matter but the persuasion fell on deaf ears. The matter could not be settled after which the present FIR was lodged against the applicant and Sipahilal Shukla on 07.04.2021 with false allegations.

8. Further, learned counsels for the applicant while placing paragraph nos. 21 to 24 of the affidavit in support of the bail application have argued that the story as narrated by the victim in her statement recorded under Section 164 Cr.P.C. is a false and cooked up story inasmuch as it is stated that she was administered poison but the poisoning was actually in the month of July, 2020. It is further submitted that even in so far as the allegations of the victim getting pregnant due to the illegal acts of the applicant and her being administered medicine for abortion is concerned, the same is false and concocted story. It is further submitted that one Km. Rakhi is stated to be a person who had helped the victim when she met her on 29.06.2021. It is submitted that the victim and Km. Rakhi are persons who have formed a gang of Advocates and are entangling people in fake cases for extorting money from them. It is argued that a co-ordinate Bench of this Court has vide order dated 18.08.2022 which is annexed as annexure 20 to the affidavit passed in a 482 application being Crl. Misc. Application u/s 482 No. 20438 of 2022 (Nikki Devi Vs. State of U.P. and another) has directed the CBI to conduct preliminary enquiry in 47 cases as per directions contained in para 12 of the said order.

9. Learned counsels have further while placing the copy of the order sheet of the trial court from 12.01.2022 to 02.01.2023 which is annexure S.A. 1 to the supplementary affidavit dated 16.01.2023 submitted that the case was committed to the Court of Sessions on 12.01.2022 but till date charges in the matter have not been framed. It is submitted that the applicant is in jail since 25.09.2021. The applicant be enlarged on bail.

10. Per contra, learned panel counsel appearing for the High Court Legal Service

Committee on behalf of the victim submitted that the first bail application of the applicant has been rejected by this Court on merits vide order dated 26.05.2022. It is submitted while placing para 29 of the affidavit in support of the bail application that totally false and baseless allegations have been levelled in the said paragraph that the victim has told the applicant that she would give her testimony in the trial court in his favour for which she demanded Rs. 10 lakhs on which the applicant showed his inability to fulfill the same. It is submitted that to the contrary the victim is being threatened by various persons on behalf of the applicant despite the fact that the applicant is in jail. It is submitted that the present bail application which is the second bail application has been filed without any fresh and new ground. It is argued that all the grounds as taken were available at the time of hearing of the first bail application. It is submitted that there is no subsequent development after rejection of the first bail application which would entitle the applicant to file a second bail application. It is submitted that the statement of the victim recorded under Section 164 Cr.P.C. fully corroborates the prosecution version. Merely by stating that the allegations therein are false and incorrect, does not at this stage entitle the applicant for grant of bail. It is submitted that the said statement of the victim was considered in extenso by this Court while deciding the first bail application. It is further submitted that in so far as the version of the victim is concerned, the same also finds corroboration from the narration given by her to the Medical Officer who conducted her medical examination on 02.07.2021. It is submitted that the applicant is a professional and is practising a noble profession of being an Advocate. He has indulged in an act that

too with a girl who is also aspiring to join the noble profession. It is submitted that the present bail application is devoid of any merit and deserves to be dismissed.

11. Learned counsel for the State also opposed the prayer for bail vehemently by adopting the arguments of learned panel counsel for the High Court Legal Service Committee on behalf of the victim. It is further argued that the charge sheet in the matter has been submitted against the applicant on 19.11.2021. The first bail application of the applicant was decided after submission of charge sheet by considering all the material collected during investigation. It is submitted that there is no fresh and new ground in the present second bail application. The first bail application of the applicant has been rejected on merits by a detailed order by this Court. It is submitted that the present second bail application be dismissed.

12. After having heard learned counsels for the parties and perusing the records, it is evident that this is a second bail application. The first bail application of the applicant was rejected by this Court vide order dated 26.05.2022. The same is extracted herein-below:-

"1. Heard Sri Rajiv Lochan Shukla, learned counsel for the applicant, Sri Sukhvir Singh, learned panel counsel for the High Court Legal Service Committee and Sri B.B. Upadhyay, learned counsel for the State and perused the material on record.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant- Rajkaran Patel, seeking enlargement on bail during trial in connection with Case Crime No. 198 of 2021, under Sections 366, 376, 354-A, 328,

323, 504, 506 I.P.C., registered at Police Station Civil Lines, District Prayagraj.

3. The first information report of the present case was lodged on 07.04.2021 at 00:32 hours, under Section 366 I.P.C. by Karunapati Patel against the applicant and Sipahi Lal Shukla in connection with an incident alleged to have taken place on 06.04.2021 at 13:30 hours alleging therein that the first informant is a resident of village Kaudru, Police Station Sarai Inayat, District Prayagraj. His daughter aged about 20 years is a LL.B. student and was practising in the High Court with Rajkaran Patel (the present applicant) who is a resident of Village Sohasha, Police Station Mungra Badshahpur, District Jaunpur who is an Advocate in the High Court. On the day of occurrence at about 1:30 pm from near Alia Law Agency, both the accused persons have enticed away his daughter. The date of birth of his daughter is 15.11.2000. The first information report is thus lodged.

4. Learned counsel for the applicant argued that the applicant has been falsely implicated in the present case. It is further argued that the prosecutrix was interrogated under Section 161 Cr.P.C. and also her statement was recorded under Section 164 Cr.P.C. The copy of the statement recorded under Section 161 Cr.P.C. is annexed as Annexure-5 to the affidavit in support of bail application whereas the certified copy of her statement recorded under Section 164 Cr.P.C. is annexed as Annexure-SA-1 to the second supplementary affidavit dated 28.04.2022. Learned counsel has placed before the Court both the statements and has argued that there has been an improvement by the prosecutrix in her statement recorded under Section 164 Cr.P.C. as that of her statement recorded under Section 161 Cr.P.C. It is further argued that the prosecutrix in her

statement recorded under Section 161 Cr.P.C. has not stated of the incident as had been stated to be continuing since long but has not mentioned the actual date and time since when she had been subjected to sexual assault by the applicant. It is argued that when the prosecutrix was brought before the doctor for her medical examination she has although narrated about the entire incident in detail but even therein there is a variation of her version as stated by her in her statements recorded under Section 161 Cr.P.C. and under Section 164 Cr.P.C. It is further argued that the medical examination of the prosecutrix was conducted on 02.07.2021 whereas as per her version as stated in her statement recorded under Section 161 Cr.P.C., she was assaulted on 29.06.2021 in front of Gate No.5 of the High Court but the doctor although has found one healed injury on her breast and an abrasion on her left arm but had opined that there is no fresh injury. It is argued that connecting the said injury with the present incident would not at all be in favour of the version of the prosecutrix as stated by her.

5. Learned counsel for the applicant further argued that the prosecutrix has stated that she had aborted her pregnancy four times but there is no evidence whatsoever regarding the said allegation and the same can very-well as such be said to be an exaggerated version given by her and as such Section 313 I.P.C. was left out. The applicant was not taken on remand under the said Section vide order dated 17.12.2021, the copy of which is annexed as Annexure-SA1 to the supplementary affidavit dated 08.04.2022. It is argued that the prosecutrix has stated in her statements that she had met one Ms. Rakhi on 29.06.2021 but the said person has not been made as a witness in the present case who is said to have helped the prosecutrix

as per her own version. Paragraph 23 of the affidavit in support of bail application has been placed to buttress the said argument. It is further argued that the prosecutrix in her statement recorded under Section 164 Cr.P.C. has stated that on 05.04.2021 when she had gone to the High Court, the accused persons met her at a crossing near the High Court, co-accused Sipahi Lal assaulted her and at that time her mobile was connected with her father who was also listening to the same. It is argued that even the said fact is false and incorrect as there is no reference about it in the present first information report which has been lodged after 02 days of the alleged incident of her being beaten up. It is argued that the prosecutrix is a major girl. She as per her own version used to come to the High Court with an Advocate and was working with him and as such was in the knowledge of legal proceedings. She kept on changing and improving her version. The applicant is having criminal history of one case which has been disclosed and explained in paragraph 15 of the affidavit but in the said case till date although it is of the year 2019, he has not received any summons or any notice from the police or any court. The applicant is in jail since 25.09.2021.

6. Per contra, learned panel counsel for the High Court Legal Service Committee and learned counsel for the State have vehemently opposed the prayer for bail and argued that the applicant is named in the first information report. The prosecutrix has in her statements recorded under Section 161 Cr.P.C. and under Section 164 Cr.P.C. named the applicant and has assigned specific role to him. It is argued that the allegation that the prosecutrix was working with the applicant in the High court in his office is not denied. Even the fact that she was known to him is not

denied. It is argued that the present case is such in which an Advocate has exploited a girl who was a law student on the pretext of imparting legal training to her through his office and courts. It is argued that there are serious allegations against the applicant. The prosecutrix has stated of the applicant exploiting her at the initial stage and then committing sexual assault on her. She has explained the circumstances under which she was being threatened and was continued to be exploited. In so far as the physical assault is concerned, the doctor has found injuries on her body which corroborate with her version. It is further argued that during investigation, the police added Shivraj Patel, Dheerendra Kumar Saroj and Saroj Devi as accused but as of now charge-sheet being Charge Sheet No. 01 dated 18.11.2021 has been filed only against Shivraj Patel and the present applicant but in so far as the investigation with regards to the other accused persons is concerned, the same is pending. It is further argued that since the applicant is an Advocate, if released on bail, there are chances of his tampering with evidence and may influence the investigation as the investigation for other accused persons is pending. The prayer for bail be thus rejected.

7. Learned counsel appearing for the High Court Legal Service Committee has further informed the Court that the applicant is involved in another case being Case Crime No. 193 of 2021, Police Station Civil Lines, District Allahabad which has not been disclosed and explained in the bail application. In so far as the disclosure in paragraph 15 of the affidavit regarding one criminal history of the applicant is concerned, it is argued by producing the photocopy of the said first information report that the applicant is named in the

first information report along with four other unknown persons.

8. After having heard the learned counsel for the parties and perusing the record, it is evident that the applicant is named in the first information report, in the statements of the prosecutrix recorded under Section 161 Cr.P.C. and under Section 164 Cr.P.C. The name of the applicant and the role assigned to him is consistent throughout. The allegations are of sexual assault and physical assault upon the prosecutrix which had continued for a substantial long period. The prosecutrix was junior in the office of the applicant. The allegations are against a person practising law and is a person in uniform involved in a noble profession. The office of a lawyer is not less respected than Courts of law. The act as complained of by her against the applicant is told by her in detail in her statements recorded under Section 161 Cr.P.C. and under Section 164 Cr.P.C. There has been no reason spelt out as to why the applicant is being falsely implicated. The investigation for other accused persons is pending and the apprehension of learned counsels for the State and of the panel lawyer of High Court Legal Service Committee of the applicant being in a position to influence the investigation and tamper with the evidence cannot be ruled out at this stage.

9. Looking to the facts and circumstances of the case, I do not find it a fit case for bail, hence, the bail application is rejected.

10. This Court has vide order dated 08.04.2022 directed the District and Sessions Judge, Prayagraj to send the statement of the prosecutrix recorded under Section 164 Cr.P.C. from the concerned Court. As per the office report dated 25.4.2022, the compliance of the order has been done and a sealed envelope has been

received. The said envelope was opened on the directions of the Court by the Bench Secretary during arguments.

11. After conclusion of the arguments, this Court directed the Bench Secretary of this Court to seal the same which has been sealed. The Registrar General is directed to remit back the said sealed envelope to the District and Sessions Judge, Prayagraj, within three days from today, who shall place the same at its appropriate place."

13. Although a second bail application on behalf of the accused is not barred and is maintainable but considerations of the grounds of bail are the factors to be taken into account in it. A second bail application is always considered on fresh and new grounds available to the accused after rejection of the first bail application. It cannot be said that a second bail application would not be maintainable. The maintainability of such bail application is there but consideration of the prayer for bail is subject to the availability of fresh and new grounds which if not available would render reviewing the earlier order rejecting the bail application. In the case of Babu Singh (*supra*), the Court was considering a bail application of an accused who was acquitted by the Sessions Court against which the State had filed an appeal against acquittal in the High Court which was successful and the findings of the Sessions Judge were reversed holding the accused persons guilty and sentencing them for the offences. Against the said judgment and order of the High Court, a statutory appeal was carried to the Apex Court. Before the Apex Court, a second bail application was filed which was the consideration in which the said judgment and order has been passed. The Apex Court with regards to the maintainability of a second bail application held that an order

refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations.

14. The Division Bench of this Court in the case of **Dal Chand (supra)** was deciding a reference made by a single Judge Bench as to whether a second bail application at the instance of a convicted accused in a pending appeal, is maintainable or not.

15. The Division Bench vide the said judgment and order while answering the reference and relying upon the judgment of the Apex Court in the case of **Babu Singh (supra)** held that a second application for bail at the instance of a convicted accused, is maintainable in a criminal appeal.

16. In so far as the part of the maintainability of a second bail application is concerned, it is no more res-integra that the same is maintainable. The question which arises is whether without any fresh new and changed circumstances, a Court should consider a subsequent bail application ignoring its previous order rejecting the previous bail application or not.

17. In the opinion of the Court, the same would not be possible. A subsequent bail application is maintainable but consideration of the prayer of bail would depend on the facts as to whether fresh and new grounds have been pleaded and are available or not.

18. In the case of **State of Maharashtra Vs. Buddhikota Subha Rao : 1989 Supp (2) SCC 605** it has been held by the Apex Court that once a bail application was rejected there was no

question of granting a similar prayer. Granting it would be virtually overruling the earlier decision without there being a change in the fact-situation. A substantial change is one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. It has been held as under :-

“7. Liberty occupies a place of pride in our socio-political order. And who knew the value of liberty more than the founding fathers of our Constitution whose liberty was curtailed time and again under Draconian laws by the colonial rulers. That is why they provided in Article 21 of the Constitution that no person shall be deprived of his personal liberty except according to procedure established by law. It follows therefore that the personal liberty of an individual can be curbed by procedure established by law. The Code of Criminal Procedure, 1973, is one such procedural law. That law permits curtailment of liberty of anti-social and anti-national elements. Article 22 casts certain obligations on the authorities in the event of arrest of an individual accused of the commission of a crime against society or the Nation. In cases of undertrials charged with the commission of an offence or offences the court is generally called upon to decide whether to release him on bail or to commit him to jail. This decision has to be made, mainly in non-bailable cases, having regard to the nature of the crime, the circumstances in which it was committed, the background of the accused, the possibility of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution, etc. In the present case the successive bail applications preferred by the respondent were rejected on merits having regard to

the gravity of the offence alleged to have been committed. One such Application No. 36 of 1989 was rejected by Suresh, J. himself. Undeterred the respondent went on preferring successive applications for bail. All such pending bail applications were rejected by Puranik, J. by a common order on 6-6-1989. Unfortunately, Puranik, J. was not aware of the pendency of yet another bail application No. 995 of 1989 otherwise he would have disposed it of by the very same common order. Before the ink was dry on Puranik, J.'s order, it was upturned by the impugned order. It is not as if the court passing the impugned order was not aware of the decision of Puranik, J.; in fact there is a reference to the same in the impugned order. Could this be done in the absence of new facts and changed circumstances? What is important to realise is that in Criminal Application No. 375 of 1989, the respondent had made an identical request as is obvious from one of the prayers (extracted earlier) made therein. **Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation. And, when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence.** Between the two orders there was a gap of only two days and it is nobody's case that during these two days drastic changes had taken place necessitating the release of the respondent on bail. Judicial discipline, propriety and comity demanded that the impugned order should not have been passed reversing all earlier orders including the one rendered by Puranik, J., only a couple of days before, in the absence of any substantial change in the fact-situation. In such cases it is necessary

to act with restraint and circumspection so that the process of the court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one judge or selected another to secure an order which had hitherto eluded him. In such a situation the proper course, we think, is to direct that the matter be placed before the same learned Judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conducive to judicial discipline and would also save the court's time as a judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency. In their view that we take we are fortified by the observations of this Court in para 5 of the judgment in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan* [(1987) 2 SCC 684]. For the above reasons we are of the view that there was no justification for passing the impugned order in the absence of a substantial change in the fact-situation. That is what prompted Shetty, J. to describe the impugned order as 'a bit out of the ordinary'. Judicial restraint demands that we say no more.

(emphasis supplied)

19. A Division Bench of this Court in the case of **Satya Pal Vs. State of U.P. : 1998 SCC OnLine All 1224 : (1998) 37 ACC 287** was deciding a question referred to by a single Judge Bench whether a fresh argument which was available earlier should be allowed to be advanced in a

second bail application. The question as before the Division Bench was as follows :-

“1. The following question has been referred by learned single Judge to be decided by this Court:—

“Whether a fresh argument in a second bail application for an accused should be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected”.”

The Division Bench held that a fresh argument in a second bail application cannot be allowed to be advanced on those very facts which were available to the accused at the time of the moving and rejection of the first bail application. The answer as given to the referred question is as follows :-

“9.
Accordingly our answer to the question referred is that fresh arguments in a second bail application for an accused cannot be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected.”

20. The Apex Court in the case of **State of M.P. Vs. Kajad : (2001) 7 SCC 673** has held that although successive bail applications are permissible but under changed circumstances. It has been held as under :-

“8. It has further to be noted that the factum of the rejection of his earlier bail application bearing Miscellaneous Case No. 2052 of 2000 on 5-6-2000 has not been denied by the respondent. It is true that successive bail applications are permissible under the changed circumstances. But without the change in the circumstances the second application would be deemed to be

seeking review of the earlier judgment which is not permissible under criminal law as has been held by this Court in *Hari Singh Mann v. Harbhajan Singh Bajwa* [(2001) 1 SCC 169 : 2001 SCC (Cri) 113] and various other judgments.”

21. Further, the Apex Court in the case of **Kalyan Chandra Sarkar Vs. Rajesh Ranjan : (2005) 2 SCC 42** has held that subsequent bail application can be filed if there is a change in the fact situation or law which would render the previous view obsolete. The Court rejected the argument that successive bail application can be filed on a ground already rejected by courts earlier and it would not be violative of Article 21 of the Constitution of India. It has been held as under :-

“8. On 23-9-2002 the accused-respondent moved the eighth bail application which came to be allowed by the High Court by its order dated 23-5-2003 solely on the ground that the accused-respondent had undergone incarceration for a period of 3 years and that there was no likelihood of the trial being concluded in the near future and an appeal filed against the said grant of bail came to be allowed [Ed.: In *Kalyan Chandra Sarkar v. Rajesh Ranjan*, op. cit. fn. 2, above] on the ground that the High Court could not have allowed the bail application on the sole ground of delay in the conclusion of the trial without taking into consideration the allegation made by the prosecution in regard to the existence of prima facie case, gravity of offence, and the allegation of tampering with the witness by threat and inducement when on bail. This Court held [Ed.: In *Kalyan Chandra Sarkar v. Rajesh Ranjan*, op. cit. fn. 2, above] that since the above factors go to the root of the right of the accused to seek bail, non-consideration of

the same and grant of bail solely on the ground of long incarceration vitiated the order of the High Court granting bail. This Court also observed that though an accused had a right to make successive applications for grant of bail the court entertaining such subsequent bail applications has duty to consider the reasons and grounds on which the earlier bail applications were rejected and in such cases the court also has a duty to record what are the fresh grounds which persuaded it to take a view different from the one taken in the earlier applications. This Court in that order also found fault with the High Court for not recording any fresh grounds while granting bail and for not taking into consideration the basis on which earlier bail applications were rejected. The Court also emphasised in the said order that ignoring the earlier orders of this Court is violative of the principle of binding nature of the judgments of the superior court rendered in a lis between the same parties, and noted that such approach of the High Court in effect amounts to ignoring or overruling and thus rendering ineffective the principles enunciated in the earlier orders especially of the superior courts. On that basis, the appeal of the complainant challenging the grant of bail came to be allowed cancelling the bail granted to the respondent. This order of this Court is reported as Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977].”

“20. The decisions given by a superior forum, undoubtedly, are binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where

earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view of the guarantee conferred on a person under Article 21 of the Constitution, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by the courts earlier, including the Apex Court of the country.”

(emphasis supplied)”

22. Now reverting back to the present case, an effort has been made to spell out the reason for false implication while placing para 20(q) of the affidavit. The same is merely a version of the accused applicant. In so far as, the other arguments relating to the falsity of the statement of the victim recorded under Section 164 Cr.P.C. by clubbing it with the event of administering poison is concerned, the said statement has been considered by this Court while deciding the first bail application and as such there is no occasion to reconsider it. If there is any contradiction in it with regards to the version as in the First Information Report and also any argument is being raised to discredit the same it has to be judged in trial only after evidence.

23. With regards to the argument of Km. Rakhi and the order of a co-ordinate Bench of this Court dated 18.08.2022 directing certain matters to be preliminarily enquired into by the CBI is concerned, although the victim referred to Km. Rakhi

in her statement recorded under Section 164 Cr.P.C. but even as has been observed in the order rejecting the first bail application of the applicant, Km. Rakhi has not been arrayed as a witness in any of the capacities in the list of witnesses of charge sheet on which the prosecution relies for its case. If she, her conduct, her status or her acts, if any, have to be considered, the same may be subject matter of trial. At the stage of consideration of bail, the Court can only go into the question of the case being prima facie established for granting bail. It cannot go into the question of credibility and reliability of the witness/es put up by the prosecution. The question of credibility and reliability of witness/es can only be tested during trial. The order sheet of the trial court which is in the supplementary affidavit although shows that the case has been committed to the Court of Session on 12.01.2022 but the same is pending till date but charge in the present matter has not been framed despite the same being fixed for framing of charge since 07.05.2022 as is evident from the order sheet of the said date.

24. Considering the arguments of learned counsels for the parties, perusing the records and the law on the issue, there is no fresh and new ground available in the present second bail application. This Court does not find any substantial change in the circumstance so far as merit of the case is concerned. This Court does not find it a fit case for bail.

25. The bail application is, accordingly, **rejected**.

26. However, the trial court may take up the trial and proceed with it in accordance with Section 309 Cr.P.C., subject to any legal impediment.

The applicant may file this order before the trial court within two weeks from today.

**(2023) 5 ILRA 1837
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.04.2023 &
08.05.2023**

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Crl. Misc. Anticipatory Bail Application No. 3099
of 2023
(u/s 438 Cr.P.C.)

Manoj Kumar Bathla ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:

Sri Pranav Tiwary, Sri Yagyavalk Pandey, Sri
Manish Tiwary (Sr. Advocate)

Counsel for the Respondent:

G.A., Sri Adesh Kumar, Sri Sushil Shukla

Criminal Law – anticipatory bail application under section 438 Cr.P.C.-order cancelling the anticipatory bail challenged-further relief of grant of anticipatory bail sought-FIR registered under Sections 406, 420, 467, 468, 471 IPC-anticipatory bail cancelled on account of flouting of bail conditions by the applicant-chargesheet already submitted-trial in progress-nothing in record to show that the applicant committed any offence after the grant of anticipatory bail-NCLT proceedings independent of criminal proceedings-criminal court cannot act as an executing court for any other forum-impugned order cancelling anticipatory bail set aside-furthermore, anticipatory bail till the end of trial granted to the applicant.

HELD:

It is not in dispute that charge sheet into the matter has been filed. In one part of the

impugned order, various observations have been made by the Sessions Judge, Meerut in respect of the alleged violation of Condition No.6 by the accused / applicant and while doing so the Court concerned entered into the history of dispute between the parties and a chain of events has been sketched but it lacks a cogent reasoning. This Court does not find any justification in the aforesaid observations made by the Sessions Judge, Meerut capable of making the accused / applicant liable for violative of aforementioned Condition No.6. Whether any criminal matter against the present accused / applicant subsequent to the order dated 10.3.2022, resulted into charge sheet, is not clear from the impugned order. Charge sheet has already been submitted in the present case and now the trial is going on before the Magistrate concerned. Thus, to hold that the Condition No.6 imposed vide order dated 10.3.2022 was violated by the accused / applicant, is not correct.

This fact is also to be taken into account that what orders to be passed by the NCLT in future is not a subject concerning to the Sessions Court sitting in the forum of anticipatory bail. The NCLT in itself is empowered to enforce its own orders under the provisions of the Companies Act. The NCLT for the execution of its orders or to meet out the conditions, where its orders are flouted, is not dependent upon any other forum / Court and is competent enough to meet out this contingency. Also, it was not a genuine condition to ask the applicant to comply with all previous orders, which were already passed by the NCLT and which might be subjudiced too in any higher forum.

The aforesaid situation takes this Court to the direction of considering as to whether a Criminal Court may act like an Executing Court for any other forum.

The impugned order is not clear on the point as to how the Court concerned came to the conclusion that a fair trial is not possible if the accused is allowed to retain his freedom of anticipatory bail during trial. It also reveals that the Court concerned travelled beyond its jurisdiction and placed reliance upon the materials outside the record which were not relevant at that stage. How the Court concerned

was sure that the applicant was trying to win over the witnesses of the case and in this way the fair trial of the case was not possible is an issue which remains illusive in the impugned order.

In view of the aforesaid discussions and the law governing the subject, the Court is of the opinion that the impugned order dated 10.3.2023 passed by the Sessions Judge, Meerut is not sustainable in law and the same is liable to be set-aside. The impugned order dated 10.3.2023 is accordingly set-aside.

Application allowed. (E-14)

List of Cases cited:

1. Dilip Singh Vs St.of M. P. & anr., (2021) 2 SCC 779
2. Udho Thakur & anr.Vs St.of Jharkhand & anr., 2022 SCC OnLine SC 1712
3. Savitri Agarwal & ors.Vs St.of Mah. & anr., (2009) 8 SCC 325
4. Dolat Ram & ors.Vs St.of Haryana, (1995)1 SCC 349
5. Charu Soneja Vs St.(NCT of Delhi) & ors.(Criminal M.C. 2050 of 2021), decided on 3.1.2022
6. Raghubir Singh & ors.Vs St.of Bihar, (1986) 4 SCC 481
7. Sushila Aggarwal & ors.Vs St.(NCT of Delhi) & anr., (2020) 5 SCC 1

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

1. This application has been moved on behalf of the applicant - Manoj Kumar Bathla with the prayer to quash the impugned order dated 10.3.2023 passed by the Sessions Judge, Meerut whereby anticipatory bail granted to the applicant vide order dated 16.3.2022 has been cancelled and further to grant anticipatory

bail to the applicant in Case Crime No. 0574 of 2019, Criminal Case No. 23164 of 2021 under Sections 406, 420, 467, 468, 471 IPC, Police Station Medical College, District Sambhal.

2. Heard Shri Manish Tiwary, learned Senior Advocate assisted by S/Shri Pranav Tiwari and Yagyavalk Pandey, learned counsel for the applicant, Shri Sushil Shukla, learned counsel for the informant as well as the learned A.G.A. for the State and perused the record.

3. It has been submitted by the learned Senior Counsel appearing for the applicant that the order dated 10.3.2023, by which the anticipatory bail granted to the applicant vide order dated 16.3.2022 has been cancelled, is bad in the eyes of law and as a matter of fact the applicant did not flout any of the conditions imposed by the Court concerned while granting anticipatory bail to the applicant. It is further submitted that while granting anticipatory bail vide aforesaid order dated 16.3.2022 a total of eight conditions were imposed upon the applicant and he complied with all the conditions. It is vehemently submitted that the impugned order dated 10.3.2023, whereby anticipatory bail granted to the applicant has been cancelled, reflects that the Sessions Judge, Meerut has emphasized mainly upon non-compliance of condition no.8 imposed by the said order wherein it was mentioned that the applicant has to file an undertaking to the effect that he will ensure compliance of the order passed by the National Company Law Tribunal (in short 'the NCLT'). In this case, it is submitted that after passing the order dated 16.3.2022, no further order was passed by the NCLT and hence, there was no occasion for the applicant for non-compliance of any

further order passed by the NCLT. It is next submitted that the Sessions Judge, Meerut has impressed upon the orders passed by the NCLT prior to passing of the order dated 16.3.2022 and non-compliance of the said earlier orders has been made a substantial ground for cancelling the anticipatory bail. It is, thus, vehemently submitted that said approach of the Sessions Judge, Meerut was not tenable in law, as no order can be made effective retrospectively. It is also submitted that if some orders were passed by the NCLT in the matter pending before it between the parties to the litigation, it was for the NCLT to take proper action in respect of non-compliance of the same. A criminal court cannot be said to be an executing court for execution of the orders passed by any other forum / authority. It is further submitted that the applicant has not repeated any alike offences, as were levelled against him in the F.I.R. of the present case and, as such, he has not flouted condition no.6 as well imposed upon him vide order dated 16.3.2022, which has also been made a ground for cancellation of anticipatory bail granted to the applicant by the Court concerned by aforesaid order. It is also submitted that since anticipatory bail was granted to the applicant by the Sessions Court Meerut till the conclusion of trial, it is explicitly clear that the Sessions Court concerned expressed its view in favour of the applicant and found sufficient and reasonable grounds for grant of anticipatory bail to him till the end of trial. Lastly, it is submitted that the impugned order dated 10.3.2023 deserves to be set-aside and cancelled and further the applicant be granted anticipatory bail till the end of trial.

4. Per contra, learned counsel for the informant as well as the learned AGA have submitted that the order dated 16.3.2022,

whereby anticipatory bail was granted to the applicant imposing certain conditions upon him, reflects that a total of eight conditions were imposed upon him out of which Condition No.1 directed the applicant to furnish a bank guarantee of the value of Rs. Five Crores. Since Rupees Five Crores was a huge amount, an application was moved by the applicant to exempt him to comply with the said condition no. 1 or the amount of bank guarantee be lessened. It is further submitted that vide order dated 28.6.2022, the Court concerned cancelled Condition No.1 to furnish the bank guarantee to the tune of Rupees Five Crores and further the applicant was directed to furnish a properly stamped and notarised indemnity bond in sum of Rupees Five Crores mentioning therein that he will not create any third party right, charge, mortgage or any other lien in any manner of properties held by him and mentioned in the indemnity bond, either in his own name or jointly with others till the matter is finally decided. It is further submitted that for the other conditions imposed vide order dated 16.3.2022, no objection or inability to fulfill the same was shown by the applicant rather he furnished an undertaking before the Court concerned for compliance of all the conditions imposed by the aforesaid order. It is further submitted that in the impugned order dated 10.3.2023, the Sessions Judge, Meerut has narrated several facts in respect of fraudulent and criminal acts committed by the applicant whereas he was directed not to repeat the similar offence again. The impugned order dated 10.3.2023 consists of many illustrations which go to show that the applicant has repeatedly committed the same offence, commission of which was made prohibited by condition no.6 imposed by the Court concerned by order dated

16.3.2022. It is also submitted that from the impugned order it also reflects that all the orders of NCLT, whether passed prior to 16.3.2022 or subsequent thereto, have to be complied with by the applicant. It is further submitted that since the applicant never made any submission before the Court concerned regarding the unsustainability or ambiguity of the said condition, it was an estoppel against him and he was bound to obey the aforesaid condition as well as the other conditions imposed by the Court concerned. On the basis of aforesaid submissions, prayer has been made to reject the present anticipatory bail application.

5. I have considered the rival submissions made by the learned counsel for the parties.

6. In this matter, from a perusal of the record, it reveals that in the matter of Anticipatory Bail Application No. 591 of 2022 in case crime no. 574 of 2019, under Sections 406, 420, 467, 468, 471 IPC, P.S. Medical College, District Meerut applicant was granted anticipatory bail vide order dated 16.3.2022 passed by the Sessions Judge, Meerut till end of trial, however, certain conditions were imposed upon the applicant while granting the anticipatory bail to him. Subsequently, on an application moved by the informant, the said anticipatory bail was cancelled by the impugned order dated 10.3.2023 passed by the Sessions Judge, Meerut on the ground of flouting of some of the conditions, which were imposed upon the applicant while granting anticipatory bail to him.

7. At the very outset, it is to be determined whether the order dated 10.3.2023 whereby the anticipatory bail granted to the applicant vide order dated 16.3.2022 was cancelled, is sustainable in the eyes of law or not.

8. From the perusal of the impugned order, it is found that the learned Sessions Judge, Meerut has emphasized on this condition that the accused applicant is not only flouting the orders of Sessions Court but also of NCLT and for this observation, the concerned Court has impressed upon many factual aspects of the matter. The Court has observed that the applicant is not deliberately providing any record and account and still misusing the bank accounts of the Company to the detriment of the complainant. It is also mentioned in the said order that as the applicant is having actual control on the Company of the parties, he is passing the books of the Company as the books of his private firm and usurping the money received from sale of such books. It has also been narrated in the said order that after the grant of anticipatory bail to the applicant the Company which provided accounting software allegedly cancelled licence resulting into the accounts becoming inaccessible and the physical records were misplaced from the scooter of the accused, the staff became non-cooperative and the bank account of the Company was being used by the accused applicant as per his own convenience. It is also mentioned in the impugned order that it is clearly the act of accused to refuse providing accounts and the record for proper adjudication and in these circumstances the Court cannot shut its eyes regarding continuous violation and misuse of liberty of the anticipatory bail by the accused.

In the impugned order dated 10.3.2023, condition Nos. 6 and 8 have been emphasized as non-complied with by the accused applicant. The said conditions are as under :

"6-जो अभियोग आवेदक पर लगाया गया है, वैसा ही अन्य कोई अपराध आवेदक कारित नहीं करेगा ।

8-यह कि आवेदक इस आशय की अन्डरेकिंग प्रस्तुत करे कि एन .सी .एल. टी द्वारा पारित आदेश का पालन सुनिश्चित करता रहेगा "

9. So far as Condition No.6 is concerned, it relates to any other offence of the similar nature committed by the applicant.

10. It is not in dispute that charge sheet into the matter has been filed. In one part of the impugned order, various observations have been made by the Sessions Judge, Meerut in respect of the alleged violation of Condition No.6 by the accused / applicant and while doing so the Court concerned entered into the history of dispute between the parties and a chain of events has been sketched but it lacks a cogent reasoning. This Court does not find any justification in the aforesaid observations made by the Sessions Judge, Meerut capable of making the accused / applicant liable for violative of aforementioned Condition No.6. Whether any criminal matter against the present accused / applicant subsequent to the order dated 10.3.2022, resulted into charge sheet, is not clear from the impugned order. Charge sheet has already been submitted in the present case and now the trial is going on before the Magistrate concerned. Thus, to hold that the Condition No.6 imposed vide order dated 10.3.2022 was violated by the accused / applicant, is not correct.

11. As regards to Condition No.8 imposed vide order dated 16.3.2022, from the perusal of the record, it transpires that both the parties are business persons having commercial company as a partnership firm and litigations are going on before the NCLT between them. Several orders have been or are to be passed by the NCLT in the

aforesaid matters. In the impugned order, the Sessions Judge, Meerut has observed that the accused applicant is working in such a manner on account of which the Company is going into loss and all the working conditions have become hampered due to lack of vigilance and inactivity on the part of the applicant and he is continuously violating the orders of NCLT, already passed in the matter pending before it between the parties.

12. This fact is also to be taken into account that what orders to be passed by the NCLT in future is not a subject concerning to the Sessions Court sitting in the forum of anticipatory bail. The NCLT in itself is empowered to enforce its own orders under the provisions of the Companies Act. The NCLT for the execution of its orders or to meet out the conditions, where its orders are flouted, is not dependent upon any other forum / Court and is competent enough to meet out this contingency. Also, it was not a genuine condition to ask the applicant to comply with all previous orders, which were already passed by the NCLT and which might be subjudged too in any higher forum.

13. The aforesaid situation takes this Court to the direction of considering as to whether a Criminal Court may act like an Executing Court for any other forum.

14. In **Dilip Singh vs. State of Madhya Pradesh and another, (2021) 2 SCC 779**, the Hon'ble Apex Court has held that :

"A criminal court, exercising jurisdiction to grant bail / anticipatory bail, is not expected to act as a recovery agent to realise the dues of the

complainant, and that too, without any trial."

15. This dictum was reiterated in **Udho Thakur and another vs. State of Jharkhand and another, 2022 SCC OnLine SC 1712**, wherein the Hon'ble Supreme Court held that :

"4. Even if we take the submissions of the learned counsel for the contesting respondent on its face value, we are clearly of the view that in essence, the petitions seeking relief of pre-arrest bail are not money recovery proceedings and, ordinarily, there is no justification for adopting such a course that for the purpose of being given the concession of pre-arrest bail, the person concerned apprehending arrest has to make payment."

16. It has been further held that :

"Having regard to the circumstances, in our view, the said condition of depositing a sum of Rs. 7,50,000/- for the purpose of granting the relief of pre-arrest bail cannot be approved and else, the order granting bail deserves to be maintained."

17. In the light of the aforesaid proposition of law, this Court is not hesitant to hold that Condition No.8 imposed vide order dated 16.3.2022 is a vague and ingenuine condition and not sustainable as such.

18. In umpteen of cases, the Hon'ble Apex Court as well as the High Courts have laid down certain parameters to deal with the matters pertaining to cancellation of bail / anticipatory bail.

19. In **Savitri Agarwal and others vs. State of Maharashtra and another,**

(2009) 8 SCC 325, the Hon'ble Apex Court has held that very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail already granted. It has been further held that rejection of bail in non-bailable case at the initial stage and cancellation of bail are required to be considered and dealt with on different basis.

20. In **Dolat Ram and others vs. State of Haryana, (1995)1 SCC 349**, the Hon'ble Apex Court held that :

"4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial....."

21. On the subject, the Delhi High in **Charu Soneja vs. State (NCT of Delhi)**

and others (Criminal M.C. 2050 of 2021), decided on 3.1.2022 has held like this :

"17. There is a significant difference between an order rejecting an application for bail and an order for cancellation of bail. An order rejecting a plea for bail in non-bailable offences is in the discretionary domain of the court and such a case can be decided without delving into details, it can be rejected simpliciter on the gravity of the offence and the perception that liberty, if granted, will be abused by the accused. Whereas in the case of cancellation, the court is called upon to extinguish the liberty that has been formerly granted. A Court must tread with utmost circumspection, and only after an in-depth examination of the situation and new emergent facts and on finding supervening circumstances and overwhelming evidence that the accused has been abusing the liberty granted to him by the court, should the court then exercise its jurisdiction in seizing the liberty of an accused undertrial. Another reason for the court to be more circumspect in setting aside an order granting bail is that, it involves review of a well considered, reasoned judicial order granting bail. Personal liberty is one of the cherished constitutional freedoms. Once granted to an accused pending completion of the trial, it must only be retracted in the face of grave and exacerbating circumstances. The party challenging bail already given needs to demonstrate, by showing evidence and instances, that the person enlarged on bail has been threatening the victim and may consequently cause personal harm to the victim or her family, is tampering with evidence or influencing prosecution witnesses to the extent that it would vitiate the trial and lead to a miscarriage of justice."

22. The Court finds some illustrative grounds in **Raghubir Singh and others vs. State of Bihar, (1986) 4 SCC 481** over this issue wherein it was observed that *"it is pertinent to mention here that bail can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. The above grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to."*

23. The impugned order is not clear on the point as to how the Court concerned came to the conclusion that a fair trial is not possible if the accused is allowed to retain his freedom of anticipatory bail during trial. It also reveals that the Court concerned travelled beyond its jurisdiction and placed reliance upon the materials outside the record which were not relevant at that stage. How the Court concerned was sure that the applicant was trying to win over the witnesses of the case and in this way the fair trial of the case was not possible is an issue which remains illusive in the impugned order.

24. In view of the aforesaid discussions and the law governing the subject, the Court is of the opinion that the

impugned order dated 10.3.2023 passed by the Sessions Judge, Meerut is not sustainable in law and the same is liable to be set-aside. The impugned order dated 10.3.2023 is accordingly set-aside.

25. So far as the question of grant of anticipatory bail to the applicant is concerned, it is evident from the perusal of the record that during the course of investigation, anticipatory bail was granted to the applicant by the Additional Sessions Judge / Special Judge (SC/ST Act), Meerut vide order dated 30.7.2021. The order dated 16.3.2022 passed by the Sessions Judge, Meerut also verifies this fact that the said liberty was not misused by the applicant till filing of the police report under Section 173(2) CrPC before the Competent Court. After filing of the charge sheet in the matter, no custodial interrogation from the applicant appears to be required in the facts and circumstances of the present case. The dispute between the parties relates to financial transactions, which took place between them regarding the Company of the informant and the applicant in the name of 'G.R. Bathla Publications Private Limited' and in this respect F.I.R. was lodged regarding embezzlement of Rs. 6.5 Crores against the applicant. It was alleged in the F.I.R. that the money of the Company was illegally deposited by the applicant in the bank accounts of his sons Sugam Bathla and Madhur Bathla, wife Rachna Bathla and in his own bank account on different dates. It also reveals from the perusal of the record that the dispute between the parties is still pending before the NCLT and several directions have been issued by the NCLT to the parties in the matter.

26. In **Sushila Aggarwal and others vs. State (NCT of Delhi) and another,**

(2020) 5 SCC 1, the Hon'ble Apex Court has settled the controversy finally by holding the anticipatory bail need not be of limited duration invariably. In appropriate case, it can continue upto conclusion of trial.

27. It has been further held therein that anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

28. It has been further held by the Hon'ble Apex Court that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

29. Considering the settled principles of law regarding anticipatory bail, nature of accusation, role of applicant and all attending facts and circumstances of the case, without expressing any opinion of the merits of the case, in my view, it is a fit case for anticipatory bail to the applicant till the end of trial.

30. In the event of arrest of the applicant in Criminal Case No. 23164 of 2021 under Sections 406, 420, 467, 468, 471 IPC, Police Station Medical College, District Sambhal, he shall be released on

anticipatory bail on his furnishing a personal bond of Rs.50,000/- with two sureties each in the like amount to the satisfaction of the Court concerned with the following conditions:-

(i) The applicant shall make himself available before the Court concerned on the date fixed in the matter and will cooperate in the trial.

(ii) The applicant shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police office.

(iii) The applicant shall not leave India without the previous permission of the Court and if he has passport, the same shall be deposited by him before the S.S.P./S.P. concerned.

(iv) In case of default of any of the conditions, the same may be a ground for cancellation of protection granted to the applicant.

31. With the above observations, the anticipatory bail application stands **disposed of** accordingly.

Criminal Misc. Correction Application No.4 of 2023.

1. This is an application for correction in the order dated 24.4.2023.

2. Learned counsel for the applicant submits that due to inadvertence district "Meerut" has wrongly been transcribed as "Sambhal" in the 8th line of paragraph 1 and just above the conditions of anticipatory bail in the order dated 24.4.2023.

3. In view of the aforesaid, the application is allowed. The order dated 24.4.2023 is corrected and district

"Sambhal" is deleted and replaced by "Meerut" in the 8th line of paragraph 1 and just above the conditions of anticipatory bail.

4. This order in the correction application shall form part of the order dated 24.4.2023.

5. The application is, accordingly, disposed of.

(2023) 5 ILRA 1846
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Anticipatory Bail Application No. 4560
of 2023
(u/s 438 Cr.P.C.)

Udit Arya		...Applicant
	Versus	
State of U.P.		...Respondent

Counsel for the Applicant:

Sri Jitendra Prasad, Sri Satya Prakash Rai, Sri C.L. Pandey (Sr. Advocate)

Counsel for the Respondent:

G.A., Sri Anil Mullick

Criminal Law – Criminal Procedure Code, 1973- Section 438 – Indian Penal Code, 1860 - Sections 498-A - 304-B - 3/4 Dowry Prohibition Act- demand of car and money in dowry- abortion of foetus- deceased succumbed to injuries- discord in the family was an admitted fact- deceased was living at her parental home for substantial time-abortion also took place at her parental home- prosecution cannot be converted into an arena to settle scores-death cannot be termed as "not under normal circumstances"-ingredients of Section

304-B IPC-misuse of dowry laws- Sections 82 and 438 CrPC do not impose any restriction on filing of anticipatory bail application by proclaimed offender-Bail application allowed. (Paras 13 to 19)

HELD: Although a second bail application on behalf of the accused is not barred and is maintainable but considerations of the grounds of bail are the factors to be taken into account in it. A second bail application is always considered on fresh and new grounds available to the accused after rejection of the first bail application. It cannot be said that a second bail application would not be maintainable. The maintainability of such bail application is there but consideration of the prayer for bail is subject to the availability of fresh and new grounds which if not available would render reviewing the earlier order rejecting the bail application. In the case of Babu Singh (supra), the Court was considering a bail application of an accused who was acquitted by the Sessions Court against which the St.had filed an appeal against acquittal in the High Court which was successful and the findings of the Sessions Judge were reversed holding the accused persons guilty and sentencing them for the offences. Against the said judgment and order of the High Court, a statutory appeal was carried to the Apex Court. Before the Apex Court, a second bail application was filed which was the consideration in which the said judgment and order has been passed. The Apex Court with regards to the maintainability of a second bail application held that an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. (Para 13)

In so far as the part of the maintainability of a second bail application is concerned, it is no more res-integra that the same is maintainable. The question which arises is whether without any fresh new and changed circumstances, a Court should consider a subsequent bail application ignoring its previous order rejecting the previous bail application or not. (Para 16)

In the opinion of the Court, the same would not be possible. A subsequent bail application is maintainable but consideration of the prayer of bail would depend on the facts as to whether fresh and new grounds have been pleaded and are available or not. (Para 17)

Considering the arguments of learned counsels for the parties, perusing the records and the law on the issue, there is no fresh and new ground available in the present second bail application. This Court does not find any substantial change in the circumstance so far as merit of the case is concerned. This Court does not find it a fit case for bail. (Para 19)

Bail Application rejected. (E-14)

List of Cases cited:

1. Criminal Misc. Anticipatory Bail Application U/s 438 Cr.P.C. No.3532 of 2022
2. Prem Shankar Prasad Vs St.of Bihar & anr., reported in AIR 2021 SC 5125
3. Lavesh Vs St.(NCT of Delhi) [(2012) 8 SCC 730: AIROnline 2012 SC 323

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.

2. Heard Sri C.L. Pandey, learned Senior Advocate assisted by Sri Jitendra Prasad, learned counsel for the applicant, Sri Anil Mullick, learned counsel for the informant and Sri V.K.S. Parmar, learned A.G.A. for the State as well as perused the record.

3. The present anticipatory bail application has been filed on behalf of the applicant in Case Crime No.310 of 2022, registered under Sections 498-A, 304-B I.P.C. and 34 Dowry Prohibition Act, at Police Station Ganga Nagar, District Meerut with a prayer to enlarge him on anticipatory bail.

PROSECUTION STORY:

4. The marriage of the applicant was solemnized with the daughter of the informant as per Hindu rites on 13.12.2021. The applicant and other members of the family are stated to have subjected her to cruelty for demand of Rs.60 lakhs and a car as dowry. In the intervening period in the month of September, 2022, the deceased is stated to have undergone the abortion of the fetus she was carrying in her womb. On Deepawali i.e. 18.10.2022, the applicant is stated to have taken the daughter of the informant to his house. The applicant and other family members are stated to have beaten the daughter of the informant as such the informant had taken her to his house on 21.10.2022. The condition of the daughter of the informant deteriorated as a result of the injuries sustained on 21.10.2022. She is stated to have succumbed to the injuries on way to hospital on 22.10.2022.

RIVAL CONTENTIONS

(Arguments on behalf of applicant)

5. Learned Senior Counsel for the applicant has vehemently argued at the outset that this is clear misuse of dowry laws as no case is made out against the applicant. There is not a whisper of complaint against the applicant or other family members before institution of the present FIR. Learned Senior Counsel has stated that the deceased person was ill and was suffering from dengue and even the applicant transfused blood to her on 20.10.2022, the said transfusion certificate is filed as Annexure No.12 to the affidavit filed with the bail application.

6. Learned Senior Counsel has further stated that the platelets count of the deceased person had extremely come down to a level where blood transfusion was essential as the applicant had himself volunteered to do so.

7. Learned Senior Counsel has also placed much reliance on the inquest report of the deceased person which indicates that there was no visible injury on the body of the deceased person. Learned Senior Counsel has also vehemently argued that as per the postmortem report, the cause of death was "septicaemia due to chronic illness of multiple organs involvement". Learned Senior Counsel has stated that the cause of death is her illness and not the injuries inflicted by the applicant or any other family members. The prosecution story stands falsified on this ground only. Learned Senior Counsel has further stated that if such FIR is entertained by the Court, then there is no question for civil liberty left as such applicant is entitled for anticipatory bail. The applicant has no criminal history to his credit.

8. Learned Senior Counsel has also placed reliance on the statement of Dr. Geetanjali Vohra, who happens to be family doctor of the informant, whereby she has categorically stated that the deceased person had acquired complications as a result of pregnancy she was having and her fetus in the womb had died after a period of six months of pregnancy. Learned Senior Counsel has also placed reliance on the said statement in detail. To avoid verbiage, the said details of statement of doctor are not being mentioned here. Learned Senior Counsel has also placed reliance on the various Whatsapp chats between the applicant and the deceased person, which indicate that they were living happily.

9. Learned Senior Counsel has also placed much reliance on the judgment of this Court passed in ***Criminal Misc. Anticipatory Bail Application U/s 438 Cr.P.C. No.3532 of 2022***, whereby the concerned delinquent was enlarged on anticipatory bail on the ground that proceedings under Section 82 Cr.P.C. were initiated subsequent to the filing of the anticipatory bail application as such applicant is also entitled for bail on this ground as the proceedings under Section 82 Cr.P.C. had taken place on the date of filing of anticipatory bail application, i.e., 29.3.2023 at the trial court. Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length. The applicant has apprehension of his arrest. Learned counsel for the applicant undertakes that he has co-operated in the investigation and is ready to do so in trial also failing which the State can move appropriate application for cancellation of anticipatory bail. The final report (charge-sheet) has not yet been filed.

(Arguments on behalf of informant/State)

10. Per contra, learned counsel for the informant has vehemently opposed the anticipatory bail application on the ground that the statement of the informant recorded by the Investigating Officer categorically indicates that the fetus had expired in her womb and she was not subjected to treatment by the applicant and his family members as the said fetus remained dead for a period of ten days in her womb. The said negligent act speaks volume of the applicant having subjected the deceased person to cruelty.

11. Learned counsel has further stated that the said case law does not apply to the present case as the proceedings under Section 82 Cr.P.C. were already initiated on 24.3.2023 and the bail application was filed on 29.3.2023. Learned counsel has stated that as such applicant is also not entitled for anticipatory bail in the light of the judgment of the Apex Court passed in **Prem Shankar Prasad vs. State of Bihar and Another**, reported in **AIR 2021 SC 5125**, whereby it was held that if the delinquent is declared a proclaimed offender and proceedings under Section 82 & 83 Cr.P.C. have been completed, then he is not entitled for anticipatory bail, as such the present anticipatory bail application is liable to be rejected.

12. Learned A.G.A. has also opposed the anticipatory bail application and reiterated the submissions raised by the learned counsel for the informant.

CONCLUSION:

13. It is to be noted that the applicant has no criminal antecedents to his credit. It is an admitted fact that there were discord in the family as the deceased person was living at her parental home for a substantial period of time as the said abortion is even stated to have taken place at her parental home. After bare perusal of the case laws filed by the rival parties, I would like to take note of the judgment passed in **Prem Shankar Prasad (supra)**, whereby much reliance has been made on the judgment passed in **Lavesh vs. State (NCT of Delhi) [(2012) 8 SCC 730: AIROnline 2012 SC 323]** in paragraph 16 as under:-

*"16. Recently, in **Lavesh vs. State (NCT of Delhi) [(2012) 8 SCC 730: AIROnline 2012 SC 323]**, this Court (of*

which both of us were parties) considered the scope of granting relief under Section 438 vis-a-vis a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under : (SCC p. 733)

"12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as 'absconder'. Normally, when the accused is 'absconding' and declared as a 'proclaimed offender', there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

14. It is true that in the judgment passed in **Lavesh (supra)**, the said applicant was not enlarged on anticipatory bail as the proceedings under Section 82 Cr.P.C. were complete. In the case of **Lavesh (supra)** there was no question of granting anticipatory bail. "Normally", when the accused was absconding and declared proclaimed absconder, the core of judgment in **Lavesh (supra)** was in the expression "normally" and when the accused absconded or concealed himself to avoid the execution of warrant.

15. Neither the proceedings under Section 82 Cr.P.C. nor Section 438 Cr.P.C. impose any restriction in the filing of anticipatory bail application by the proclaimed offender. Even in the **Lavesh (supra)** while laying down the law, the Supreme Court has used word "normally".

16. Section 438 Cr.P.C. was inserted to the Code as it was seen that the

influential persons try to implicate their rivals in false cases for the purpose of disgracing them by detaining them in jail for some time. It is true, such powers are to be exercised in exceptional cases. The prosecution cannot be permitted to be converted into an arena to settle scores.

17. The deceased has expired as a result of "septicaemia due to chronic illness of multiple organs involvement". Thus, the death cannot be termed as "not under normal circumstances" as envisaged under Section 304-B I.P.C. The ingredients of Section 304-B I.P.C. do not stand fulfilled. This case seems to be a misuse of the dowry laws.

18. After hearing the rival contentions, going through the record, considering the nature of accusations and antecedents of the applicant and taking into note the very fact that the cause of death has been opined to be septicaemia due to chronic illness of multiple organs involvement and also that there was no complaint against the applicant or his family members before the death of the deceased person and also that no visible injury has been observed on the body of the deceased person internally or externally, the applicant is liable to be enlarged on anticipatory bail in view of the judgment of Supreme Court in the case of "*Sushila Aggarwal Vs. State (NCT of Delhi)*, (2020) 5 SCC 1". The future contingencies regarding the anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.

19. In view of the above, the anticipatory bail application of the applicant is allowed. Let the accused-applicant- **Udit Arya** be released forthwith in the aforesaid case crime (supra) on anticipatory bail till the conclusion of trial on furnishing a personal and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

(i). that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii). that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii). that the applicant shall not leave India without the previous permission of the court;

(iv). that in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

(v). that the applicant shall not pressurize/ intimidate the prosecution witness;

(vi). that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

(vii). that in case of breach of any of the above conditions the court below shall have the liberty to cancel the bail.

20. It is made clear that observations made hereinabove are exclusively for deciding the instant anticipatory bail application and shall not affect the trial.

(2023) 5 ILRA 1850

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 18.04.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Anticipatory Bail Application No. 12954
of 2022
(u/s 438 Cr.P.C.)

Princess Mahi @ Saher Naqvi ...Applicant
Versus

State of U.P. ...Respondent

Counsel for the Applicant:

Sri Sujan Singh, Sri Anjani Kumar Raghuvanshi,
Ms. Princess Mahi @ Saher Naqvi (In Person)

learned A.G.A. for the State and perused the records.

Counsel for the Respondent:

G.A., Sri Anil Kumar Pal, Sri Pankaj Kumar Gupta

Criminal Law – Criminal Procedure Code, 1973- Section 438 – Indian Penal Code, 1860 - Sections 420, 467, 468, 471 & 506 - money taken by applicant to get informant's wife admitted to job-money also transferred in lieu of sale of plot-transfer of money into the account of applicant- Bail application rejected. (Paras 11 and 12)

HELD:

It is an admitted fact that the said amount of Rs.50 lakhs has been transferred to the account of the applicant by the informant, who is the Director in company Kchipra Business Solution Pvt. Ltd. The applicant is an Advocate and has argued the matter in person and has also admitted the fact of the said transfer of money to her account, but has stated that she is unable to do so as she is facing a case under Section 138 NI Act at Telangana, as such she is not sure as to whom she has to repay the said amount. (Para 11)

After hearing the parties, going through the evidence on record and taking into consideration the fact that a huge amount of Rs.50 lakhs has been transferred to the account of applicant I do not find it a fit case for grant of anticipatory bail to the applicant. (Para 12)

Bail Application rejected. (E-14)

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.
2. Supplementary affidavit filed by the applicant in person is taken on record.
3. Heard Ms. Princess Mahi @ Saher Naqvi, applicant in person, Sri Pankaj Kumar Gupta, learned counsel for the informant as well as Sri V.K.S. Parmar,

4. The present anticipatory bail application has been filed on behalf of the applicant in Case Crime No.930 of 2019, under Sections 420, 467, 468, 471 and 506 I.P.C. at Police Station Colonelganj, District Prayagraj with a prayer to enlarge her on anticipatory bail.

PROSECUTION STORY:

5. The FIR was lodged by Rakesh Kumar, an ex-army-man, with the allegations that the applicant Princes Mahi @ Saher Naqvi had taken Rs.20 lakhs from him in the year 2018 to get his wife admitted to a job in junior high school. She had even introduced the informant to one Rajeev Tripathi at the office of BSA. The applicant is stated to have neither returned the amount nor got the said job to his wife and she kept on dilly dallying with him. On 1.1.2019, the applicant is stated to have taken Rs.50 lakhs from the informant in lieu of a sale of a 200 square meters plot in Arazi No.86 of NK Mukherji Marg, Civil Lines, Allahabad. The said amount of Rs.50 lakhs was transferred from the account no.37438827327 of Kchipra Business Solution Pvt. Ltd. of State Bank, Branch Sub-Area Cantt., Prayagraj to the bank account no.6177000100027382 of the applicant through NEFT. It transpired later on that the documents of the said plot are fake and the said forgery has been committed by the applicant in conspiracy with other members of the family. The applicant is stated to have fleeced and fooled the informant on one pretext or other and even threatened him.

6. The FIR was instituted at police station Colonelganj, Prayagraj on 25.10.2019 at about 01:12 a.m.

RIVAL CONTENTIONS:

(Arguments of applicant-in-person)

7. The applicant in-person has pressed the anticipatory bail application on the following grounds:-

(i) that she has been falsely implicated in this case and has nothing to do with the said offence. The allegations with respect to the supply of Rs.20 lakhs are per se false as there is nothing on record to suggest that any amount has been withdrawn from any account or transferred to the applicant. The said transaction is in cash, which is false.

(ii) that already final report (charge-sheet) has been submitted and the cognizance by the trial court has been taken. The FIR has been lodged against all the family members just to harass them.

(iii) that after registration of FIR, the applicant and co-accused person Rizwan Ali (father of the applicant) had approached this Court in Criminal Misc. Writ Petition No.25063 of 2019, in which ad-interim protection was granted to them vide order dated 29.1.2020. The said order has been filed as Annexure No.2 to the affidavit filed with the bail application.

(iv) that after the submission of final report (charge-sheet), the applicant had challenged it by filing a Criminal Misc. Application U/s 482 Cr.P.C. No.18674 of 2022 and prayed for quashing the entire charge-sheet including the summoning order dated 12.1.2022.

(v) that she is a bona fide person as is evident from the fact that she had filed a Civil Misc. Writ Petition No.11906 of 2022 praying for a direction to issue mandamus to District Magistrate, Prayagraj regarding illegal encroachment on plot no.86/1, measuring area 2.05 hectare and plot no.86/2, measuring area 0.864 hectare. The said writ petition is pending before this Court.

(vi) that transfer of Rs.50 lakhs to her account is admitted, but the said amount has been transferred from the account of the company Kchipra Business Solutions Pvt. Ltd. and the matter is between applicant and the said company, that too is civil in nature and the informant, who is a stranger to the said transaction, has converted it into a criminal case which is not sustainable in the eyes of law.

(vii) that the agreement between the applicant and the informant is a notarized document and is not maintainable in the eyes of law.

(viii) that the applicant is an Advocate registered at Bar Council of Uttar Pradesh since 2019. She has also argued at length that when the applicant had cheated the informant to the tune of Rs.20 lakhs, then there was no occasion for the informant to transfer such a hefty amount to her account, as such the allegations leveled in the FIR are false.

(ix) that the informant is neither the agent nor office bearer nor in the management team of company, as such he has no locus standi to lodge FIR.

(x) that she is facing a case under Section 138 of NI Act at Telangana against the dishonor of cheque with respect to the said transfer of money through RTGS mentioned in the FIR.

(xi) that the present FIR is a counterblast to FIR No.1115 of 2019 lodged at police station Colonelganj by the applicant against Shyam Reddy and others.

(xii) that although the FIR lodged by her has been lodged later on to the present FIR, but the occurrence is of much before the lodging of the present FIR.

(xiii) that the informant has not narrated correct facts in the FIR as the said company had granted a loan of Rs.65 lakhs to the applicant and informant regarding the said plot and the cheque of Rs.50 lakhs has dishonored twice.

(xix) that the reply to the notice given by the company to her and the informant falsifies the prosecution story. She had even reported the matter to NHRC with respect to the said supply of Rs.65 Lakhs as she was being coerced to act as a conduit in their illegal activities of human trafficking.

(xv) that the Investigating Officer has not taken up the investigation properly and has filed the present final report (charge-sheet) only on the ground of transfer of the said amount of Rs.50 lakhs to the account of the applicant.

(xvi) that she does not have any criminal antecedents to her credit, except the two cases which have been lodged against her regarding the same incident. She has pressed hard that she being an Advocate and lady is being harassed and she may be enlarged on anticipatory bail.

(Arguments for the informant)

8. Learned counsel for the informant has argued that the applicant has admitted the fact that an amount of Rs.50 lakhs has been transferred to her and the very fact has also been mentioned in the order of the Court passed in Criminal Misc. Application U/s 482 Cr.P.C. No.18674 of 2022. Learned counsel has further stated that the applicant had misused the process of the court by taking it's refuge at the drop of the hat as in addition to filing petition U/s 482 Cr.P.C. challenging the final report (charge-sheet), she has even filed a criminal revision before this Court.

9. Learned counsel has further stated that the applicant had even filed a Writ Petition (Criminal) No.486 of 2022 before the Apex Court under Article 32 of the Constitution of India seeking anticipatory bail, which was dismissed on the ground of alternate remedy being available to the

applicant, although her anticipatory bail application was already rejected by the Sessions Court, Allahabad. Learned counsel has further stated that the final report (charge-sheet) has already been filed in the court against the applicant on 30.9.2022. Learned counsel has placed on record the information issued by Subhash Chandra Diwakar, Lekhpal, Sadar, Prayagraj stating that the the title of the said land Arazi no.86/1, 86/2 is held by municipal board at gata khewat no.1 and the said property is not registered in the name of Princes Mahi @ Saher Naqvi vide report dated 7.9.2022, which has been annexed as Annexure no.8 to the short-counter affidavit dated 6.2.2023.

10. Learned counsel has stated that this is an open and shut case with respect to the applicant and she is not entitled for anticipatory bail. She has even misled the Apex Court in getting an order dated 3.3.2023 in SLP (Crl.) No.5412 of 2023. The factum of final report (charge-sheet) having been submitted against her was concealed by her in the Apex Court. Learned counsel has further stated that the informant is the Director in the company Kchipra Business Solution Pvt. Ltd. which was formed after his superannuation from Indian Army. The hard earned money of the informant has been usurped by the guile of the applicant misusing her licence to practice as an Advocate.

CONCLUSION:

11. It is an admitted fact that the said amount of Rs.50 lakhs has been transferred to the account of the applicant by the informant, who is the Director in company Kchipra Business Solution Pvt. Ltd. The applicant is an Advocate and has argued the matter in person and has also admitted the

fact of the said transfer of money to her account, but has stated that she is unable to do so as she is facing a case under Section 138 NI Act at Telangana, as such she is not sure as to whom she has to repay the said amount.

12. After hearing the parties, going through the evidence on record and taking into consideration the fact that a huge amount of Rs.50 lakhs has been transferred to the account of applicant, I do not find it a fit case for grant of anticipatory bail to the applicant.

13. The anticipatory bail application is found devoid of merits and is, accordingly, *rejected*.

(2023) 5 ILRA 1854

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 08.05.2023

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 52326 of 2022

Suryansh Kharbanda	...Applicant
Versus	
State of U.P.	...Respondent

Counsel for the Applicant:

Sri Alok Ranjan, Sri G.S. Chaturvedi(Sr. Advocate)

Counsel for the Respondent:

Sri Shiv Kumar Pal (G.A.), Sri O.P. Dwivedi (A.G.A.), Sri Raghuvansh Mishra, Sri Vidit Agarwal, Sri Ashwani Tripathi

Criminal Law – Criminal Procedure Code, 1973- Section 439 – Indian Penal Code, 1860 - Sections 498-A, 323, 504, 506, 304-B & 120-B - Section 3/4 of Dowry Prohibition Act,1961 -first informant-father of the deceased-husband and other

family members-demand of dowry, indulged in fight and instigated the deceased to commit suicide-death by hanging-within seven years of marriage-no demand of dowry in suicide-applicant was not at home on the date of incident-treating written statement of witnesses from complainant's side-statement under section 161 CrPC- authority to be exercised in the manner provided in the statute itself-presumption under Section 113-A of the Indian Evidence Act, 1872 would not apply automatically-offence under Section 306 of IPC-abetment of suicide-abetment is constituted by instigating a person to commit an offence-words "soon before death" Section 304 B IPC-to be understood in relative and flexible sense-words cannot be construed as laying down a rigid time period to be applied mechanically in each case-Courts duty bound to consider bail applications wholesomely- Bail granted-Bail application allowed- botched up investigation-matter referred to DGP, Uttar Pradesh Police to ensure free and fair investigation. (Paras 26, 33, 38, 39,40, 41, 42, 44, 48, 50,51 and 57)

HELD:

The aforesaid entries in the case diary coupled with the statements of Radhika and Kiran go to suggest that the applicant had removed the jewelries from the house on 12.11.2021 as the deceased was putting the locker on fire and was living in her sister's house and on the day and time when the deceased committed suicide, he was not at his home. (Para 26)

So far as taking the written statements of some of the witness of the complainant's side and treating the same as statement under section 161 of Cr.P.C. is concerned, it is well settled that it is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. (Para 33)

It is well settled that the mere fact that if a married woman commits suicide within a period

of seven years of her marriage, the presumption under section 113-A of the Evidence Act, 1872 would not automatically apply. The term "the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband." would indicate that the presumption under section 113-A of the Evidence Act, is discretionary and the Court can consider the nature of cruelty to which the woman was subjected to, having regard to the meaning of the word "cruelty" in section 498-A of the Indian Penal Code. "Abetment of suicide" is also confined to the case of persons who aid or abet the commission of the suicide. In the matter of an offence under section 306 of the Indian Penal Code, abetment must attract the definition thereof in section 107 IPC. Abetment is constituted by instigating a person to commit an offence or engaging in a conspiracy to commit, aid or intentional aiding a person to commit it. (Para 38)

The words "soon before her death" occurring in Section 304-B of Indian Penal Code are to be understood in a relative and flexible sense. Those words cannot be construed as laying down a rigid period of time to be mechanically applied in each case. (Para 40)

In the case in hand, accused is husband and is seeking bail pending trial. The issue which arises before this Court is whether if wife committed suicide within a period of seven years from the date of her marriage, the bail prayer of accused-husband is liable to be rejected straight away merely by drawing adverse presumption of abetment of suicide under Section 113-A of the Evidence Act, or presumption of dowry death under Section 113-B of the Evidence Act? (Para 42)

There is no dispute that the parameters for considering the bail of accused pending trial and conviction or acquittal of accused after adducing evidences by both the parties before the trial Court are different. This Court is of the view that each case turns on its own facts and circumstances. Even a little difference between the facts of two cases, may alter the entire aspect. In view of the provisions under Section 113A and 113B of the Evidence Act, it is not that the Courts will shut eyes and act as a silent

spectator in all the cases while considering bail applications, the Courts are duty bound to consider broader aspect of the matter and in the light of nature of allegations, the relevant materials of the case diary either produced by the complainant's side or by the accused's side to prove his/her innocence cannot be ignored because bail matters are also related to the valuable liberty of the accused. (Para 44)

The investigating officer has not assigned any cogent reason as to why he has not investigated the case in respect of the complaint made by Nisha Kharbanda on 13.11.2021 to the Commissioner, U.P. Police, Mahanagar, Kanpur as well as in respect of above-mentioned materials provided from the side of accused. Investigating Officer neither taken pain to open and see the materials (video of beating the applicant by the deceased and vulgar telephonic conversation between deceased and her father available in pen-drive, which has been filed at page no 178 to 202 of the paper book) provided from the accused's side nor recorded the transcript of the same in the case diary. Investigating Officer even did not ask Naveen Bhatia about the source and certificate under Section 65B of the Evidence Act regarding said video and telephonic conversation available in the pen-drive whereas he, vide letter dated 01.12.2021 had asked the complainant Pawan Grover about the source of origin regarding the material provided by him in the pen-drive. (Para 48)

In the present case the allegation of harassment and cruelty has been levelled by both sides against each other. Learned Government Advocate for the St. after arguing the matter at length, has lastly conceded that no sincere effort has been made by the investigating officer to investigate the material evidences provided from the accused side, while it is accepted on record and mentioned in CD Nos. 14 and 47. (Para 51)

Not investigating the materials provided from the side of the accused and only making the same as part of C.D Nos. 14 and 47 is a serious issue and it is not excepted from the investigating officer, who is in the rank of Deputy Superintendent of Police. This Court may observe that the investigating officer did

not meet the obligations, he was under. (Para 57)

Application allowed. (E-14)

List of Cases cited:

1. Common Cause Vs U.O.I.(2015)6 SCC 332
2. Maghavendra Pratap Singh @ Pankaj Singh Vs St.f Chhattisgarh, 2023 SCC OnLine SC 486S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla, (2005) 8 SCC 89

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

1. Heard Shri Gopal Swaroop Chaturvedi, learned Senior Counsel assisted by Shri Alok Ranjan, learned counsel for the applicant, Shri Shiv Kumar Pal, learned Government Advocate assisted by Shri Om Prakash Dwivedi, learned Additional Government Advocate representing the State and Shri Raghuvansh Mishra, learned counsel along with Shri Vidit Agarwal and Shri Ashwani Tripathi, learned counsel appearing on behalf of the first informant.

2. By means of this application under Sections 439 of the Code of Criminal Procedure, applicant Suryansh Kharbanda, who is involved in Case Crime No. 162 of 2021, under Sections 498-A, 323, 504, 506, 304-B, 120-B IPC and Section 34 of Dowry Prohibition Act, police station Nazirabad, district Kanpur Nagar, seeks enlargement on bail during the pendency of trial.

3. In short compass the facts of the case are that the informant Pawan Grover, who is the father of Anchal Kharbanda (hereinafter referred as 'the deceased') lodged a first information report on 20.11.2021 in respect of the incident which took place on 19.11.2021 against Suryansh

(husband) Nisha (mother-in-law) Bharat Grover alias Kaku (phupha), Minakshi, Annu Khullar (paternal aunt) Puneet Kotwani, (brother-in-law)(Bahnoi) Nikita Kotwani (sister-in-law)(nand) and Tanya Grover with the allegations that the aforesaid accused persons used to demand Rs. 70,00,000/- (rupees seventy lac) and indulged in fight (Marpeet) with his daughter and instigate her to commit suicide. Suryansh and his mother Nisha are of bad character and they also wanted to drag the victim in that misdeed. On 12.11.2021, all the accused persons with common intention tortured the victim physically and mentally and in the evening Suryansh, husband of the victim after beating her, took her cash and jewelries. The said incident was reported to the police by dialing 112 and 181. The FIR further alleges that her daughter used to telephone him several times a day and tell him about the harassment and torture meted out to her by her family members. On 19.11.2021 when the victim did not make any call, he informed the police by dialing 181 and when he went to the matrimonial house of the victim, he found her daughter dead hanging from the fan. All the aforementioned accused persons with common intention after killing his daughter hanged her from the fan.

4. After getting the information, the police rushed to the spot and conducted inquest proceeding as well as post mortem examination on the body of the deceased.

5. Inquest on the body of the deceased was conducted on 20.11.2021 between 8.30 AM to 11.15 AM, in which Shri Jitendra Bhalla (maternal uncle of the deceased), Shri Rajeev Madan, (Mausa of the deceased) Shri Arun Grover (uncle of the deceased), Shri Akshay (brother of the

deceased) and Smt. Reeta Grover (aunt of the deceased) were the witnesses of inquest proceedings.

6. Post mortem on the cadaver was conducted by Doctor Sunil Kumar on 20.11.2021 at 12.55 PM. Doctor found the following ante-mortem injuries:

“Ligature Mark 29 cm x 3.5 cm around the neck with a gap of 7 cm right side back of neck.

Distance 5.5 cm below chin, 6 cm below left ear and 1.5 cm below right ear.

On dissection white hard and glistening subcutaneous tissue present under the ligature mark.”

7. Shri Gopal Swaroop Chaturvedi, learned Senior Advocate appearing on behalf of the applicant submits as under:

7.1 Keeping in view the injuries sustained by the deceased, it is a case of hanging and not strangulation.

7.2 There was no mention of any dowry demand in the suicide note, which was given by the father of the deceased to the police on 24.11.2021.

7.3 There is nothing on record to show that the applicant ever instigated or abetted the deceased to commit suicide.

7.4 At the time of incident, both the applicant (husband) and his mother (mother-in-law) of the deceased were in Lucknow.

7.5 Incident has not taken place in the manner as alleged by the prosecution.

7.6 Investigating officers have conducted one sided investigation in collusion with the complainant.

7.7 Describing the nature and behaviour of the deceased, it is submitted that the deceased was completely free and

very domineering woman. She lived her independent and luxurious life. She did not even like anybody stopping her from coming and going anywhere at any time. Referring her family photographs filed at pages 443 to 450, it is submitted that she was enjoying her family trip with the husband and in-laws. On 18.11.2020 and 02.4.2021 all the family members including deceased as well as her both maids namely Ms. Radhika Kumari and Ms Kiran Kumari had gone to Goa and Bangalore tour by flight, which itself demonstrate that exaggerated allegations of harassment etc. against the applicant and his family members are false.

7.8 It is vehemently urged that in fact, deceased had tortured the applicant and his mother, therefore, Nisha Kharbanda, mother of the applicant gave a written complaint dated 13.11.2021 to the Commissioner of Police, Kanpur about her harassment by the deceased-Anchal Kharbanda, on which SI Prem Kumari made an enquiry and the allegations against the deceased were found true in the enquiry report dated 13.11.2021, which has been made part of CD No. 14. Sub-Inspector Prem Kumari, along with her report dated 13.11.2021 had submitted a pen-drive containing video of harassment of Smt. Nisha Kharbanda, mother of the applicant by the deceased, but said pen-drive has been removed by the investigating officer from the record.

7.9 On 08.02.2022 also Navin Bhatia, a relative of the applicant sent a representation by speed post to A.D.C.P (crime) along with some photographs and pen drive, in which there is a recording of very vulgar and abusive conversation between the deceased-Anchal Kharbanda and her father Pawan Grover for investigating several aspects of the matter indicated in the representation. Transcript

of the conversation has been filed at page Nos. 178 to 202 of the paper book. It is pointed out that reference of the above documents/evidences has been mentioned in CD No. 47, but the investigating officer in collusion with the complainant did not take pain to investigate the same in correct perspective.

8. Opposing the prayer for bail of the applicant, Shri Shiv Kumar Pal, learned Government Advocate assisted by Shri Om Prakash Dwivedi, learned Additional Government Advocate representing the State and Shri Raghuvansh Mishra, learned counsel appearing on behalf of the first informant submit as under:

8.1 The applicant is the husband of the deceased. The marriage of the applicant with the deceased took place on 09.2.2019 and she committed suicide on 20.11.2021, i.e. within seven years of marriage and, therefore, the presumption of abetment and dowry death under Section 113-A and 113-B of the Indian Evidence Act respectively shall be drawn against the applicant and bail application of the applicant is liable to be rejected on this ground alone.

8.2 Deceased was a woman of 25 years and she left behind her toddler. The first information report speaks two essential details, (a) demand of dowry by the husband (for the purpose of business of Suryansh) (Suryansh ke Vyapar hetu). (b) cruelty by the accused towards the deceased.

8.3 A week before the incident, police helpline 112 and 181 were contacted to make complaints of harassment and jewelries having been taken forcibly by the applicant.

8.4 Mobile phones of the deceased, her mother and father were

collected and made part of case diary. Computer operator of the police station made transcript of the whatsapp chat and conversation and also gave certificate under Section 65 of the Indian Evidence Act regarding its genuineness.

8.5 There was proximate link between the demand of dowry, cruelty and suicide committed by the deceased.

8.6 Referring the transcript of telephonic conversation dated 23.10.2021 between the deceased and her father filed at Page 279 to 291 of the paper book and whatsapp chat dated 16.10.2021 between the deceased and her mother, filed at page 271 to 272 of the paper book, it is submitted that the demand of dowry has been well established by digital record and the husband was the source of harassment of the deceased.

9. In the light of the rival contentions and the charges levelled against the appellants and to place the matter in its correct perspective, it is considered necessary to take note of the relevant materials on record.

10. The first informant Shri Pawan Grover, during investigation, has also handed over suicide note to the police on 24.11.2021 purportedly written by the deceased, which was found in the pocket of jeans of deceased's son kept in a bag. The suicide note reads as under:

(Anchal Kharbanda) Mera Beta (Yansh Kharbanda) agar hame zara si bhi kharoch ya nuksaan pachuchta hai toh uske zimedaar Bharat Grover, Meenakshi Grover, Suryansh Kharbanda, Nisha Kharbanda aur Nikita Kotwani aur Puneet Kotwani Mujhe bahot torture kar rahe hai pichhle kuch dino se:

- (1) Denying money, Bills etc.
- (2) Restricted me to go outside (of house).
- (3) If I dared to go out, he won't let me in.
- (4) His mother abuses me all time.
- (5) Every night he is out of the house.

11. In order to ascertain the veracity of the suicide note, it was sent to the Forensic Science Laboratory, Jhansi, which confirmed that it was in the handwriting of the deceased, but so far as signature on the suicide note is concerned, it does not correspond with the signature of the deceased.

12. Statement of the first informant was recorded on 20.11.2021 in which he reiterated the versions given in the first information report.

13. The investigating officer has recorded the statement of Akshay Grover, brother of the deceased on 24.11.2021, in which he has stated that the marriage of his sister was solemnized with the applicant on 09.2.2019. After the marriage the behaviour of the applicant towards the deceased was very cruel. After the deceased became pregnant, the applicant started mentally and physically torturing her as the deceased did not want to deliver the child. On 08.4.2020, deceased has informed him that her husband has brutally beaten her. When his parents went to the matrimonial house of the deceased to propitiate her in-laws, they threatened that unless Rs. 70,00,000/- (rupees seventy lac) will not be given by them for the business of the applicant, they will beat the deceased. On 12.11.2021 at about 8.00 in the night the applicant took away all the cash and jewelries of the deceased in two bags, information whereof had been given by the deceased to the

police by dialing 112 and 181. On 19.11.2021 at about 6.00 P.M., he had a conversation with the deceased. When he along with his parents reached the house of the deceased at about 1.45 AM, they found the deceased hanging.

14. Instead of recording the statement under Section 161 Cr.P.C., of Smt. Reena Grover, mother of the deceased, the investigating officer has taken her written statement on 25.11.2021 in which she has made allegations of demand of dowry of Rs. 70,00,000/- (rupees seventy lac) and torture meted out to the deceased by her in-laws.

15. Shri Jitendra Bhalla (maternal uncle of the deceased), Shri Rajeev Madan, (Mausa of the deceased) Shri Arun Grover (uncle of the deceased), Shri Akshay and Smt. Reeta Grover (aunt of the deceased), who were the witnesses of inquest proceedings have given their written statements.

16. Statement of Radhika, daughter of Gopal, who has been working in the house of the applicant and the deceased was recorded by the investigating officer. She stated that she has been working in their house for the last about two years. For about one and a half year she has been looking after the son of Anchal (deceased). Whenever the quarrel take place, Anchal, her husband and mother-in-law bolt the room from inside. Applicant-Suryansh used to slap the deceased. The quarrel started after the birth of their son. The applicant used to smoke hookah. His friend also come to smoke hookah. Whenever, the applicant works out on the upper portion of the house, Nisha (mother-in-law) asked not to go there. She told to the deceased about this. She further stated that in the night

intervening 19/20 between 12.00 and 1.00 in the night deceased after giving the child to Kiran, left for her room. On knocking the door, when the door was not opened, they saw from the glass that deceased was hanging from the fan. The information to this effect was given to the applicant from the phone of guard.

17. In her second statement, which was recorded on 08.12.2021, Radhika, daughter of Gopal stated that Anchal (deceased) always used to quarrel with Suryansh (applicant). One day, Anchal (deceased) beaten the applicant with broom. Anchal's family members also came to the house one or two times. Once, in the presence of her father, Anchal (deceased) assaulted her husband by tumbler. She used to say that she will leave her husband. She does not take care of her son. She further stated that she along with Kiran used to take care of deceased's son. From the conduct of the deceased, it appeared that she was a little insane. Her treatment was going on in Madhuraj Hospital and that she used to take medicines. On 12.11.2021, quarrel took place and the deceased was indulged in chaos and abusing all the members. Thereafter, the applicant went to her sisters house along with his mother Nisha. He came back in the evening and took the jewelries with him as the deceased was putting the locker on fire. Thereafter, the deceased called the police. On 13.11.2021 again police came to the house. Applicant and Nisha also came. Deceased was also called by the police. Two-three days before her death, deceased, while she was talking to his father, said that she will hang herself. On 19.11.2021 Kiran saw the scarf (Chunni) hanging from the fan, thereafter she removed it. In the night at about 12.00, when this witness Radhika and Kiran went

to her room to take diaper and knocked the door, she neither opened the door nor received the phone. When they went to balcony, they noticed that she was standing on the bathroom and her neck was crooked. On seeing her in that posture, they scared and informed the applicant from the phone of guard.

18. Statement of Kiran, daughter of Suresh, who is also working in the house of the applicant, was recorded on 20.11.2021. She stated that she has been working in the house for about three months. She was with Ayansh (son of the deceased). At about 12.00 in the night she along with Radhika knocked the door, but she did not open the door. Thereafter, she informed the applicant from the phone of Guard.

19. Second statement of Kiran was recorded on 08.12.2021, in which she stated that deceased does not look after her child. From the conduct of the deceased, it appeared that she was a little insane. Her treatment was going on in Madhuraj Hospital and that she used to take medicines. On 12.11.2021, quarrel took place and the deceased was indulged in chaos and abusing all the members. Thereafter, the applicant went to her sister's house along with his mother Nisha. He came back in the evening and took the jewelries with him as the deceased was putting the locker on fire. Thereafter, the deceased called the police. On 13.11.2021 again police came to the house. Applicant and Nisha also came. Deceased was also called by the police. She always used to quarrel with the applicant and Nisha (mother of the applicant) and breaks the household articles of the house.

20. Statement of Ram Pratap Singh, who was working in the house of the

deceased and applicant as guard was recorded on 20.11.2021. He stated that whenever quarrel took place between the applicant and the deceased, their relatives come to propitiate them. In the night intervening 19/20.11.2021 both the girls (maid) came to him and from his mobile spoken to the applicant. The child was also with them. After some time, Suryansh (applicant) and his in-laws along with police reached there and broken the glass of room, they found the deceased hanging.

21. In his statement Satish Chandra Vishwakarma, who was working in the house of the applicant as guard, has also stated that on 19/20.11.2021 both the girls (maid) came to him and asked that they have to talk to the applicant. Thereafter, they spoken to the applicant from the mobile of Ram Pratap. The child was also with them.

22. Statement of Ram Naresh alias Ram, who was also working in the house of the applicant as guard, was record on 24.11.2021 in which he has stated that quarrel between the applicant and the deceased was usual and in a month at least three-four times they used to quarrel.

23. Statement of Raja Ram, who was also a security guard in the house of the applicant, was recorded on 24.11.2021 in which he has stated that quarrel between the applicant and the deceased was usual.

24. Statements of Amit Singh and Vivek Yadav, who were working as bouncer (personal security guard) of the applicant were also recorded, who have stated that on the fateful day and time, the applicant were not at home, but he along with his mother were living in his sister's house and did not come to his house at Ashok Nagar since

13.11.2021. Prem Chandra, who was working as driver of Nisha Kharbanda, mother of the applicant, also stated that they were not at home and were living in Arya Nagar.

25. Having heard the learned counsel for the parties and examined the matter in its entirety as well as case diary containing more than 1600 pages produced by the Government Advocate representing the State, I find that the marriage of the deceased with the applicant was solemnized on 09.2.2019. Applicant's house and parental house (Maika) of the deceased are in district Kanpur. The deceased was aged about 25 years and was an able bodied lady. As per description of Case Diary No. 41 prepared on 03.01.2022, on 12.11.2021 at 22:15:05 from the mobile of Smt. Reena Grover, mother of the deceased a call was made at 181 informing the police that Suryansh (applicant) took all the money and jewelries from the lockers and at present he is in the house of his sister. Again on 13.11.2021 at 19:20:59 a call was made from the mobile of Reena Grover at 181 to the effect that deceased is being ousted from her house and that her husband (applicant) took away all the jewelries. On 15.11.2021 at 08.49.08 again on the call of Reena Grover, mother of the deceased, when the police contacted the applicant, he told the police that there is danger to his life from the deceased. On 20.11.2021 at about 01:27:46, Smt. Reena Grover, mother of the deceased called at 181 informing the police that her daughter is not picking up the phone and when the police rushed to the house of the deceased, they came to know that deceased has died. At the house the persons from maternal side of the deceased were present, whereas no person from her in-laws was there. Radhika and Kiran (maid servants) in their statements

stated that on 12.11.2021, the deceased was indulged in chaos and abusing all the members. Thereafter, the applicant went to her sister's house along with his mother Nisha. He came back in the evening and took the jewelries with him as the deceased was putting the locker on fire. Thereafter, the deceased called the police. On 13.11.2021 again police came to the house and that on 20.11.2021 when Radhika and Kiran went to her room to take diaper and knocked the door, she neither opened the door nor received the phone. When they went to balcony, they noticed that she was standing on the bathroom and her neck was crooked. On seeing her in that posture, they scared and informed the applicant from the phone of guard. After some time maternal family members of the deceased along with police came there and broken the glass and entered the room.

26. The aforesaid entries in the case diary coupled with the statements of Radhika and Kiran go to suggest that the applicant had removed the jewelries from the house on 12.11.2021 as the deceased was putting the locker on fire and was living in her sister's house and on the day and time when the deceased committed suicide, he was not at his home.

27. So far as suicide note which was found in the pocket of jeans of the toddler of the applicant and the deceased and was given to the police by the informant, is concerned, I find that no allegation of demand of dowry was levelled by the deceased against her husband and her in-laws.

28. I also find that in the post-mortem examination report, except ligature mark, no other injury was found on the body of the deceased and viscera was preserved and

as per report of the Forensic Science Laboratory, Jhansi dated 12.5.2022, in viscera no poison was found.

29. Further in the conversation between the deceased and her mother and father, no specific demand of dowry has been mentioned by them. I also find that prior to the incident, neither in the call recording nor in the whats app chat, there was any demand of Rs. 70,00,000/- and for the first time, it has been mentioned in the FIR.

30. Since Radhika and Kiran, who are key witnesses in this case because they always stayed with the deceased-Anchal Kharbanda and took care of her toddler, in their statements have exposed the act and conduct of the deceased that deceased used to beat the applicant with broom (Jhadu), breaks the household article, take medicines for her illness, always indulge in marpeet, putting the locker on fire and does not care of her toddler etc., therefore, the investigating officer did not make the said statements as part of the charge sheet. Further the investigating officer has not given any cogent reason in the case diary for not considering the statements of Radhika and Kiran and also not including them in the list of witnesses while submitting the charge sheet dated 14.2.2022.

31. Along with the bail application certain photographs were annexed at pages 451 to 454. I find that in some photographs deceased was seen beating the applicant, which find corroboration from the statement of Radhika and Kiran, whereas it is argued from the complainant's side that the said photographs are not genuine.

32. So far as the prosecution case that the deceased was killed and then hanged does not find corroboration from the post-

mortem report, which shows that exaggerated allegations have been levelled. It appears that after the marriage, the deceased did not want to deliver a child. She even did not take care of her toddler, therefore, wear and tear of matrimonial issues had arisen. I also find that balance as on 07.10.2021 in the account of the deceased was Rs. 1,07,365/-.

33. So far as taking the written statements of some of the witness of the complainant's side and treating the same as statement under section 161 of Cr.P.C. is concerned, it is well settled that it is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.

34. The F.I.R. was lodged against eight accused persons, out of whom, five persons, namely, Minakshi, Annu Khullar, Puneet Kotwani, Nikita Kotwani and Tanya Grover have been exonerated after investigation and final report has been submitted in their favour.

35. Smt. Nisha Kharbanda, mother-in-law of the deceased with similar accusation and Bharat Grover (Kaku), have been granted bail by the Coordinate Bench of this Court vide order dated 27.5.2022 and 10.10.2022 in Criminal Misc. Bail Application Nos. 3398 of 2022 and 31590 of 2022, which have not been challenged before the Apex Court as informed by the counsel for the applicant.

36. Mr. Raghuvansh Mishra, learned counsel for the complainant heavily relied

upon the section 113-A of the Indian Evidence Act. On the other hand Mr. Shiv Kumar Pal, learned Government Advocate made emphasis upon Section 113-B of the Evidence Act. Considering the rival submissions of the learned counsel for the parties on this issue, here it would be apposite to discuss about the statutory presumption under Section 113A and 113B of the Evidence Act, 1872.

37. Section 113A reads as follows:

113A. Presumption as to abetment of suicide by a married woman.—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.—For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860).]

38. It is well settled that the mere fact that if a married woman commits suicide within a period of seven years of her marriage, the presumption under section 113-A of the Evidence Act, 1872 would not automatically apply. The term "the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband." would indicate that the presumption under section 113-A of the Evidence Act, is discretionary

and the Court can consider the nature of cruelty to which the woman was subjected to, having regard to the meaning of the word "cruelty" in section 498-A of the Indian Penal Code. "Abetment of suicide" is also confined to the case of persons who aid or abet the commission of the suicide. In the matter of an offence under section 306 of the Indian Penal Code, abetment must attract the definition thereof in section 107 IPC. Abetment is constituted by instigating a person to commit an offence or engaging in a conspiracy to commit, aid or intentional aiding a person to commit it.

39. Section 113B reads as follows:

113B. Presumption as to dowry death.-- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

Explanation. For the purposes of this section, dowry death shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860).

40. The words "soon before her death" occurring in Section 304-B of Indian Penal Code are to be understood in a relative and flexible sense. Those words cannot be construed as laying down a rigid period of time to be mechanically applied in each case.

41. In the light of Section 113B of the Indian Penal Code, for the conviction under Section 304-B of the Indian Penal Code, the following essential ingredients are to be established/proved before the Trial Court :

"(a) the death of a woman should be caused by burns or bodily injury or otherwise than under a 'normal circumstances';

(b) such a death should have occurred within seven years of her marriage;

(c) she must have been subjected to cruelty or harassment by her husband or any relative or her husband;

(d) such cruelty or harassment should be for or in connection with demand of dowry; and

(e) such cruelty or harassment is shown to have been meted out to the woman soon before her death."

42. In the case in hand, accused is husband and is seeking bail pending trial. The issue which arises before this Court is whether if wife committed suicide within a period of seven years from the date of her marriage, the bail prayer of accused-husband is liable to be rejected straight away merely by drawing adverse presumption of abetment of suicide under Section 113-A of the Evidence Act, or presumption of dowry death under Section 113-B of the Evidence Act ?

43. In the light of above issue, it is relevant to mention the brief background of the case. Initially in the F.I.R. it was the case of the complainant that the deceased was killed and then hanged, but in the investigation the same does not find corroboration from the post-mortem report, as cause of the death of the deceased has been found due to hanging. She committed suicide in her room which was locked from inside. Admittedly on the day of the incident, the accused-applicant (husband) and his mother (mother-in-law) were not in the house at Kanpur but they were in Lucknow. In the suicide note produced by father of deceased, there is no allegation of

demand of dowry. It is a case where allegation of cruelty has been levelled by both the sides against each other, but investigating officer has conducted one sided investigation and submitted charge-sheet in haste manner on 14.02.2022 through Case Diary No. 46 dated 14.02.2021 against the applicant only relying upon the statements of the family members of the deceased ignoring other materials in favour of the accused-applicant on record, on which, concerned court below took cognizance on 17.02.2022. Even the transcript of telephonic conversations between the deceased and her father on which learned Government Advocate and learned counsel for the complainant heavily relied upon has been brought on record by the investigating officer through Case Diary No. 57 dated 28.03.2022 much after submitting charge-sheet against the applicant and taking cognizance of the case. Material evidences provided from the side of the accused though have been taken on record through case diary Nos.14 and 47, but no investigation has been done on the same, for the reason best known to the investigating officer.

44. There is no dispute that the parameters for considering the bail of accused pending trial and conviction or acquittal of accused after adducing evidences by both the parties before the trial Court are different. This Court is of the view that each case turns on its own facts and circumstances. Even a little difference between the facts of two cases, may alter the entire aspect. In view of the provisions under Section 113A and 113B of the Evidence Act, it is not that the Courts will shut eyes and act as a silent spectator in all the cases while considering bail applications, the Courts are duty bound to

consider broader aspect of the matter and in the light of nature of allegations, the relevant materials of the case diary either produced by the complainant's side or by the accused's side to prove his/her innocence cannot be ignored because bail matters are also related to the valuable liberty of the accused.

45. A complaint has also been filed by Mrs Nisha Kharbanda, mother-in-law of the deceased to the Commissioner, Mahanagar, Kanpur on 13.11.2021 about the behaviour of the deceased towards her stating inter alia therein that the marriage of her son Suryansh Kharbanda was solemnized with the deceased on 09.2.2021 as per Punjabi rites and ritual. After the marriage, she came to know that Anchal (deceased) is mentally retarded. Every day she used to indulge in anarchy, fracas, beating and also extend threats of sending jail in false cases. The complaint further alleges that she also used to beat her husband. In this regard, the applicant has also given a written complaint to the Senior Superintendent of Police, Kanpur Mahanagar on 27.7.2020. The complaint made by Mrs. Nisha Kharbanda has been received by the Reception Officer, Police station Nazirabad, district Kanpur Nagar on 13.11.2021 vide token No. 166/102. Copy of the said complaint is extracted herein below:

माननीय कमिश्नर,
उत्तर प्रदेश पुलिस,
महानगर कानपुर

दिनांक 13.11.2021

आदरणीय महोदय,

विषय:- बहू द्वारा दी जाने वाली प्रताड़ना के सम्बन्ध में
प्रार्थना पत्र

सविनय निवेदन है कि प्रार्थिनी निशा खरबन्दा पत्नी स्व०
सुरेन्द्र खरबन्दा प्रमुख समाजसेवी की पत्नी है एवम् भवन सं०

111-ए/108 अशोक नगर, कानपुर की निवासिनी है, प्रार्थिनी के पति शहर के प्रतिष्ठित समाज सेवी थे। जिनकी समाज सेवा की ख्याति पूरे शहर में थी वह आर्ट ऑफ लिविंग/ रोटरी क्लब कानपुर (पश्चिम) के माध्यम से सेवा करते रहते थे।

प्रार्थिनी के दो सन्ताने हैं पुत्र श्री सूर्यान्श खरबन्दा का विवाह (पूर्वनाम) ऑचल ग़ोवर.वर्तमान नाम श्रीमती ऑचल खरबन्दा पुत्री श्री पवन ग़ोवर के साथ दिनांक 09 फरवरी 2019 को कानपुर नगर में पंजाबी रीतिरिवाज के अनुसार हुआ था, विवाहोपरान्त यह ज्ञात हुआ कि ऑचल मानसिक रूप से अस्वस्थ है।

किन्तु समाजिक प्रतिष्ठा / लोकलाज के भय से उसके अवगुणों को छिपाये रखा, जबकि ऑचल खरबन्दा के अवगुण एवम् दुष्ट चरित्र में दिन.दूनी रात चौगनी वृद्धि होती गई जिससे प्रताड़ित होकर प्रार्थिनी का स्वास्थ्य खराब होता गया, ऑचल आये दिन बिना किसी कारण के अराजकता, मारपीट, धमकी जेल भेजना मुकदमें इत्यादि की धमकी देती रही, मेरे पुत्र के साथ मारपीट करती रही, इस सम्बन्ध में मेरे पुत्र द्वारा दिनांक 27/7/2020 को वरिष्ठ पुलिस अधीक्षक कानपुर महानगर के यहाँ लिखित सूचना देकर मदद की गुहार लगायी थी जिसकी प्रति संलग्न है।

प्रार्थिनी विधवा है, प्रार्थिनी के पुत्र के अतिरिक्त अन्य कोई सहारा नहीं है, कल ऑचल द्वारा एक झूठा आरोप की मेरा पुत्र 28 माह के पुत्र के साथ मारपीट करने का आरोप लगाते हुए 112 पर डायल कर दिया जिससे भयग्रस्त होकर प्रार्थिनी अपने इलाज एवम् स्वास्थ्य लाभ हेतु अपनी पुत्री के यहाँ कल से शिफ्ट हो गई हैं पुलिस के आने पर उससे उसने मेरे पुत्र पर आरोप लगाया कि हम लोग घर का जेवरात लेकर चले गये हैं उपरोक्त तथ्यों को देखते हुए आपसे विनम्र प्रार्थना की जाती है कि प्रार्थिनी को जान माल की सुरक्षा प्रदान की जाये।

एवम् श्रीमती ऑचल खरबन्दा को उक्त निवास स्थान से बेदखल करने के निर्देश दिये जाये ताकि प्रार्थिनी अपने निवास में शान्ति पूर्वक अपना बचा हुआ जीवन व्यतीत कर सके अन्यथा मानसिक विधित्त बहु के आचरण से पीड़ित होकर प्रार्थिनी के जीवन को खतरा है एवम् ऑचल भी मानसिक विधिप्रता के कारण कोई भी गलत कदम उठाकर प्रार्थिनी अपने विरुद्ध कुछ भी कर सकती है।

अतः पुनः विनम्र निवेदन है कि सम्बन्धित थाने को आवश्यक निर्देश देने की कृपा करें।

धन्यवाद।

ह० अप०

(निशा खरबन्दा)

पत्नी स्व० सुरेन्द्र खरबन्दा

निवासिनी.111-ए/108, अशोक नगर
कानपुर

Mob. 8400068888

46. It appears that on the said complaint, on the direction of the In-charge Inspector, an enquiry was made by SI Prem Kumari, posted at police station Nazirabad, district Kanpur Nagar. After enquiry, SI Prem Kumari submitted enquiry report. She, in her statement under Section 161 Cr.P.C. also disclosed the said fact. Here it would be apposite to reproduce the enquiry report:

सेवा में,

श्रीमान प्रभारी निरीक्षक महोदय,

थाना नजीराबाद कानपुर नगर

विषय. आवेदिका श्रीमती निशा खरबन्दा पत्नी स्व० सुरेस खरबन्दा नि०111A/108 अशोक नगर थाना नजीराबाद कानपुर नगर द्वारा दिये गये प्रार्थना पत्र की जांच आख्या के सम्बन्ध में रिपोर्ट-

महोदय,

सविनय निवेदन है कि आवेदिका श्रीमती निशा खरबन्दा पत्नी स्व० सुरेस खरबन्दा नि०111A/108 अशोक नगर थाना नजीराबाद कानपुर नगर द्वारा दिये गये प्रा०पत्र की जाँच मैं म०उ०नि० व मय हमराह म०का० 5010 निशा यादव को साथ लेकर मौके पर उपस्थित आये मौके पर आवेदिका श्रीमती निशा खरबन्दा व सूर्याश खरबन्दा व बहू आँचल खरबन्दा मौजूद जिनसे घटना के संबंध में पूछताछ की जा रही है।

बयान आवेदिका श्रीमती निशा खरबन्दा पत्नी स्व० सुरेन्द्र खरबन्दा उम्र करीब 54वर्ष निवासी 111ए/ 108 थाना नजीराबाद कानपुर नगर ने पूछने पर बताया कि मेरे पति का देहांत 05वर्ष पहले हो गया था मेरे पति का एमडीएच मसाले का बिजनेस था तब मेरा बेटा सूर्याश छोटा था लेकिन फिर भी मेरे बेटे ने मेरे पति का बिजनेस कड़ी मेहनत करके संभाल लिया मेरी बहू आचल ग़ोवर पुत्री पवन ग़ोवर द्वारा संपत्ति को अपने नाम करवाने के लेकर मेरे बेटे सूर्याश के साथ मारपीट करना एवं भद्दी.भद्दी गालियाँ देती है जानलेवा हमला करती है मेरी बहू के अवैध लोगो के साथ संबंध है और उनका आना जाना है एव मुझे व मेरे बेटे के खाने पीने पर भी प्रतिबंध

लगाती है मैं और मेरा बेटा बाहर का खाना खाकर काम चलाते हैं मेरी बहू को मेरा बेटा हर संभव खुश रखने का प्रयास करता है मेरी बहू कीमती से कीमती चीजों को तोड़ देती है मैं बहू आये दिन धमकी देती है कि जिस दिन मैं तुझे व तेरे बेटे सूर्याश को मरवा दूंगी उस दिन मैं तेरी पूरी प्रोपर्टी पर ऐश करूंगी। आवेदिका ने एक वीडियो दिखाया जिसमें बहू आंचल द्वारा अपने पति सूर्याश के साथ मारपीट कर रही है और अपनी मेरे साथ गन्दी-गन्दी गालियां दे रही है और जान से मारने की धमकी दे रही है। आवेदिका से एक पैन ड्राइव में वीडियो लेकर अवलोकन कर संलग्न आख्या किया गया एवं आवेदिका द्वारा दिये गये अपने इलाज से संबंधित मेडिकल प्रपत्र अवलोकन करने के पश्चात संलग्न आख्या की गयी। जो बयान वो सत्य है।

बयान आवेदिका का पुत्र सूर्याश पुत्र स्व० सुरेन्द्र खरबन्दा उम्र करीब 25 वर्ष निवासी 111ए/108 थाना नजीराबाद कानपुर नगर ने पूछने पर बताया कि मेरी विवाह आंचल ग़ोवर पुत्री पवन ग़ोवर निवासी 117/9/218 तुलसी नगर काकादेव के साथ 09 फरवरी 2019 में हुआ था। मेरे पिता का देहांत 05 वर्ष पहले हो गया था मेरे पिता का एमडीएच मसाले का बिजनेस था तब मैं छोटा था और मुझे बिजनेस के बारे में जानकारी नहीं थी अपने पिता के बिजनेस को मैंने कड़ी मेहनत करके संभाला। और मैं हर संभव अपनी पत्नी को खुश रखने का प्रयास करता रहा हूँ मेरी पत्नी कीमती से कीमती चीजों को तोड़ देती है और मेरी पत्नी आंचल ग़ोवर द्वारा संपत्ति को अपने नाम करवाने के लेकर मेरी मां पर दबाव बनाने लगी तथा मेरी पत्नी आंचल का मेरे साथ मारपीट करना एवं भद्दी-भद्दी गालियां देती है व मेरे ऊपर जानलेवा हमला करती है मेरी पत्नी के अवैध लोगों के साथ संबंध है और उनका आना जाना है एवं मेरी पत्नी कभी भी मेरी व मेरी माँ की हत्या करवा सकती है मुझे अपनी पत्नी से अपनी व अपनी माँ का जान का खतरा है एवं मेरी माँ व मेरे खाने पीने पर भी प्रतिबंध लगाती है मैं और मेरी माँ बाहर का खाना खाकर काम चलाते हैं मैं व आये दिन धमकी देती है कि जिस दिन मैं तुझे व तेरी माँ को मरवा दूंगी उस दिन मैं तेरी पूरी प्रोपर्टी पर ऐश करूंगी। जो बयान दिया वो सत्य है।

बयान आवेदिका की पुत्र बहू आंचल ग़ोवर पत्नी सूर्याश खरबन्दा नि० 111A/108 अशोक नगर कानपुर नगर उम्र करीब 25 वर्ष ने पूछने पर किसी भी बात का स्पष्ट जबाब नहीं दिया। और चुप रही।

तत्पश्चात आस पास के लोगों से जानकारी करने का प्रयास किया गया तो कुछ लोगों ने आपसी बुराई की वजह से पहचान न जाहिर करने की शर्त पर बताया कि निशा खरबन्दा अक्सर हम लोगों से अपनी प्रताड़ना की बात बताती रहती है एवं निशा खरबन्दा की बहू आंचल ग़ोवर की सारी गतिविधियां हम लोग देखते भी हैं सिर्फ मनमाने तरीके से अपना एकाधिकार

घर परिवार पर रखना चाहती है और अपनी सास निशा खरबन्दा व पति सूर्याश खरबन्दा से अक्सर गाली गलौच व विवाद करती रहती है कई बार हम लोगों ने भी समझाने बुझाने का प्रयास किया लेकिन वो मानने को तैयार नहीं है यह सत्य है कि यह आंचल ग़ोवर अपने पूरे परिवार को प्रताड़ित कर रही है।

जांच में वाक्यात इस प्रकार पाये गये कि आवेदिका की बहू आंचल ग़ोवर पत्नी सूर्याश खरबन्दा नि० 111A/108 अशोक नगर कानपुर नगर द्वारा अपनी सास (निशा खरबन्दा) एवं पति सूर्याश खरबन्दा के साथ आये दिन मारपीट करना एवं संपत्ति के अपने नाम करवाने के लिये धमकाना एवं प्रताड़ित करना एवं मुकदमा करवाने व जेल भेजने की धमकी देना एवं आवेदिका तथा अपने पति सूर्याश को जान से मरवाने की धमकी देना पाया गया। एवं आवेदिका कई गंभीर बीमारियों से ग्रसित है। आवेदिका ने एक वीडियो दिखाया जिसमें आवेदिका को बहू आंचल अपने पति के साथ मारपीट कर रही है एवं अपनी सास निशा खरबन्दा को गन्दी गन्दी गालियां दे रही है। एवं अपनी सास को एवं अपने पति को जान से मारने की धमकी दे रही है। आवेदिका की बहू आंचल ने अपनी गलतियों को स्वीकार किया है। आवेदिका द्वारा दिये गये अपने इलाज से संबंधित मेडिकल प्रपत्र एवं वीडियो की पैन ड्राइव अवलोकन करने के पश्चात संलग्न आख्या की गयी।

श्रीमान जी उपरोक्त प्रा०पत्र के संबंध में जांच से आवेदिका श्रीमती निशा खरबन्दा उपरोक्त के प्रा०पत्र के आधार पर संपत्ति को लेकर आवेदिका की बहू श्रीमती आंचल ग़ोवर कोई भी अप्रिय घटना की जा सकती है या करवायी जा सकती है। इससे इंकार नहीं किया जा सकता वादिनी की बहू श्रीमती आंचल द्वारा पूरे घर का उत्पीड़न किया जा रहा है। आवेदिका की उम्र 55 वर्ष है पति का देहांत हो चुका है कई गंभीर पैरालाइसिस जैसी बीमारियों से ग्रसित है। इनका देखरेख की आवश्यकता है परन्तु बहू द्वारा किसी प्रकार की देखरेख न करके उपर से प्रताड़ित किया जा रहा है। उपरोक्त सभी जांच के तथ्यों से श्रीमान SHO महोदय थाना नजीराबाद कानपुर नगर को अवगत कराया जा रहा है।

ह० अप०

(प्रेम कुमारी)

(उ०नि०)

संलग्नक. थाना नजीराबाद कानपुर नगर

1. रिपोर्ट. 01वर्क दि० 13/11/2021

2. मेडिकल प्रपत्र की छायाप्रति-07वर्क

3. पैन ड्राइव- 01

47. After going through the case diary, I find that above mentioned complaint

dated 13.11.2021 of Smt. Nisha Kharbanda and enquiry report thereon submitted by SI Prem Kumari has been kept on record as enclosure of CD No. 14. Similarly, representation of Naveen Bhatiya (filed at pages 456-467 of the paper book), photographs and pen drive containing CCTV footage and vulgar telephonic conversation between the deceased-Anchal Kharbanda and her father Pawan grover (filed at Page No. 178 to 202) have been made part of the case diary No. 47, but investigating officer did not make any effort to investigate that aspect of the matter.

The relevant extract of CD No. 47 is extracted below:

"श्री नवीन भाटिया के द्वारा अभियोग मे नामित अभियुक्तो की तरफ से मुकदमा उपरोक्त से सम्बन्धित एक प्रार्थना पत्र डीसीपी क्राइम महोदय को दिया गया है जो आज डाक पैड से प्राप्त हुआ। प्रार्थना पत्र मे प्रथम सूचना रिपोर्ट मिथ्या होने के आधार के सम्बन्ध मे 13 बिन्दु अंकित किये गये है तथा अभियुक्तो के बचाव मे 07 बिन्दु एवं अन्य अभियोजन साक्ष्य के संदेहास्पद होने के A से J तक आधार दिये है। प्रार्थना पत्र मे कुल 26 बिन्दु का समावेश किया गया है प्रार्थना पत्र के साथ सूर्यांश खरबंदा, आँचल खरबंदा व निशा खरबंदा के फोटो व एक पेन ड्राइव भी संलग्न की गयी है। प्रार्थना पत्र मय संलग्नक सीडी किया जा रहा है।"

48. The investigating officer has not assigned any cogent reason as to why he has not investigated the case in respect of the complaint made by Nisha Kharbanda on 13.11.2021 to the Commissioner, U.P. Police, Mahanagar, Kanpur as well as in respect of above mentioned materials provided from the side of accused. Investigating Officer neither taken pain to open and see the materials (video of beating the applicant by the deceased and vulgar telephonic conversation between deceased and her father available in pen-

drive, which has been filed at page no 178 to 202 of the paper book) provided from the accused's side nor recorded the transcript of the same in the case diary. Investigating Officer even did not ask Naveen Bhatia about the source and certificate under Section 65B of the Evidence Act regarding said video and telephonic conversation available in the pen-drive whereas he, vide letter dated 01.12.2021 had asked the complainant Pawan Grover about the source of origin regarding the material provided by him in the pen-drive.

49. However, in the absence of the certificate under Section 65 of the Evidence Act, this Court does not deem it fit to consider the aforesaid evidences provided by the accused' side in pen-drive.

50. In the present case the allegation of harassment and cruelty has been levelled by both sides against each other. Learned Government Advocate for the State after arguing the matter at length, has lastly conceded that no sincere effort has been made by the investigating officer to investigate the material evidences provided from the accused side, while it is accepted on record and mentioned in CD Nos. 14 and 47.

51. Considering the facts and circumstances of the case as well as keeping in view the nature of the offence, evidence, complicity of the accused and submissions of the learned counsel for the parties as discussed and noted above, this Court is of the opinion that the applicant has made out a case for bail. Hence, the bail application is hereby allowed.

52 Let the applicant Suryansh Kharbanda, be released on bail in the

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

(i) That the applicant shall cooperate in the expeditious disposal of the trial and shall regularly attend the court unless inevitable.

(ii) That the applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the court or to any police officer or tamper with the evidence.

(iii) That after his release, the applicant shall not involve in any criminal activity.

(iv) The identity, status and residential proof of sureties will be verified by court concerned before the release of the applicant.

53. In case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail of the applicant.

54. It is clarified that observations made herein above are only limited to the extent of determination of this bail application and will in no way be construed as an expression on the merits of the case. The trial court shall be absolutely free to arrive at its independent conclusions on the basis of evidence to be adduced uninfluenced by anything mentioned in the order.

55. Before parting with the case, I would like to mention that fair and unbiased investigation are the fundamental canons of our criminal jurisprudence and are quite in

conformity with the constitutional mandate enshrined in Articles 20 and 21 of the Constitution of India. Every investigation has to be conducted in a fair manner and in accordance with law. Fair and proper investigation is the primary duty of the investigating officer. In every civilized society, the police is invested with powers of investigation of a crime to secure punishment for the criminals and it is in the interest of the society that the investigating agency must act honestly and fairly and the investigating officer should not ignore the materials on record because such acts shake the confidence of the common people not only in the investigating agency, but in the ultimate analysis in the system of dispensation of criminal justice. Where there is stringent provisions under the law, high responsibility lies on the investigating agency. The duty of the investigating officer is not only to bolster up the prosecution case, but to bring out the unvarnished truth. The ethical conduct is also essential and investigation should be free from objectionable features or legal infirmities.

56. Hon'ble Supreme Court in **Common Cause Vs. Union of India (2015)6 SCC 332**, held as under:

“ There is a very high degree of responsibility placed on an investigating agency to ensure that an innocent person is not subjected to a criminal trial. This responsibility is coupled with an equally high degree of ethical rectitude required of an investigating officer or an investigating agency to ensure that the investigations are carried out without any bias and are conducted in all fairness not only to the accused person but also to the victim of any crime, whether the victim is an individual or the State.”

The aforesaid decision has been followed by Hon'ble Supreme Court in

Maghavendra Pratap Singh alias Pankaj Singh Vs. State of Chhattisgarh, 2023 SCC OnLine SC 486.

57. Not investigating the materials provided from the side of the accused and only making the same as part of C.D Nos. 14 and 47 is a serious issue and it is not excepted from the investigating officer, who is in the rank of Deputy Superintendent of Police. This Court may observe that the investigating officer did not meet the obligations, he was under.

58. In view of the above, the matter is referred to the Director General of Police, U.P. Lucknow to look into the matter in the light of the observations of this Court as mentioned in preceding paragraph Nos. 30, 45 to 50 and 55 to 57 relating to faulty investigation and issue suitable guideline in respect of fair investigation in all cases within four weeks in order to maintain the public faith in investigating agencies as well as upon the courts.

(2023) 5 ILRA 1870
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 25182 of 2016

State of U.P.	...Petitioner
Versus	
Presiding Officer, Labour Court, U.P. Bareilly & Anr.	...Respondents

Counsel for the Petitioner:

Sri S.M. Iqbal Hasan, Sti Dhananjay Singh (S.C.)

Counsel for the Respondents:

Sri Bhupendra Nath Singh, Devendra Nath Singh, Sri Dharmendra Kumar Srivastava, Sri Hari Prakash Mishra

A. Civil Law – Labour Law- Award passed in favour of respondent-workman under challenge- respondent workman challenged sudden termination of his services- Section 6-N of the U.P. Industrial Disputes Act, 1947 and Rule 42-violation.

B. Applicability of 1947 Act on irrigation department-Irrigation Department falls under the definition of Industry- Section 2(j) of the Act 1947-plea of the petitioner rejected. (Paras 19, 20 and 21)

HELD:

I find substance in the arguments advanced by the learned counsel for the respondent-workman as in the case of Des Raj Vs St.of Punjab (supra) the Apex Court had considered the tests laid down in various earlier judgments of the Apex Court itself, culminating in the judgment in Bangalore Water Supply (supra) and thereafter had arrived at a conclusion that the Irrigation Department falls within the definition of Industry within the meaning of Section 2(j) of the I.D. Act. It was held that the view taken down in Des Raj's case was the better in point of law and hence it is the view in Des Raj's case which was directed to be followed. Once it was so held and also that the work of the Irrigation Department of the St.of Punjab and the material placed before the Supreme Court including the written submissions filed on behalf of the concerned petitioners that the irrigation department of the St.of Maharashtra was discharging the same or similar functions as the Irrigation Department of the St.of Punjab, it was held that the projects of the Irrigation Department or work connected with that of the St.of Maharashtra, on the same tests as applied by the Apex Court in Des Raj's case would fall within the definition of an industry for the purpose of Section 2(j) of the I.D. Act. (Para 20)

In view of above discussions, the first contention of the St.to the effect that Irrigation Department does not fall within the definition of "Industry" or that provisions of Act of 1947 are

not applicable, does not have any force and is hereby rejected. Even, the Labour Court, in the impugned award has also given the same interpretation after relying upon the judgments in the case of Des Raj and etc. (supra) and other authorities. I do not find any error in the view taken by the Labour Court in this regard. (Para 21)

C. Plea of State-petitioner- respondent-workman was appointed on part time basis-automatic cessation of his services-Section 114 of Indian Evidence Act-Court may draw favourable and unfavourable inference-No evidence led by the State-petitioner before Labour Court-hence, the contention rejected. (Paras 22 to 24)

HELD:

In this regard, I find it appropriate to refer to the provisions of section of 114 of Indian Evidence Act, 1872. It is a provision wherein the Court may draw inferences in any proceedings which include inferences favourable or unfavourable (adverse) to any party. (Para 23)

In the present case, reliance has been placed upon Annexure R.A.-1 to the rejoinder affidavit, so as to explain the nature of services of the respondent-workman, however the said document did not form part of the record of the proceedings before the Labour Court. In view of provisions of section 114 of Indian Evidence Act, 1872, as quoted herein-above, the said document cannot confer any advantage upon the State-petitioner in a writ of certiorari, by which a challenge has been made to the award of the Labour Court, which is based upon the oral and documentary evidence produced by the respective sides before it. Admittedly, annexure R.A.-1 to the rejoinder affidavit, did not form part of the record of the proceedings. Therefore, second contention of the St.regarding nature of service of the respondent is hereby rejected. (Para 24)

D. Reference made after a huge delay of 16 years-respondent workman was not gainfully employed-after termination of his services-no reinstatement has been awarded-hence, the contention regarding delay in reference also rejected-the impugned order does not suffer from any illegality, perversity-award upheld-writ

petition dismissed. (Paras 43, 46, 47 and 49)

HELD:

Further, The Supreme Court in several authorities some of which are mentioned below has held that if the only defect in the termination order is non-payment of retrenchment compensation as required by Section 25 F of Industrial Dispute Act (or Section 6 N of U.P.I.D. Act) then it is not always necessary to direct reinstatement with full back wages and that in such situation more often than not proper relief may be to award consolidated damages/compensation particularly when the employer is Government or Governmental agency and relevant rules have not been followed before appointment. (Para 43)

The Court cannot ignore one aspect of the matter. The Labour Court, in the present case, has not directed reinstatement of the workman in his services. In case, the workman was aggrieved by denying such relief, he could have challenged the award but, admittedly, he has not challenged the same nor has he claimed relief of reinstatement. Even during the course of arguments, learned counsel for the respondent-workman submitted that at this stage he is just supporting the award whereby only backwages from the date of reference till the enforcement of the award have been awarded. Therefore, this Court is conscious of the fact that Labour Court did not award even backwages from the year, 1990, when the services of the respondent-workman were terminated, but the same have been awarded from the date of reference. Therefore, the delay of 15-16 years in the present case, is not fatal to the claim of the respondent-workman, who, though claimed reinstatement, but has been denied the same. I do not think that award of the backwages from the year 2005 onwards, would be defeated by the delay, which may be a factor in those cases, where the reinstatement with backwages has been ordered, as there is no question of reinstatement in the present case either under the award or in the absence of challenge by the workman to the award. (Para 46)

Even the Labour Court has recorded clear finding just above the operative portion of the

impugned award that the workman had stated that he had not worked over a period of 15 years and that he had made an oral request from the employer to take him on duty, but did not submit any application in this regard. Therefore, the labour Court has taken a view that the workman was not entitled to get backwages upto the date of making reference. Since the said denial has not been challenged by the workman by filing writ petition or otherwise, I cannot examine the validity or illegality of the said findings in totality of the facts of the case. (Para 47)

Therefore, the third contention of the State-petitioner based upon the delay in making reference also does not have any force and is liable to be discarded. (Para 48)

Insofar as other findings recorded in the award impugned are concerned, I find that the view taken by the Labour Court that termination of services of respondent-workman was contrary to the provisions of section 6-N of the U.P. Industrial Disputes Act, 1947 does not suffer from any illegality or perversity in view of the evidence on record produced before the Labour Court. (Para 49)

Application allowed. (E-14)

List of Cases cited:

1. Executive Engineer (St.of Karn. Vs K Somasetty & ors., reported in 1997 (5) Supreme Court Cases 434

2. Des Raj etc. Vs St.of Pun. & ors., reported in AIR 1988 Supreme Court 1182

3. Bangalore Water Supply and Sewerage Board Vs A. Rajappa & ors., reported in 1978 (2) Supreme Court Cases 213

4. St.of U.P. through Secretary Irrigation Vs Mohd. Rais, reported in 2021 (169) FLR 520

5. The St.of U. P. & ors.Vs Uttam Singh, reported in AIR 2021 Supreme Court 3909

6.Chairman, Town Area & anr.Vs St.of U.P. & ors., reported in 2013 (11) ADJ 197

7. St.of Karnataka & anr.Vs Ravi Kumar reported in 2009 (13) SCC 746

8. Haryana St.Cooperation Land Development Bank Vs Neelam reported in 2005 (5) SCC 91

9. Bharat Sanchar Nigam Ltd. Vs Bhurumal reported in 2014 (7) SCC 177

10. Assistant Engineer, Rajasthan St.Agriculture Marketing Board, Sub Division, Kota Vs, Madan Lal reported in (2013) 14 SCC 543

11. Nagar Mahapalika Vs St. of U.P. & ors.. reported in 2006,(5) SCC 127

12. Municipal Council, Sujampur Vs Surinder Kumar reported in 2006 (5) SCC 173

13. Haryana St.Electronics Development Corp. Ltd. Vs Mamni reported in 2006 (9) SCC 434

14. Uttaranchal Forest Development Corp. Vs M.C. Joshi reported in 2007 (9) SCC 353

15. Ghaziabad Development Authority & anr.Vs Ashok Kumar & anr.reported in 2008 (4) SCC 261

16. Telecom District Manager Vs Keshab Deb, reported in 2008 (8) SCC 402

17. Jagbir Singh Vs Haryana St.Agriculture Marketing Board reported in 2009 (15) SCC 327

18. Uttar Pradesh St.Electricity Board Vs Laxmi Kant Gupta reported in 2009 (16) SCC 562

19. Bharat Sanchar Nigam Ltd. Vs Man Singh reported in 2012 (1) SCC 558

20. Senior Superintendent Telegraph (Traffic), Bhopal Vs Santosh Kumar Seal & ors., reported in 2010 (6) SCC 773

21. Assistant Engineer, Rajasthan Development Corporation and Anr. Vs Gitam Singh reported in 2013 (5) SCC 136

22. St.of U.P. Vs Presiding Officer, Labour Court & anr.reported in 2017 (7) ADJ 393

23. Nagar Mahapalika Vs St.of U.P., AIR 2006 SC 2113

24. Sita Ram Vs Moti Lal Nehru Farmers Training Institute, AIR 2008 SC 1955

25. Senior Superintendent, Telegraph (Traffic) Bhopal Vs Santosh Kumar Seal & ors., reported in AIR 2010 SC 2140

26. Incharge Officer Vs Shankar Shetty reported in JT 2010(9) SC 262

27. Divisional Engineer, Telecom, Jhansi Vs Presiding Officer & anr.2011 (4) ADJ, 199

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. This writ petition has been filed challenging the award dated 01.04.2015 passed in Adjudication Case No. 77 of 2006 (Executive Engineer vs Krishna Murari Sharma) published on 04.11.2015 by the Presiding Officer, Labour Court, Bareilly (herein-after referred to as the "Labour Court").

Facts of the Case

2. The facts of the case are that the respondent-workman was appointed on the post of Tubewell Operator on 27.02.1985 and was assigned duties at Tubewell No. 106 Adhkata, Bareilly. He was given the charge of the said Tubewell under the order dated 30.07.1985 issued by the Assistant Engineer.

3. It is contended that the workman performed duties till October, 1990, but all of a sudden, his services were terminated in November, 1990 without disclosing any reason and without paying him retrenchment compensation. The workman agitated the issue and, ultimately, the matter was referred by the State Government to the Labour Court, Bareilly,

where it was registered as Adjudication Case No. 77 of 2006 (Executive Engineer vs Krishna Murari Sharma) for adjudication of the dispute as to whether termination of services of the workman Krishna Murari Sharma w.e.f. 23.11.1990 is legal and, if not, as to what relief/benefit/compensation, the workman is entitled to get?

4. Pursuant to the notices issued by the Labour Court to the contesting parties, the workman filed his reply stating that he was appointed under the Office order No. 12/84/85 numbered as Letter No. 944/1/u0l0o0/dated 27.02.1985 and, initially he was sent for training and was appointed on the Tubewell No. 106 Adhkata Bareilly. It was further stated that the workman had been given complete charge of the aforesaid Tubewell under the Order No. 523, dated 30.07.1985 and further letter No. 200, dated 30.07.1985 issued by the Assistant Engineer; his services were full time in nature and that he had worked with full satisfaction of the authorities. It was further contended that violating the provisions of section 6-N of the U.P. Industrial Disputes Act, 1947 and Rule 42, the services of the workman were suddenly terminated in the year 1990. Accordingly, the workman made a prayer that he be reinstated on his post with full backwages and continuity in services. The workman also filed written arguments.

5. On the other hand, the employer (Executive Engineer) submitted his reply before the Labour Court stating that the workman was appointed on a monthly honorarium of Rs.299/- on purely temporary basis, which was mentioned in the conditions of the service agreement itself. The termination of services in April, 1990 was not disputed in the reply, and it was contended that since the Government

had declared cadre of part-time Tubewell Operator as a dead cadre, the workman was not entitled for any relief. It was further contended that the Department did not fall within the definition of "Industry" and, therefore, the matter was not covered by the provisions of the U.P. Industrial Disputes Act, 1947.

Evidence before Labour Court

6. The parties led evidence in support of their respective cases. A cash book has been annexed along with the writ petition, which shows that the workman was engaged by the Department and was paid salary/honorarium. The workman appeared as D.W.-1 and reiterated his stand in his oral evidence also explaining the nature of works and activities performed by him. He also stated that since after termination of his services, he was unemployed and dependent upon other persons. He also proved the documents on record, which included the Salary Register etc.

7. One Sushil Sharma, the Assistant Engineer was examined by the Department, who stated that the services of the workman according to the agreement were purely part-time, which were extended upto 30.09.1989 and the said agreement was not further extended. The said witness expressed his ignorance about sending/service of notice to the workman before termination of his services. Written arguments were also filed on behalf of the Department, stating that the reference was made after a long delay of 15 years in the year 2005 after the termination of his services; that the opposite party cannot be treated as a workman and that the Irrigation Department did not fall within the definition of "Industry" and, therefore, the provisions of U.P. Industrial Disputes Act,

1947 were not applicable and, consequently, the reference was liable to be dismissed.

The Award

8. The Labour Court, after considering the material on record and after hearing the respective parties, passed the impugned award dated 01.04.2015 holding that termination of the services of the workman w.e.f. 23.11.1990 was improper and illegal and the workman was held entitled to get the entire salary for the period with effect from the date of reference till the enforcement of the award.

The Basic Structure of the writ petition

9. The writ petition is founded basically on the pleas that Irrigation Department is not an "Industry" as per the law laid down by the Supreme Court in the case of *Executive Engineer (State of Karnataka vs K Somasetty and others*, reported in 1997 (5) Supreme Court Cases 434; the reference was made after a delay of 16 years; and, therefore, the workman is not entitled for any relief; the Labour Court has not properly considered the evidence; as per the decisions of the Supreme Court, payment of compensation is not a necessary consequence in case of reinstatement of the workman, and therefore, the order of reinstatement is bad in the eyes of law. (*The plea qua reinstatement is contrary to award as reinstatement was not ordered under the award*).

Counter Affidavit

10. Counter affidavit has been filed on behalf of the respondent-workman stating that termination of his services was

contrary to the provisions of the U.P. Industrial Disputes Act, 1947, specially section 6-N thereof; that the workman had worked for more than 240 days and, therefore, is entitled for the reliefs claimed; findings of fact have been recorded by the Labour Court while passing the award impugned, which do not call for interference. Insofar as the law relied upon in the writ petition with regard to definition of "Industry" in connection with Irrigation Department is concerned, reliance has been placed upon the judgments of Supreme Court in the cases of **Des Raj etc. Vs State of Punjab and others**, reported in AIR 1988 Supreme Court 1182 and **Bangalore Water Supply and Sewerage Board vs A. Rajappa and others**, reported in 1978 (2) Supreme Court Cases 213.

Rejoinder Affidavit

11. A rejoinder affidavit has been filed by the petitioner reiterating the stand taken in the writ petition also annexing a copy of the order dated 29.07.1985 as Annexure No. R.A.-1 to the rejoinder affidavit, wherein the conditions of services of the respondent-workman are enlisted, particularly disclosing that after 30.09.1989, the services of the workman shall automatically come to an end and that extension was granted to the services w.e.f. 01.10.1988 to 30.09.1989 after he was reappointed as part-time Tubewell Operator since after the expiry of his services on 30.09.1988.

12. I have heard Shri Dhananjay Singh, learned Standing Counsel for the petitioner State of U.P. and Shri Dharmendra Kumar Srivastava, learned Counsel for the respondent-workman.

Contention of the Petitioner

13. The contention of learned Standing Counsel on behalf of the petitioner is that since, the Irrigation Department does not fall within the definition of "Industry" as laid down by the Supreme Court in the case of **Executive Engineer (State of Karnataka)** (supra), not only the reference, but also the impugned award is illegal as the matter was not covered by the provisions of U.P. Industrial Disputes Act, 1947. Further submission is that the services of the respondent-workman were purely part time in nature, which ceased to operate after 1989 and, therefore, the termination was an automatic consequence as per conditions of the services and, hence, there is no illegality in terminating the services of the respondent-workman. Further submission is that reference was made at a very belated stage, i.e. after a period of 15-16 years and, therefore, the workman is not entitled for any relief.

Contention of Respondent-Workman

14. Per contra, Shri Dharmendra Kumar Srivastava, learned counsel for respondent-workman has elaborately explained the ratio of the judgments of the Supreme Court in the cases of **Des Raj etc.** (supra) and **Bangalore Water Supply and Sewerage Board (supra)** and by placing reliance upon the decision of this Court in the case of **State of U.P. through Secretary Irrigation vs Mohd. Rais**, reported in 2021 (169) FLR 520, he has contended that the issue as to whether the Department of Irrigation is or is not an Industry so as to attract the provisions of U.P. Industrial Disputes Act, 1947, has already been settled in the aforesaid authorities and, therefore, the contention of the State to the contrary is unacceptable.

Analysis of Rival Contentions

15. Before proceeding further, it is necessary to refer the law laid in various authorities as to the applicability of the provisions of the Act of 1947 on the Irrigation Department.

16. This Court in the case of **State of U.P. through Secretary Irrigation Vs. Mohd Rais** reported in 2021 (169) FLR 520, in paragraphs 5, 7, 8, 9, 10 and 11, has held as under:

"5. Learned counsel appearing on behalf of opposite party no.1 refuting the submission advanced by learned counsel for petitioner has in turn placed reliance upon judgment rendered by Hon'ble the Supreme Court in the case of Des Raj vs. State of Punjab & Ors. reported in AIR 1988 Supreme Court 1182 to submit that a Government Department such as the Irrigation Department has already been held to come within the purview of term 'Industry' but the subsequent judgment rendered in the case of K. Soma Setty (supra) has been passed without noticing the aforesaid two judgments, which should therefore prevail. Learned counsel has also relied upon judgment rendered by Hon'ble the Supreme Court in the case of Workmen of American Express International Banking Corporation vs. Management of American Express International Banking Corporation reported in AIR 1986 Supreme Court 458 to submit that for the purposes of calculation of 240 days of service, weekends and other gazetted holidays are required to be taken into account. Learned counsel has also relied upon a Full Bench Decision of this Court rendered in Ganga Saran vs. Civil Judge, Hapur reported in AIR 1991 Allahabad 114 to submit that in case of a conflict between judgments of

Hon'ble Supreme Court consisting of equal authorities, the concerned High Court must follow judgment which appears to lay down the law elaborately and accurately irrespective of time line. Learned counsel also placed reliance on a Single Judge judgment rendered by High Court of Bombay in Executive Engineer, Yavantmal Medium Project Division & Anrs. vs. Anant S/o Yadao Murate & Another reported in 1997 ILLJ 91 wherein after considering the contradictory judgments of Hon'ble Supreme Court regarding Irrigation Department being an 'Industry' has followed the judgment rendered in the case of Des Raj (supra).

.....

7. As has been indicated hereinabove, the Hon'ble Supreme Court in the case of Des Raj (supra) has held that an Irrigation Department of particular Government to be an Industry in terms of the Act of 1947. The said judgment has taken into account various other judgments rendered by Hon'ble the Supreme Court particularly a Constitution Bench judgment rendered in Bangalore Water Supply and Sewerage Board vs. A. Rajappa, reported in (1978)2 SCC 213. On the contrary, the subsequent judgment rendered by Hon'ble Supreme Court in case of K. Soma Setty (supra) has not adverted to the aforesaid judgments of Des Raj (supra) and Bangalore Water Supply and Sewerage Board (supra).

8. Upon perusal of Judgment rendered in the case of Desh Raj (supra) as compared to judgment rendered in the case of K. Soma Setty (supra), it is apparent that in the case of Desh Raj (supra) Irrigation Department has been held to come within the definition of Industry whereas judgment

of K. Soma Setty holds otherwise. As such, there is clear conflict in the two judgments which are of Coordinate Bench.

9. The proposition of law required to be followed in conflicting judgments rendered by Hon'ble the Supreme Court by Benches of Coordinate strength has been discussed in the Full Bench of this Court in Ganga Saran (*supra*). The Full Bench after considering the relevant aspect has held as follows:

" 7. One line of decision is that if there is a conflict in two Supreme Court decisions, the decision which is later in point of time would be binding on the High Courts. The second line of decisions is that in case there is a conflict between the judgments of Supreme Court consisting of equal authorities, incidence of time is not a relevant factor and the High Court must follow the judgment which appears to lay down law elaborately and accurately.

8. Similar situation arose before a Full Bench of Punjab and Haryana High Court in the case of M/s Indo Swiss Time Limited, Dundahera, vs. Umrao, AIR 1981 Punj & Har 213. What the Full Bench in the said case held is extracted below (at pp. 219-220 of AIR) :

Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the superior Court are of co-equal Benches and therefore, of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered.

It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extant then both of them cannot be binding on the courts below. Inevitably a choice, though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of coequal Benches of the Superior Court are earlier later is a consideration which appears to me as hardly relevant."

This decision was followed by the Bombay High Court in the case of Special Land Acquisition Officer vs. Municipal Corporation, AIR 1988 Bombay 9. The majority of Judges in the Full Bench held that if there was a conflict between the two decisions of equal benches which cannot possibly reconcile, the courts must follow the judgment which appear to them to state the law accurately and elaborately. We are in respectful agreement with the view expressed by the Full Bench of Punjab & Haryana High Court in the case of M/s Indo Swiss Time Limited v. Umrao, (AIR 1981 Punj & Har 213) (*Supra*) especially when the Supreme Court while deciding Qamaruddin's case (1990 All WC 308) (*Supra*) did not notice the U.P. amendment to S.115, C.P.C. and earlier decision of the Supreme Court."

10. The aforesaid aspect has also been dealt with by a learned Single Judge of the High Court of Bombay in which judgment rendered by Hon'ble the Supreme Court in the case of Des Raj (*supra*) has been followed:

"13. On considering all the concepts of industry and after reviewing

the various tests which need not be repeated, as the tests were laid down in Bangalore Water Supply case (supra). The concept of sovereign and regal function was explained in Chief Conservator of Forests (supra). The Apex Court in para 13 specifically rejected an argument that welfare activities partake sovereign functions on the ground that if such a view was taken it would be eroding the view taken by it in Bangalore Water Supply's case. While observing that welfare activities partake sovereign functions the Apex Court did not notice this in Sub-Divisional Inspector of Post, Vaikam and Other (supra). Therefore, considering the various precedents of the Apex Court itself it is clear that the law declared by the Apex Court is that welfare activities do not necessarily partake sovereign functions. In Executive Engineer, State of Karnataka the reliance was placed on the judgment in the case of Union of India v. Jai Narain Singh (supra). In Union of India v. Jai Narain Singh, the Apex Court has merely noted that the Central Ground Water Board is not an Industry. It is not possible to discern from that judgment as to what were the reasons for the Apex Court to so hold. The other judgment relied on is that of State of Himachal Pradesh v. Suresh Kumar Varma & Anr. (supra). On a perusal of the fact and the law laid down it does not seem that the issue as to whether a particular department was an industry or not was in issue. What was in issue was whether the work charged employees who perform duty of transitory nature were appointed to posts and their appointments were on daily wage basis in an appointment to a post. The Apex Court therein noted that such appointments were not appointments to the posts and, therefore, no directions could have been given to re-engage them in any work or appoint them against existing

vacancies. Thus the two judgments relied upon by the Apex Court to arrive at the conclusion arrived at in Executive Engineer, State of Karnataka (supra), nowhere have laid down the tests to hold as to why Irrigation Department is to be excluded from the definition of industry. As pointed out earlier, even the case of Sub Divisional Inspector of Post, Vaikam and Others was considered by the Apex Court in Physical Research Laboratory and explained the same in paragraph 10 of the judgment. After that, it proceeded to apply the tests as laid down in Bangalore Water Supply. In the case of Des Raj v. State of Punjab (supra) the Apex Court had considered the tests laid down in various earlier judgments of the Apex Court itself, culminating in the judgment in Bangalore Water Supply (supra) and thereafter had arrived at a conclusion that the Irrigation Department falls within the definition of Industry within the meaning of Section 2(j) of the I.D. Act. I am, therefore, of the considered opinion that the view laid down in Des Raj's case is the better in point of law and hence it is the view in Des Raj's case which will have to be followed. Once it is so held and as I have already set out earlier the work of the Irrigation Department of the State of Punjab and the material placed before this Court including the written submissions filed on behalf of the petitioners show that the projects undertaken by the irrigation department of the State of Maharashtra is discharging the same or similar functions as the Irrigation Department of the State of Punjab. It, therefore, follows that the projects of the Irrigation Department or work connected with that of the State of Maharashtra, on the same tests as applied by the Apex Court in Des Raj's case would fall within the definition of an industry for the purpose of Section 2(j) of the I.D. Act."

11. Upon applicability of said factors to the present case, it is clear that the judgment rendered by Hon'ble the Supreme Court in *Des Raj (supra)* has elaborately dealt with the question as to whether Irrigation Department of the Government would come within the definition of Industry or not. After considering the Constitution Bench Judgment of Hon'ble Supreme Court rendered in *Bangalore Water Supply and Sewerage Board (supra)*, the Hon'ble Supreme Court has reached a definite conclusion that Irrigation Department of the Government would come within the definition of Industry."

17. The Supreme Court in the case of ***The State of Uttar Pradesh and others Vs. Uttam Singh***, reported in AIR 2021 Supreme Court 3909, in paragraphs 10 and 11, has held as under:

"10. We have also taken note of the fact that during his 13 long years of employment and before that having battled the appellants for the period of 6 years to get his dues, the father of the respondent was also transferred from one department to the other, normally an aspect which would be associated with a person who had a regular employment. The most significant aspect is that had the father of the respondent not been considered a regular appointee, there would be no occasion for the Department to volunteer his services to the State Election Commission to perform election duties, which could have been done only by a Government employee, as is specified under Section 159 of the Representation of the People Act, 1950 ("Staff of certain authorities to be made available for election work").

11. The present case is thus one which is peculiar in its given factual

scenario which we have discussed above and thus for all practical purposes, it is a case of an appointment against a regular vacancy. The respondent's father was treated as a regular employee by the aforesaid conduct of the appellants even though he was labelled as a Part Time tubewell operator."

18. This Court in the case of ***Chairman, Town Area & another Vs. State of U.P. and others***, reported in 2013 (11) ADJ 197, in paragraph 14 held as under:

"14. The submission of learned counsel for the petitioner that in respect of true meaning and import of the expression 'Industry' defined under Industrial Disputes Act, the correctness of decision of Apex Court rendered in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa & others*, AIR 1978 S.C. 548 has been doubted by Apex Court in *Coir Board, Ernakulam, Cochin and Another Vs. Indira Devi P.S. and others*, (1998) 3 S.C.C. 259 and further in case of *State of U.P. Vs. Jai Bir Singh* (2005) 5 S.C.C. Page 1 and decision of the Apex Court rendered in *Bangalore Water Supply* case has been referred to the larger Bench, also does not make any difference for the reason that the learned counsel for the petitioner could not point out the final decision rendered by larger Constitution Bench of the Apex Court in respect of the aforesaid references, therefore, I have no hesitation to hold that earlier view taken by the Apex Court is still good law and cannot be held to be detracted by Apex Court itself by now. Accordingly, no different opinion can be given by this court in this regard."

19. The submission of the learned counsel for the respondent-workman,

therefore, is that once the Supreme Court as well as this Court have already held in the aforesaid authorities that Irrigation Department and also the departments of the like nature depending upon the services rendered by the said departments, shall be covered by definition of "Industry" and, further, once the respondent was treated as an employee in the petitioner establishment, no error can be pointed out in adjudication of the dispute by the Labour Court and the provisions of U.P. Industrial Disputes Act, 1947 were fully applicable.

20. I find substance in the arguments advanced by the learned counsel for the respondent-workman as in the case of **Des Raj v. State of Punjab** (supra) the Apex Court had considered the tests laid down in various earlier judgments of the Apex Court itself, culminating in the judgment in **Bangalore Water Supply** (supra) and thereafter had arrived at a conclusion that the Irrigation Department falls within the definition of Industry within the meaning of Section 2(j) of the I.D. Act. It was held that the view taken down in **Des Raj's** case was the better in point of law and hence it is the view in **Des Raj's** case which was directed to be followed. Once it was so held and also that the work of the Irrigation Department of the State of Punjab and the material placed before the Supreme Court including the written submissions filed on behalf of the concerned petitioners that the irrigation department of the State of Maharashtra was discharging the same or similar functions as the Irrigation Department of the State of Punjab, it was held that the projects of the Irrigation Department or work connected with that of the State of Maharashtra, on the same tests as applied by the Apex Court in **Des Raj's** case would fall within the definition of an

industry for the purpose of Section 2(j) of the I.D. Act.

21. In view of above discussions, the **first contention** of the State to the effect that Irrigation Department does not fall within the definition of "Industry" or that provisions of Act of 1947 are not applicable, does not have any force and is hereby **rejected**. Even, the Labour Court, in the impugned award has also given the same interpretation after relying upon the judgments in the case of **Des Raj and etc.** (supra) and other authorities. I do not find any error in the view taken by the Labour Court in this regard.

22. Insofar as the second contention of the State-petitioner that respondent-workman was appointed on part time basis and there was automatic cessation of his services, I have perused the award impugned in the writ petition, and I find that no document demonstrating the conditions of services of the respondent-workman was filed by the petitioner-Department during the course of proceedings before the Labour Court. The Labour Court has also observed that despite the fact that the workman had summoned the concerned documents from the Department, the latter did not produce the same. Therefore, relying upon the oral testimony of the D.W-1, in which reference of appointment letters/orders numbered as 523 dated 30.07.1985 and 200 dated 30.07.1985 was also made, the contention of the petitioner-Department regarding nature of services of the respondent-workman was not accepted.

23. In this regard, I find it appropriate to refer to the provisions of section of 114 of Indian Evidence Act, 1872. It is a

provision wherein the Court may draw inferences in any proceedings which include inferences favourable or unfavourable (adverse) to any party. Section 114 alongwith relevant illustration (g) is quoted hereinbelow:-

"114. Court may presume existence of certain facts. --*The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

Illustrations

The Court may presume-

(a) to (f)

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

24. In the present case, reliance has been placed upon Annexure R.A.-1 to the rejoinder affidavit, so as to explain the nature of services of the respondent-workman, however the said document did not form part of the record of the proceedings before the Labour Court. In view of provisions of section 114 of Indian Evidence Act, 1872, as quoted hereinabove, the said document cannot confer any advantage upon the State-petitioner in a writ of certiorari, by which a challenge has been made to the award of the Labour Court, which is based upon the oral and documentary evidence produced by the respective sides before it. Admittedly, annexure R.A.-1 to the rejoinder affidavit, did not form part of the record of the

proceedings. Therefore, **second contention** of the State regarding nature of service of the respondent is hereby rejected.

25. The **third contention** of the petitioner is to the effect that since reference was made after a huge delay of 16 years and, therefore, reinstatement with back wages was not proper, particularly, when there is nothing on record to indicate that the workman was not gainfully employed anywhere.

26. In this regard, I have perused the oral testimony of D.W.-1, who clearly stated that after termination of his services, he could not get job anywhere and was wholly unemployed and dependent upon others. **Futher, I find that reinstatement has not been ordered under the impugned award and what has been awarded is the past wages/salary to the workman only.** Therefore, the contention that reinstatement is bad, is contrary to the award passed in the present case.

27. Insofar as gainful employment is concerned, there is no reason to disbelieve the statement of the workman as referred to hereinabove that he was not gainfully employed.

28. In ***State of Karnataka and another Vs. Ravi Kumar*** reported in 2009 (13) SCC 746, long delay in seeking reference of the dispute rendered the reference stale and Supreme Court held that it should have been rejected by the Labour Court. In that case reference was sought after fourteen years.

29. In ***Haryana State Cooperation Land Development Bank Vs. Neelam*** reported in 2005 (5) SCC 91, the Supreme Court held delay of seven years in

approaching the Labour Court to be relevant factor to refuse relief of reinstatement.

30. In ***Bharat Sanchar Nigam Ltd. Vs. Bhurumal*** reported in 2014 (7) SCC 177, it has been held that relief of reinstatement with full back-wages, when termination is found to be illegal is not to be granted mechanically in all cases. In case of termination of a daily wage worker, made in violation of Section 25F of the Industrial Disputes Act, 1947 it was held reinstatement with back-wages was not automatic and instead workman should be given monetary compensation.

31. The Supreme Court in the case of ***Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub Division, Kota Vs. Madan Lal*** reported in (2013) 14 SCC 543, after considering the law on the subject, held that though Limitation Act is not applicable to such cases, yet delay in raising the dispute is an important circumstance and Labour Court must consider before it exercises discretion irrespective of objection has or has not been raised by the other side.

32. Further in the case of ***Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota Versus Mohan Lal*** reported in (2013) 14 SCC 543 in similar circumstances, a muster roll employee in a government establishment who had been found to have worked for 286 days in one twelve calendar month period prior to his disengagement, and in whose case the industrial dispute was raised after six years, was found not entitled to reinstatement but compensation in lieu thereof, Rs. One lac only.

33. In ***Nagar Mahapalika vs. State of U.P. and Ors.*** reported in 2006,(5) SCC

127, it was held by Supreme Court that non compliance with the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947 (this provision is broadly pari materia with Section 25-F), although, leads to the grant of a relief of reinstatement with full back wages and continuity of service in favour of the workman, the same would not mean that such relief is to be granted automatically or as a matter of course. It was emphasised that the Labour Court must take into consideration the relevant facts for exercise of its discretion in granting the relief.

34. Supreme Court in ***Municipal Council, Sujampur vs. Surinder Kumar*** reported in 2006 (5) SCC 173, reiterated the above legal position. That was a case where the Labour Court had granted reinstatement in service with full back wages to the workman as statutory provisions were not followed. The award was not interfered with by the High Court. However, the Court granted monetary compensation in lieu of reinstatement.

35. In ***Haryana State Electronics Development Corporation Ltd. v. Mamni*** reported in 2006 (9) SCC 434 following Nagar Mahapalika (supra), Supreme Court held that the reinstatement granted to the workman because there was violation of Section 25F, was not justified and modified the order of reinstatement by directing that the workman shall be compensated by payment of a sum of Rs.25,000/- instead of the order of the reinstatement.

36. In ***Uttaranchal Forest Development Corporation v. M.C. Joshi*** reported in 2007 (9) SCC 353, the services were terminated on 24.11.1991 in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act. He

had completed 240 days of continuous work in a period of twelve months preceding the order of termination. The workman approached the Conciliation Officer on or about 02.09.1996, i.e., after a period of about five years. The Labour Court granted to the workman, M.C.Joshi, relief of reinstatement with 50% back wages. In the writ petition filed by the Corporation, the direction of reinstatement was maintained but back wages were reduced from 50% to 25%. The Supreme Court substituted the award of reinstatement by compensation for a sum of Rs.75,000/-.

37. In **Ghaziabad Development Authority and Another v. Ashok Kumar and Another** reported in 2008 (4) SCC 261], the Apex Court was concerned with the question as to whether the Labour Court was justified in awarding relief of reinstatement in favour of the workman who had worked as daily wager for two years. His termination was held to be violative of U.P. Industrial Disputes Act. The Supreme Court held that the Labour Court should not have directed reinstatement of the workman in service and substituted the order of reinstatement by awarding compensation of Rs.50,000/-

38. In **Telecom District Manager v. Keshab Deb**, reported in 2008 (8) SCC 402, the termination of the workman who was a daily wager, was held illegal on diverse grounds including violation of the provisions of Section 25-F. Supreme Court held that even in a case where order of termination was illegal, automatic direction for reinstatement with full back wages was not contemplated. The Court substituted the order of reinstatement by an award of compensation of Rs.1,50,000/-.

39. In **Jagbir Singh v. Haryana State Agriculture Marketing Board** reported in 2009 (15) SCC 327, the workman had worked from 01.09.1995 to 18.07.1996 as a daily wager and was granted compensation of Rs.50,000/- in lieu of reinstatement with back wages.

40. It is also necessary to refer to subsequent three decisions of Supreme Court, namely, **Uttar Pradesh State Electricity Board vs. Laxmi Kant Gupta** reported in 2009 (16) SCC 562, **Bharat Sanchar Nigam Limited vs. Man Singh** reported in 2012 (1) SCC 558 and **Senior Superintendent Telegraph (Traffic), Bhopal vs. Santosh Kumar Seal and Others**, reported in 2010 (6) SCC 773, where the view has been taken in line with the cases discussed above. As a matter of fact in **Santosh Kumar Seal** (supra), Apex Court awarded compensation of Rs.40,000/- to each of the workmen who were illegally retrenched as they were engaged as daily wagers about 25 years back and worked hardly for two or three years. It was held that the relief of reinstatement cannot be said to be justified and instead granted monetary compensation.

41. In the case of **Assistant Engineer, Rajasthan Development Corporation and Anr. v. Gitam Singh** reported in 2013 (5) SCC 136], Supreme Court on consideration of the most of the cases cited above reiterated the principle regarding exercise of judicial discretion by the Labour Court in a matter where the termination of the workman is held to be illegal being in violation of Section 25-F by holding that the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground

on which the termination has been set aside and the delay in raising the industrial dispute before grant of relief in an industrial.

42. The aforesaid authorities have been considered by this Court in its judgment in the case of ***State of U.P. Vs. Presiding Officer, Labour Court and another*** reported in 2017 (7) ADJ 393.

43. Further, The Supreme Court in several authorities some of which are mentioned below has held that if the only defect in the termination order is non payment of retrenchment compensation as required by Section 25 F of Industrial Dispute Act (or Section 6 N of U.P.I.D. Act) then it is not always necessary to direct reinstatement with full back wages and that in such situation more often than not proper relief may be to award consolidated damages/compensation particularly when the employer is Government or Governmental agency and relevant rules have not been followed before appointment.

- ***Nagar Mahapalika v. State of U.P.***, AIR 2006 SC 2113

- ***Haryana State Electronics Devpt Corpn v. Mamni***, AIR 2006 SC 2427

- ***Sita Ram v. Moti Lal Nehru Farmers Training Institute***, AIR 2008 SC 1955

- ***Jagbir Singh Vs. Haryana State Agriculture Marketing Board and another***, AIR 2009 SC 3004

44. In ***Senior Superintendent, Telegraph (Traffic) Bhopal Vs. Santosh Kumar Seal and others***, reported in AIR 2010 SC 2140, it has been held that if daily wagers had worked for 2 or 3 years and

their services were terminated without payment of retrenchment compensation then consolidated damages should be awarded to them (Rs.40,000/- to each of the workmen was awarded in the said case). It has also been held that daily wager does not hold a post and can not be equated with permanent employee. This view has been reiterated in ***Incharge Officer Vs. Shankar Shetty*** reported in JT 2010(9) SC 262.

45. The aforesaid authorities have been considered by this Court in its judgment reported in ***2011 (4) ADJ, 199: Divisional Engineer, Telecom, Jhansi Vs. Presiding Officer and another***.

46. The Court cannot ignore one aspect of the matter. The Labour Court, in the present case, **has not directed reinstatement of the workman in his services**. In case, the workman was aggrieved by denying such relief, he could have challenged the award but, admittedly, he has not challenged the same nor has he claimed relief of reinstatement. Even during the course of arguments, learned counsel for the respondent-workman submitted that at this stage he is just supporting the award whereby only backwages from the date of reference till the enforcement of the award have been awarded. Therefore, this Court is conscious of the fact that Labour Court did not award even backwages from the year, 1990, when the services of the respondent-workman were terminated, but the same have been awarded from the date of reference. Therefore, the delay of 15-16 years in the present case, is not fatal to the claim of the respondent-workman, who, though claimed reinstatement, but has been denied the same. I do not think that award of the backwages from the year 2005 onwards, would be defeated by the delay, which may

be a factor in those cases, where the reinstatement with backwages has been ordered, as there is no question of reinstatement in the present case either under the award or in the absence of challenge by the workman to the award.

47. Even the Labour Court has recorded clear finding just above the operative portion of the impugned award that the workman had stated that he had not worked over a period of 15 years and that he had made an oral request from the employer to take him on duty, but did not submit any application in this regard. Therefore, the labour Court has taken a view that the workman was not entitled to get backwages upto the date of making reference. Since the said denial has not been challenged by the workman by filing writ petition or otherwise, I cannot examine the validity or illegality of the said findings in totality of the facts of the case.

48. Therefore, the **third contention** of the State-petitioner based upon the delay in making reference also does not have any force and is liable to be discarded.

49. Insofar as other findings recorded in the award impugned are concerned, I find that the view taken by the Labour Court that termination of services of respondent-workman was contrary to the provisions of section 6-N of the U.P. Industrial Disputes Act, 1947 does not suffer from any illegality or perversity in view of the evidence on record produced before the Labour Court.

50. In view of above discussions, I do not find any illegality or perversity in the impugned award. **The writ petition fails and is accordingly, dismissed.**

51. The respondent-workman shall submit appropriate application before the Comptent Court/Authority by giving a calculation of the backwages/salary awarded under the impugned award with effect from the date of reference till the date of moving such application. The Court/Authority shall call upon the employer to submit calculations/computations of the backwages/salary payable to the respondent-workman under the award impugned. While computing/calculating the same, all increments in the backwages/salary, which the workman would have been entitled to, with effect from the date of reference shall also be added in award of the "entire backwages/salary".

52. On submission of such application by the respondent-workman, the Court/Authority shall pass an order directing release of the benefits, so computed and respondent-workman shall be paid the same within a period of **four months** from the date of moving of such application.

(2023) 5 ILRA 1885
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.04.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI
(THAKUR), J.

Application U/S 482 No. 45327 of 2019

Lalit Kumar

...Applicants

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Applicant:

Sri Suresh chandra Pandey

Counsel for the Opposite Parties:

G.A., Sri Ram Chandra Uttam, Sri Vinay Kumar Tripathi

A. Criminal law – Criminal Procedure Code, 1973 -Section 482.- Entire proceedings under section 406 IPC under challenge- Allegation- Applicant did not execute sale deed- nor did he return money- Final report submitted after investigation-protest petition filed by the opposite party no.2- allowed- further investigation-again a final report was submitted- second protest petition-treated as complaint applicant summoned to face trial under Section 406 IPC.

B. Applicant moved application under Section 468 Cr.P.C.- complaint regarding the incident of 23.05.2011 registered on 23.06.2014- cognizance taken on 11.03.2016- maximum punishment under Section 406 IPC-3 years-cognizance cannot be taken after three years of lodging of complaint-both registration of complaint and order of cognizance-time barred.

C. Section 473 Cr.PC. – extension of period of limitation in certain cases mentioned therein- court has been empowered to take cognizance of the offence after the expiry of the period of limitation-if it is satisfied on the facts and the circumstances of the case-delay has been properly explained or that it is necessary to do so in the interest of justice-in the instant case FIR was lodged within time-opposite party no. 2 was continuously busy in the proceedings of the said case-no laxity on his part- opp. party no. 2 is entitled for benefit of extension of period of limitation on the basis of section 473 Cr.P.C.- application dismissed.

HELD:

If we go through the provision under section 468 Cr.P.C., this section relates to the bar taking cognizance after lapse of period of limitation. Admittedly, the applicant has been summoned to face trial for the offence under section 406 I.P.C. wherein the maximum sentence is 3 years

imprisonment or imprisonment with fine or both. As per this section the offence is punishable with imprisonment for a term up to 3 years and the limitation period of taking cognizance in the case is also 3 years. On the basis of this provision only, the applicant makes a prayer that the offence is of year 2011 complaint has been registered on 23.6.2014 and cognizance has been taken in the year 2016, so the complaint and cognizance both are time barred.

If we go through the section 473 of Cr.P.C. it is related to the extension of period of limitation in certain cases mentioned therein. Vide this section 473 Cr.P.C., the court has been empowered to take cognizance of the offence after the expiry of the period of limitation, if it is satisfied on the facts and the circumstances of the case that delay has been properly explained or that it is necessary to do so in the interest of justice. Referring the Judgment of Bharat Damodar Kale Anr. Vs St.of Andhra Pradesh (2003) 8 SCC 559, learned counsel for the opp. party no.2 submitted that in the present case cognizance was taken on 11.3.2016 and the revisional court confirmed the said order vide order dated 15.7.2017. Section 473 Cr.P.C. provides for the extension of period of limitation, if the court is satisfied going through the facts and circumstances of the case. In the judgment of Bharat Damodar Kale (supra), the Apex Court held that this limitation is only for filing of a complaint and not for taking cognizance. Regarding cause of action dated 23.5.2011, on the basis of an application under section 156(3) Cr.P.C., the FIR was lodged on 17.9.2011. Thus, it would be considered that the process has been initiated within time, hence, the proceedings cannot be said to be time barred.

From the perusal of the record, it is found that after lodging the FIR within time, the opp. party no. 2 had to face two final reports and then to file two protest petitions. His second protest petition was registered as complaint on 23.6.2014. He had also to adduce the evidence under sections 200 and 202 Cr.P.C. in the complaint and finally the court took cognizance vide order dated 11.3.2016. This shows that the opp. party no. 2 was continuously busy in the proceedings of the said case. There was no laxity on his part. In the opinion of the court,

the opp. party no. 2 is entitled for benefit of extension of period of limitation on the basis of section 473 Cr.P.C.

Application dismissed. (E-14)

List of Cases cited:

Bharat Damodar Kale & anr. Vs St.of Andhra Pradesh (2003) 8 SCC 559

(Delivered by Hon'ble Mrs. Sadhna Rani
(Thakur), J.)

1. Heard learned counsel for the applicant, learned counsel for the opp. party no. 2 and perused the record.

2. By moving this application, the prayer is made to quash the order dated 24.12.2018 and 11.3.2016 passed by learned A.C.J.M., Court No. 4, Mathura, in case crime no. 2171 of 2014, Nand Kishor Vs. Lalit Kumar, and the order dated 30.9.2019 passed by Additional Sessions Judge, Court No. 5, Mathura in Cr. Revision No. 25 of 2019, Lalit Kumar Vs. State of U.P. and another. Prayer is also made to quash the entire proceedings of case no. 2171 of 2014 under section 406 I.P.C., police station Highway District Mathura.

3. As per the facts of the case on 17.9.2011 an FIR under section 406 and 420 I.P.C. was lodged by the opp. Party no. 2 against the applicant Lalit Kumar alleging therein that the opp. party no. 2 and the applicant had agreed orally for sale of two plots belonging to the applicant to the opp. party no. 2. Date 23.5.2011 was fixed for the execution of the sale deed. The whole consideration of Rs. 2 lacs had been paid to the applicant in advance on the date fixed for sale deed. All the stamp papers were purchased in the name of the

applicant. The documentation was also done on the same day and the same was submitted in the registry office. But at the time of registry, the applicant eloped. Thus, the allegation is that after taking due consideration and getting all the documents prepared, the applicant neither executed the sale deed nor returned the money to the opp. party no. 2 and thus, cheated the opp. party no. 2.

4. It has further been submitted that on the basis of the application u/s 156 (3) Cr.P.C., this FIR could hardly be lodged on 17.9.2011. After investigation Final Report was submitted on 15.10.2021. On the protest petition of the opp. party no. 2 the F.R. was rejected and further investigation was done but again the final report was filed. On the protest of the opp. party no. 2 for the second time, it was treated as a complaint and vide order dated 11.3.2016 the applicant was summoned to face trial under section 406 I.P.C.

5. On 17.8.2017, The applicant moved an application u/s 468 Cr.P.C. that after the incident dated 23.5.2011 the complaint has been registered on 23.6.2014, the cognizance has been taken on 11.3.2016 and the applicant has been summoned to face trial under section 406 I.P.C. only. Under section 406 I.P.C. maximum punishment is three years simple imprisonment. So the cognizance could not be taken in his case after 3 years of lodging the first information report. The complaint has also been registered after 3 years of the incident, thus, both the registration of complaint and the order of cognizance are time barred.

6. Vide order dated 11.3.2016 passed by learned A.C.J.M. Court No. 4 Mathura, the applicant was summoned to face trial

under section 406 I.P.C. The application 13-B of the applicant was rejected. Vide order dated 24.12.2018 passed by A.C.J.M. Court No. 4 Mathura against that order the revision was also dismissed on 30.9.2019. Both the courts have wrongly rejected his application/ revision and did not consider his plea of section 468 Cr.P.C. hence, the prayer is made to quash all the three above mentioned orders.

7. Learned counsel for the opp. party no. 2 however, opposed the prayer and submitted that on 23.5.2011, the sale deed was to be executed. Regarding the incident dated 23.5.2011, the opp. party no. 2 had moved an application to S.S.P. concerned on 26.7.2011. Later on, on the basis of this application under section 156(3) Cr.P.C., the FIR was registered on 17.9.2011.

8. After investigation by police final reports were filed by the police twice and the opp. party no. 2 had to move protest petitions against both the final reports. His second protest petition was registered as complaint and after recording the statements under section 200 and 202 Cr.P.C. only, the cognizance was taken on 11.3.2016 against the applicant. Thus the opp. party no.2 was continuously contesting the matter. If the procedure takes long time, the applicant cannot be penalized for this delay, hence, prayer is made accordingly.

9. If we go through the provision under section 468 Cr.P.C., this section relates to the bar taking cognizance after lapse of period of limitation. Admittedly, the applicant has been summoned to face trial for the offence under section 406 I.P.C. wherein the maximum sentence is 3 years imprisonment or imprisonment with fine or both. As per this section the offence is

punishable with imprisonment for a term up to 3 years and the limitation period of taking cognizance in the case is also 3 years. On the basis of this provision only, the applicant makes a prayer that the offence is of year 2011 complaint has been registered on 23.6.2014 and cognizance has been taken in the year 2016, so the complaint and cognizance both are time barred.

10. If we go through the section 473 of Cr.P.C. it is related to the extension of period of limitation in certain cases mentioned therein. Vide this section 473 Cr.P.C., the court has been empowered to take cognizance of the offence after the expiry of the period of limitation, if it is satisfied on the facts and the circumstances of the case that delay has been properly explained or that it is necessary to do so in the interest of justice. Referring the Judgment of **Bharat Damodar Kale Anr. Vs. State of Andhra Pradesh (2003) 8 SCC 559**, learned counsel for the opp. party no.2 submitted that in the present case cognizance was taken on 11.3.2016 and the revisional court confirmed the said order vide order dated 15.7.2017. Section 473 Cr.P.C. provides for the extension of period of limitation, if the court is satisfied going through the facts and circumstances of the case. In the judgment of **Bharat Damodar Kale** (supra), the Apex Court held that this limitation is only for filing of a complaint and not for taking cognizance. Regarding cause of action dated 23.5.2011, on the basis of an application under section 156(3) Cr.P.C., the FIR was lodged on 17.9.2011. Thus, it would be considered that the process has been initiated within time, hence, the proceedings cannot be said to be time barred.

11. From the perusal of the record, it is found that after lodging the FIR within

time, the opp. party no. 2 had to face two final reports and then to file two protest petitions. His second protest petition was registered as complaint on 23.6.2014. He had also to adduce the evidence under sections 200 and 202 Cr.P.C. in the complaint and finally the court took cognizance vide order dated 11.3.2016. This shows that the opp. party no. 2 was continuously busy in the proceedings of the said case. There was no laxity on his part. In the opinion of the court, the opp. party no. 2 is entitled for benefit of extension of period of limitation on the basis of section 473 Cr.P.C.

12. Learned counsel for the applicant drawing the attention of the court toward the judgment in Prem Lata and another VS. State of Rajasthan and another claimed the benefit of his argument on the basis of section 468 of Cr.P.C. that the complaint was registered and the cognizance was taken on complaint after more than 5 years of the alleged committal of the crime but if we go through this judgment, it is found that as per the facts of this case there was a delay of 12 years between filing the complaint and taking cognizance and this delay was attributed to the complainant who did not produce any witness in support of his protest petition but in the case in hand, the position is different. Here delay is caused for the reason not attributing to the opp. party no. 2 / the complainant himself, but it was due to this long procedure which was followed due to the peculiar circumstances of the case, hence, learned counsel for the applicant cannot get benefit of this judgment filed by him.

13. No ground exists for quashing of the orders dated 11.3.2016, 24.12.2018 and 30.9.2019 as prayed by the learned counsel for the applicant above.

14. The application u/s 482 Cr.P.C. being devoid of merits is liable to be dismissed and is accordingly dismissed.

(2023) 5 ILRA 1889
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 41462 of 2022

Brijesh Kumar Tiwari @ Pankaj

...Applicant

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Applicant:

Dr. C.P. Upadhyay

Counsel for the Opposite Parties:

G.A., Sri Deepak Dubey

Criminal Law – Criminal Procedure Code, 1973 - Section 482 - objection regarding maintainability of application under section 482 Cr.P.C-against order rejecting the discharge application made- applicant asserted that entire proceedings of the aforesaid case challenged-hence application under section 482 Cr.P.C. is maintainable-generally, order rejecting discharge application shall be challenged by filing a criminal revision-exceptional cases-such orders may also be challenged under Section 482 Cr.P.C.-entire proceedings challenged-hence, application maintainable under Section 482 Cr.P.C. (Para 10)

HELD:

From the perusal of the aforesaid judicial precedents it is very much clear that an order regarding rejection of the discharge application would be generally challenged by filing a criminal revision, but in some exceptional cases such orders may also be challenged under Section 482 Cr.P.C. So far as the quashment of

entire proceedings is concerned, it can be challenged under Section 482 Cr.P.C in this case the entire proceedings has been challenged which cannot be looked into in a criminal revision. As per F.I.R, the case is based on circumstantial evidence and the applicant has been made accused and the charge-sheet had been submitted against him. The discharge application has been rejected and the charge has to be framed. The applicant has taken several grounds that his name has come into picture during the course of investigation only on the basis of confessional statement of the accused Mohd. Farooq. The dead body / Skelton was recovered after three month of the incident. It is also mismatched to the deceased Gopal. It could not be ascertained as to whether the Skelton belonged to a male of female. Neither any direct evidence nor last seen evidence nor PM report is available. Mobile number, basis of the case is not in the name of the applicant which can only be decided during the trial and its validity might be seen under Section 482 Cr.P.C to some extent.

Since the applicant has also challenged the legality of entire proceeding, of the concerned Criminal Case, hence this application is maintainable under Section 482 Cr.P.C. (Para 10)

Application held to be maintainable. (E-14)

List of Cases cited:

1. Amit Kapoor Vs Ramesh Chander & ors. Manu/SC/0746/2012

2. Girish Kumar Suneja Vs C.B.I. 2017 Law Suit (SC) 685

3. Vijay & ors. Vs St.of Mah. & ors., Manu/SC/1633/2016

4. Shila Devi Vs St.of U.P. & ors. Manu/UP/0649/2022

5. Haryana Land Reclamation & Development Corporation Ltd.Vs St.of Haryana & anr.1990 SCC (Cri.) 515

6. Sanjay Kumar Rai Vs St.of U.P., & anr.2021 0 Supreme (SC) 242

7. Asian Resurfacing of Road Agency Pvt. Ltd. Vs C.B.I, (2018) 16 SCC 299

8. Madhu Limaye Vs St.of Mah., (1977) 4 SCC 551

9. Honnaiah T. H. Vs St.of Kar.& ors. 2022 Law Suite (SC) 950

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

1. Heard Dr. C.P. Upadhyay, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned A.G.A. for the State and perused the material available on record.

2. At the time of hearing of argument an objection regarding maintainability of this petition, has been raised by the learned A.G.A that since the order dated 25.11.2022, by which 19-B Discharge application has been rejected, has been challenged which is a final order, hence a revision can be preferred against such order and a petition under Section 482 Cr.P.C. is not maintainable. Contrary to that learned counsel for the appellant argued that since the entire proceeding of the aforesaid case has also been challenged, hence this petition under 482 Cr.P.C is maintainable. In support of the argument learned counsel for the applicant has relied on following citations.

3. In *Amit Kapoor Vs. Ramesh Chander and others Manu/SC/0746/2012*, para 19 and 20, following principles have been laid down:-

"19. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to

which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be :

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

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

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

4) Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be

committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

5) Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

6) The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

7) The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8) Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

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

10) It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to

find out whether it is a case of acquittal or conviction.

11) Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12) In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

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

14) Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15) Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised *ex debito justitiae*, i.e. to do real and substantial justice for administration of which alone, the courts exist.

{Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [AIR 1982 SC 949]; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao

Chandrojirao Angre & Ors. [AIR 1988 SC 709]; Janata Dal v. H.S. Chowdhary & Ors. [AIR 1993 SC 892]; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors. [AIR 1996 SC 309]; G. Sagar Suri & Anr. v. State of U.P. & Ors. [AIR 2000 SC 754]; Ajay Mitra v. State of M.P. [AIR 2003 SC 1069]; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [AIR 1988 SC 128]; State of U.P. v. O.P. Sharma [(1996) 7 SCC 705]; Ganesh Narayan Hegde v. s. Bangarappa & Ors. [(1995) 4 SCC 41]; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors. [AIR 2005 SC 9]; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors. [AIR 2000 SC 1869]; Shakson Belthissor v. State of Kerala & Anr. [(2009) 14 SCC 466]; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors. [(2009) 7 SCC 234]; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr. [(2009) 11 SCC 203]; Sheo Nandan Paswan v. State of Bihar & Ors. [AIR 1987 SC 877]; State of Bihar & Anr. v. P.P. Sharma & Anr. [AIR 1991 SC 1260]; Lalmuni Devi (Smt.) v. State of Bihar & Ors. [(2001) 2 SCC 17]; M. Krishnan v. Vijay Singh & Anr. [(2001) 8 SCC 645]; Savita v. State of Rajasthan [(2005) 12 SCC 338]; and S.M. Datta v. State of Gujarat & Anr. [(2001) 7 SCC 659]}.

20. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or

do not appear to be satisfied if there is substantial compliance to the requirements of the offence. At this stage, we may also notice that the principle stated by this Court in the case of *Madhavrao Jiwaji Rao Scindia (supra)* was reconsidered and explained in two subsequent judgments of this Court in the cases of *State of Bihar & Anr. v. Shri P.P. Sharma & Anr.* [AIR 1991 SC 1260] and *M.N. Damani v. S.K. Sinha & Ors.* [AIR 2001 SC 2037]. In the subsequent judgment, the Court held that, that judgment did not declare a law of universal application and what was the principle relating to disputes involving cases of a predominantly civil nature with or without criminal intent. "

4. In *Girish Kumar Suneja Vs. C.B.I.* 2017 Law Suit (SC) 685, paras 28 & 29 to 34, 38,

28. However, this does not mean that the appellants have no remedy available to them - paragraph 10 of the order does not prohibit the appellants from approaching this Court under Article 136 of the Constitution. Therefore all that has happened is that the forum for ventilating the grievance of the appellants has shifted from the High Court to this Court. It was submitted by one of the learned counsel that this is not good enough for the appellants since this Court is not obliged to give reasons while dismissing such a petition unlike the High Court which would necessarily have to give reasons if it rejected a revision petition. In our opinion, the mere fact that this Court could dismiss the petition filed by the appellants under Article 136 of the Constitution without giving reasons does not necessarily lead to the conclusion that reasons will not be given or that some

equitable order will not be passed. The submission of learned counsel has no basis and is only a presumption of what this Court might do. We cannot accept a submission that has its foundation on a hypothesis.

29. This leads us to another facet of the submission made by learned counsel that even the avenue of proceeding under Section 482 of the Cr.P.C. is barred as far as the appellants are concerned. As held in *Amar Nath* and with which conclusion we agree, if an interlocutory order is not revisable due to the prohibition contained in Section 397(2) of the Cr.P.C. that cannot CrI. Appeal Nos._____/2017 etc. (@ SLP (CrI.) Nos. 9503/2016 etc.) be circumvented by resort to Section 482 of the Cr.P.C. There can hardly be any serious dispute on this proposition "

34. How ridiculous a challenge can become was illustrated in *Centre for Public Interest Litigation v. Union of India* 14 wherein this Court cautioned against challenging the appointment of the Special Public Prosecutor or his assistant advocates! Quite obviously, these are tactics employed by the accused to delay the trial while the endeavour of Parliament is to expedite all trials to prevent harassment to the accused. This has led to odd situations in 14 (2012) 3 SCC 117 CrI. Appeal Nos._____/2017 etc. (@ SLP (CrI.) Nos. 9503/2016 etc.)

38. The Cr.P.C. is undoubtedly a complete code in itself. As has already been discussed by us, the discretionary jurisdiction under Section 397(2) of the Cr.P.C. is to be exercised only in respect of final orders and intermediate orders. The power under Section 482 of the Cr.P.C. is to be exercised only in respect of interlocutory orders to give effect to an order passed under the Cr.P.C. or to

prevent abuse of the process of any Court or otherwise to serve the ends of justice. As indicated above, this power has to be exercised only in the rarest of rare cases and not otherwise. If that is the position, and we are of the view that it is so, resort to Articles 226 and 227 of the Constitution Crl. Appeal Nos._____/2017 etc. (@ SLP (Crl.) Nos. 9503/2016 etc.) would be permissible perhaps only in the most extraordinary case. To invoke the constitutional jurisdiction of the High Court when the Cr.P.C. restricts it in the interest of a fair and expeditious trial for the benefit of the accused person, we find it difficult to accept the proposition that since Articles 226 and 227 of the Constitution are available to an accused person, these provisions should be resorted to in cases that are not the rarest of rare but for trifling issues.

5. In *Vijay & others Vs. State of Maharashtra and others*, Manu/SC/1633/2016, it was a case under Sections 420, 468, 506, 367 and 392 I.P.C of which para 7 and 8 are relevant, which are as under : -

7. *After hearing the counsel and also after perusing the impugned order, we are of the considered opinion that the order of the High Court has no legs to stand in view of the law laid down by this Court in Prabhu Chawla [Prabhu Chawla v. State of Rajasthan, (2016) 16 SCC 30] . In the above referred case, in view of the divergent opinions of this Court in Dhariwal Tobacco Products Ltd. [Dhariwal Tobacco Products Ltd. v. State of Maharashtra, (2009) 2 SCC 370 : (2009) 1 SCC (Cri) 806] and Mohit v. State of U.P. [Mohit v. State of U.P., (2013) 7 SCC 789 : (2013) 3 SCC (Cri) 727] , the matter was placed before the*

three-Judge Bench of this Court. The three-Judge Bench took the view that Section 482 CrPC begins with a non obstante clause to state:

"482. Saving of inherent powers of High Court.--Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

As Section 397 CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 CrPC only to petty interlocutory orders! A situation which is wholly unwarranted and undesirable. The three-Judge Bench has confirmed the law laid down by this Court in Dhariwal Tobacco Products Ltd. [Dhariwal Tobacco Products Ltd. v. State of Maharashtra, (2009) 2 SCC 370 : (2009) 1 SCC (Cri) 806]

8. *In view of the above settled law, mere availability of alternative remedy cannot be a ground to disentitle the relief under Section 482 CrPC and, apart from this, we feel that the learned Judge without appreciating any of the factual and legal position, in a mechanical way, passed the impugned order, which warrants interference by this Court. Accordingly, the order of the High Court is set aside and the matter is remanded to the High Court for reconsideration in the light of the settled legal position.*

6. *Shila Devi Vs. State of U.P. and others Manu/UP/0649/2022*, in para 11 of the judgment, the co-ordinate bench of this court has held that a petition under section 482 Cr.P.C is maintainable against the revisional order of the Sessions Court.

7. Contrary to the above citations the learned counsel for the respondent has relied on ***Haryana Land Reclamation and Development Corporation limited vs. State of Haryana and another*** 1990 SCC (Cri.) 515, in which it has been held that Magistrate's order of discharge of accused on the basis of Police Report is not an interlocutory order. Hence it can be challenged by revision before the High Court.

Learned A.G.A. has relied on following citations.

8. In ***Sanjay Kumar Rai Vs. State of U.P. and another*** 2021 0 Supreme (SC) 242, in this case the criminal revision had been dismissed by the high court on the ground of lack of jurisdiction under Section 397 Cr.P.C, the Hon'ble the Apex Court held that orders framing charges or refusing discharge are neither interlocutory nor final in nature and are not affected by bar of Section 397 (2) Cr.P.C. High Court is imbued with inherent jurisdiction to prevent abuse of process or to secure ends of justice having regard to the facts and circumstances of individual cases. It was also opined that trial court while considering the discharge application is not to act as a mere post office. Court has to sift through evidence in order to find out whether there are sufficient grounds to try the suspect or not. The court has to consider broad probabilities, total effect of evidence and documents produced and basic infirmities appearing in case and so on. The Apex Court held that the High Court has committed jurisdictional error by not entertaining revision on merit and overlooking the fact that "**Discharge**" is a valuable right provided to the accused. In para 12 and 13 of the judgment, the Apex Court has referred the judgments ***Asian Resurfacing of Road Agency Pvt. Ltd. Vs.***

C.B.I, (2018) 16 SCC 299 and Madhu Limaye Vs. State of Maharashtra, (1977) 4 SCC 551, in which Hon'ble the Apex Court has held that order regarding framing charges can be challenged under Section 397 (2), Section 482 Cr.P.C or Article 227 of the Constitution of India in exceptional situation.

9. In ***Honnaiah T. H. Vs. State of Karnatka & Ors.*** 2022 Law Suite (SC) 950, in this case the Revisional power of the High Court has been discussed. In this case the question had arisen during the trial regarding the mark of exhibit, hence this ruling is not applicable on account of deference of situation.

10. From the perusal of the aforesaid judicial precedents it is very much clear that an order regarding rejection of the discharge application would be generally challenged by filing a criminal revision, but in some exceptional cases such orders may also be challenged under Section 482 Cr.P.C. So far as the quashment of entire proceedings is concerned, it can be challenged under Section 482 Cr.P.C in this case the entire proceedings has been challenged which cannot be looked into in a criminal revision. As per F.I.R, the case is based on circumstantial evidence and the applicant has been made accused and the charge-sheet had been submitted against him. The discharge application has been rejected and the charge has to be framed. The applicant has taken several grounds that his name has come into picture during the course of investigation only on the basis of confessional statement of the accused Mohd. Farooq. The dead body / Skelton was recovered after three month of the incident. It is also mismatched to the deceased Gopal. It could not be ascertained as to whether the Skelton belonged to a

male of female. Neither any direct evidence nor last seen evidence nor PM report is available. Mobile number, basis of the case is not in the name of the applicant which can only be decided during the trial and its validity might be seen under Section 482 Cr.P.C to some extent.

Since the applicant has also challenged the legality of entire proceeding, of the concerned Criminal Case, hence this application is maintainable under Section 482 Cr.P.C.

ORDER

a) This application under 482 Cr.P.C is held to be maintainable. It is made clear that this Court has not touched the merit of this case.

b) List on 08th May, 2023, for hearing on merit, before the appropriate Bench.

c) The interim stay order passed on 17.02.2023, shall continue till the next date of listing.

(2023) 5 ILRA 1896
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.04.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI
(THAKUR), J.

Application u/s 482 No. 11742 of 2018

Prashant Tyagi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
 Sri Sanjay Singh, Sri Amrendra Nath Rai

Counsel for the Opp. Parties:
 G.A., Sri Abhinav Gaurav, Sri Anoop Trivedi, Sri Vibha Rai

Criminal Law - Criminal Procedure Code, 1973 - Section 482 - Entire proceedings under section 138 Negotiable Instruments Act under challenge- Allegation- Opposite parties issued cheque in favour of complainant- cheque dishonoured- applicants had resigned from the directorship on the date the cheque was issued- for promotion of justice or to prevent injustice or abuse of process- Court may look into the materials which have significant bearing on the matter at prima facie stage- applicant no.1 had resigned from the Company much prior to the issuance of the cheque in question- cheque did not bear the signatures of any of the applicants- On the date of issuance of the cheque the applicants were mere the shareholders of the Company- no active participation of the applicants in the day to day business and transactions of the Company-complaint also silent about the role of the applicants- travesty of justice to drag the persons to face the prosecution- no way connected with the issuance of the cheque or its being dishonour thereof-summoning order quashed-Application allowed.

HELD:

Thus on the basis of the discussion and the judgments placed above, it is found that applicant no.1 had resigned from the Company much prior to the issuance of the cheque in question. Admittedly, the cheque did not bear the signatures of any of the applicants. On the date of issuance of the cheque the applicants were mere the shareholders of the Company. There was no active participation of the applicants in the day to day business and transactions of the Company and in the complaint itself, it is not mentioned that as to how and in what manner the applicants were in-charge or were responsible to the accused Company for the conduct of its business. Thus, in the opinion of the Court, as on the face of the record, participation of the applicants is not found in the day to day functioning of the Company, hence, on the basis of the version that the defence would be seen at the time of evidence, it would be travesty of justice to drag the persons to face the prosecution who are no

way connected with the issuance of the cheque or its being dishonour thereof.

On the basis of above discussion, the summoning of the applicants to face trial under Section 138 of Negotiable Instruments Act is found to be against the mandate of law laid down by the Apex Court in above mentioned judgments.

Application allowed. (E-14)

List of Cases cited:

1. Smt. B Devi (Basanti Devi) Vs St.of U.P., 2016 (94) ACC 90
2. Sunita Palita & ors. Vs M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019], decided on 01.08.2022
3. S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla, (2005) 8 SCC 89
4. Harshendra Kumar D. Vs Rebatilata Koley & ors., (2011) 3 Supreme Court Cases 351
5. Pooja Ravinder Devidasani Vs St.of Maharashtra & anr., (2014) 16 SCC 1

(Delivered by Hon'ble Mrs. Sadhna Rani
(Thakur), J.)

1. Heard learned counsel for the applicants, learned counsel for opposite party no.2 and perused the record.

2. By moving this application under Section 482 Cr.P.C., the prayer is made to quash summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad in C.C. No.67/2016 under Section 138 Negotiable Instruments Act and also to set aside order dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in Criminal Revision No.15 of 2017.

3. As per facts of the case, a complaint was filed by opposite party no.2 on 13.10.2016 against the applicants and six other persons with the version that opposite party no.2 was a limited Company registered under Companies Act and Vijay Kumar son of late Sri Satpal was authorized to filed complaint on behalf of the Company. The opposite party no.2 was indulged in the business of purchasing, selling and the construction of properties. Opposite party no.1 (in the complaint) M/S C.S.K. Infrastructure Pvt. Ltd. was a registered Company. Opposite parties no.2 to 6 were its Directors and officers and opposite parties no.7 to 9 were the Company's authorized representatives. Opposite party nos.2 to 9 were responsible for all the day to day business and transactions of opposite party no.1, M/S C.S.K. Infrastructure Pvt. Ltd.

4. The opposite parties (in the complaint) had assured the complainant/opposite party no.2 herein that they would make available a land to the complainant/opposite party no.2 at a reasonable price. Having faith in the opposite parties the complainant/ opposite party no.2 on 16.08.2014 paid Rs. 5,00,00,000/- to the opposite parties, which were received by the opposite parties. When as per their assurance the opposite parties could not arrange the land for the complainant/opposite party no.2 and the complainant gave them a threat of lodging FIR, then opposite parties promised to pay Rs. 7,00,00,000/- in pursuance of the principal amount of Rs. 5,00,00,000/- with interest. Opposite parties issued a cheque of Rs.1,00,00,000/- in favour of the complainant/ opposite party no.2. This Cheque No.000283 valued Rs.1,00,00,000/- dated 30.06.2016 got dishonoured despite of the assurance of

opposite parties that it would get encashed. The information of which was received by the complainant/opposite party no.2 on 08.09.2016 and after due procedure, a complaint under Section 420 I.P.C. was filed by the complainant/opposite party no.2 against the nine accused persons including the Company itself.

5. After the statements under Sections 200 Cr.P.C. and 202 Cr.P.C., the trial court vide order dated 25.11.2016 summoned all the nine accused persons to face trial under Section 138 of Negotiable Instruments Act 1881. Against this order dated 25.11.2016, three of the opposite parties/ present applicants named Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi, filed a revision before the Sessions Court, which was rejected vide order dated 22.02.2018.

6. Feeling aggrieved by the summoning order dated 25.11.2016 and revisional court's order dated 22.02.2018, the present application has been moved by the applicants Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi only with the version that the applicant no.1, who was earlier the Director of M/S C.S.K. Infrastructure Pvt. Ltd. had resigned from his post on 26.09.2014, much prior to the issuance of the cheque no.000283 dated 30.06.2016 to the opposite party no.2. He has filed a certified copy of the form DIR-12 (earlier known as Form 32) to this effect. He had neither signed the cheque nor the amount was received in his bank account, thus, applicant no.1 is the ex-director in the accused Company. Applicant nos.2 and 3 are the mother and sister of the applicant no.1. They had no relation with the functioning of the accused company in any manner. They could not be the in-charge and responsible for the conduct and the business of the Company. Without any

specific averment that what role they have played in the functioning and the business of the accused Company they can not be implicated for the offence under Section 138 N.I. Act. The summoning order has been passed without considering section 141 of N.I. Act, hence, the prayer is made accordingly.

7. Counter affidavit has been filed on behalf of the opposite party no.2, wherein it has been mentioned that all the applicants alongwith co-accused persons are the shareholders of the Company and belong to the one and the same family. The present applicant Prashant Tyagi is the son of Ram Sevak Tyagi, applicant no.2 Smt. Neeta Tyagi is the wife of Ram Sevak Tyagi and applicant no.3 Smt. Shweta Tyagi, is the wife of Gaurav/ daughter of Ram Sevak Tyagi and Ram Sevak, is the person who is the authorized representative of the accused company and had issued the cheque in favour of the complainant/ opposite party no.2 on 30.06.2016. When an annual general meeting was called on 30.08.2013 the shares of all the shareholders in the disputed Company were as under:-

8. Ram Sewak Tyagi was having 20000 shares, Prashant Tyagi applicant no.1 was having 25000, Smt. Neeta Tyagi was having 20000 and Smt. Shweta Tyagi was having 10000 and Ram Kishan is said to have 5000 shares, thus, all the applicants here are the shareholders of the accused Company.

9. All the applicants are the blood relatives of Ram Sevak Tyagi and Ram Kishan, is the brother-in-law of Ram Sevak, who is the master mind of the aforesaid fraud. Ram Sevak was handling the financial as well as accounts affairs of the Company alongwith other Directors and

the shareholders of the Company and was acting as authorized signatory of the Company on behalf of the Directors, authorized representatives as well as other shareholders of the Company. All the applicants are the over all incharge of the day to day business of the Company. A revision of the applicants was also rejected by the trial court. Applicant no.1 is a Joint Director of the Company and still a Director of the Company and for a very short time he was not there on the Board of Directors. All the applicants looking after the day to day business/ functions of the Company and being the authorized representatives of the Company are liable for the offence, hence, cognizance has been rightly taken by the court.

10. The applicants filed a rejoinder affidavit wherein the version of the counter affidavit was denied and the version of the complaint was reiterated.

11. Learned counsel for the applicants has argued that the trial court has not gone through the Section 141 of N.I. Act, which deals with the offences by the companies. Without going through this section the impugned order cannot be said to be a complete and affective order.

12. It is further submitted that the applicant no.1 had resigned on 26.09.2014, while impugned cheque is said to have been issued on 30.06.2016. Regarding his resignation Form DIR-12 has been filed, which is a public document. Applicant nos.2 and 3 are the mere shareholders in the Company and are the ladies. Their participation cannot be said to be active in the Company and in the complaint there is bald averment that the accused nos.2 to 6 being the Directors and shareholders of the Company are responsible for the day to day

business of the accused Company. Accused No.7 to 9 including applicant no.2 and 3 are the authorized representatives of the Company and thus all the accused persons including all the three applicants are responsible for all the transactions and overall business of the Company. But no particulars or the specific role of the persons, which must be explained in the complaint, has been explained. Admittedly the cheque was not issued by any of the applicants. The applicant no.2, the mother of the applicant no.1 is a senior citizen. Hence, the prayer is made accordingly.

13. While, learned counsel for the opposite party no.2 opposed the version of the learned counsel for the applicants and submitted that the applicants are the shareholders in the Company and family members of Ram Sevak, who is said to have issued the impugned cheque and being the wife, son and daughter of the person issuing cheque all the applicants must have knowledge of the works done by Ram Sevak Tyagi, accused no.7 in the complaint. As the whole fraud/ cheating has been done with the consent and connivance of the applicants, so with the help of section 141 of the N.I. Act all the applicants would be liable for the acts done by the Company. The defence of the applicants cannot be adjudicated at this stage of summoning. Liability of the applicants can only be decided after the evidence, because as per sub-section 2 of Section 141 of the Act if the offence is found to be proved committed with the consent or connivance of the applicants they shall also be liable for the same and punished accordingly. Thus for proving the offence of the applicants evidence of the parties is to be adduced and at this nascent stage the liability of the applicants cannot be fixed.

14. Placing reliance over the judgment of this Court in **Smt. B Devi (Basanti Devi) Versus State of U.P., 2016 (94) ACC 90**, it is argued by the learned counsel for opposite party no.2 that at the stage of summoning, defence of the accused which they may adduce subsequently cannot be seen since there was no occasion to look into such probable defence, which may come when the accused would appear and place their case before the magistrate. At the stage of issuing summons Court has to see whether a prima facie commission of offence has been shown and appropriate material has come justifying summoning of the accused persons against whom complaint has been made. The role assigned to the applicants in clear and specific words is referred in paragraph 4 of the complaint, that all the accused persons are responsible for the day to day business and functioning of the Company.

15. On the basis of this judgment, it is further argued that all the officers of the Company are responsible for the acts done in the name of Company and are sought to be made personally liable for the acts which resulted in criminal action being taken against the Company. Thus, it is claimed that all the applicants are liable to face trial under the aforesaid sections.

16. Learned counsel for the applicants drew the attention of the Court towards the judgment in **Sunita Palita & Others Versus M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019], decided on 01.08.2022** and the judgment in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89**, mentioned therein wherein para-10 the Apex Court held that-

"every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status."

17. The attention of the Court is further drawn towards judgment in **Harshendra Kumar D. Versus Rebatilata Koley & Others, (2011) 3 Supreme Court Cases 351** wherein it was held by the Apex Court that as dishonour of the cheques through the complainant banker was subsequent to his resignation so the applicant no.1 could not be said to have any concern with the Company at that time.

18. It is further argued by the learned counsel for the applicants that mere bald averment in the complaint that the "applicants are looking after the day to day business of the Company, hence, they are liable for the offence committed" is not

enough to prove the offence. This averment is devoid of any particulars.

19. In judgment ***Pooja Ravinder Devidasani Versus State of Maharashtra & Anr., (2014) 16 SCC 1***, the Apex Court held that to fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company.....Every person connected with the Company will not fall into the ambit of the provision.

20. Thus, it is argued that the applicant no.1 was not a Director of the Company on the date when the cheque was issued and regarding his resignation Form DIR-12 has been placed on record. Applicant nos.2 and 3 are admittedly mere shareholders in the Company. They cannot be said to actively participate in the working of the Company.

21. So far as the argument of the learned counsel for the opposite party no.2 that a defence of the applicants shall be seen at the time of arguments is concerned in this regard, the Apex Court opined in judgment ***Harshendra Kumar D. Versus Rebatilata Koley & Others (supra)*** that if on the face of the documents which are beyond suspicion or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the Court may look into the materials which

have significant bearing on the matter at prima facie stage.

22. If we go through the judgment in ***Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)*** placed by the learned counsel for opposite party no.2, the facts of that case are different from the facts of the present case, wherein as per facts of that case the cheques were issued in the presence of the petitioner and other Directors, while in the present case cheques were never issued in the presence of the complainant rather till then applicant no.1 had resigned from the Company. While as per facts of the case of ***Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)*** the resignation and the documents with regard to the resignation were alleged to be the forged documents, but in the case in hand resignation of applicant no.1 has not been challenged, hence, the counsel for the opposite party no.2 cannot take benefit of the judgment of this Court, in the presence of various Apex Court judgments placed above by the counsel for the applicants.

23. Thus on the basis of the discussion and the judgments placed above, it is found that applicant no.1 had resigned from the Company much prior to the issuance of the cheque in question. Admittedly, the cheque did not bear the signatures of any of the applicants. On the date of issuance of the cheque the applicants were mere the shareholders of the Company. There was no active participation of the applicants in the day to day business and transactions of the Company and in the complaint itself, it is not mentioned that as to how and in what manner the applicants were in-charge or were responsible to the accused Company

for the conduct of its business. Thus, in the opinion of the Court, as on the face of the record, participation of the applicants is not found in the day to day functioning of the Company, hence, on the basis of the version that the defence would be seen at the time of evidence, it would be travesty of justice to drag the persons to face the prosecution who are no way connected with the issuance of the cheque or its being dishonour thereof.

24. On the basis of above discussion, the summoning of the applicants to face trial under Section 138 of Negotiable Instruments Act is found to be against the mandate of law laid down by the Apex Court in above mentioned judgments.

25. The summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad and the judgment dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in criminal revision are quashed.

26. The application under Section 482 Cr.P.C. is, hereby, **allowed**.

(2023) 5 ILRA 1902
ORIGINAL JURISDICTION
CRIMINAL SIDE

DATED: LUCKNOW 11.05.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application u/s 482 No. 7907 of 2022

Shekhar Ramamurthy	...Applicant
Versus	
State of U.P. & Anr.	...Opp. Parties

Counsel for the Applicant:
Purnendu Chakravarty, Pranjal Jain

Counsel for the Opp. Parties:
G.A., Nilish Anand, Radhika Singh

Criminal Law – Criminal Procedure Code, 1973 - Section 482 - - Indian Penal Code, 1860 -Sections 406, 420, 467, 468, 471 & 120-B - entire proceeding challenged- applicant was mere director of the company- appointed under Sections 149/150 of the Companies Act, 2013-he had no role in the alleged transactions- mandate of Section 305(2) Cr.P.C. not followed- under Section 482 Cr.P.C. High Court may examine and take note of the facts and allegations- to ascertain the genuineness of the impugned proceedings-vicarious liability may be fixed-if the applicant was involved in alleged transaction at any point of time- an Officer, Director, Managing Director or Chairman of the Company can be made an accused along with the Company- only if there is sufficient material to prove his active role coupled with criminal intent- all the contentions raised by the applicant's counsel relate to disputed questions of fact-the court below is not expected to examine and assess in detail the material placed on record-at stage of issuing process- quashing of charge sheet, summoning order and entire proceedings can also be done only if it does not disclose any offence or if there is any legal bar which prohibits the proceedings on its basis-prayer for quashing refused- applicant directed to move discharge application -application disposed of. (Paras 42,46, 49, 52, 53, 54 and 55)

HELD:

The powers of the High Court to quash criminal proceedings in exercise of its jurisdiction under Section 482 Cr.P.C. is well known. The High Court may not enter into determination of the disputed questions of fact at the stage of its exercise of powers under section 482 Cr.P.C., however, the Court may examine and take note of the facts and allegations in order to find out whether the impugned proceedings are in abuse of the process of the court and law and their continuance would result in miscarriage of justice or not. (Para 42)

Thus, an Officer, Director, Managing Director or Chairman of the Company can be made an accused along with the Company only if there is

sufficient material to prove his active role coupled with criminal intent. Indian Penal Code does not contain any provision for vicarious liability. For Managing Director or Director to be accused and their implications in the offence allegedly committed on behalf of the company, when the accused is a Company, the complaint/ FIR or Charge-sheet must contain requisite allegations of commission of the offence by such individual(s). (Para 49)

Thus, this Court is of the view that all the contentions raised by the applicant's counsel relate to disputed questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded. In the process of invoking its inherent jurisdiction, this court cannot be persuaded to have a pre trial before the actual trial begins. The submissions made by the learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. (Para 52)

The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists. Hence the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In S.W. Palankattkar & ors. Vs St.of Bihar, 2002 (44) ACC 168, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code; (ii) to prevent abuse of the process of the court; (iii) to otherwise secure the ends of justice. (Para 54)

In absence of any of the grounds recognized by the Apex Court which might justify the quashing of summoning order dated 17.10.2022 or

consequential proceedings, the prayer for quashing the same is refused, as I do not see any abuse of the courts process either. The court below has been vested with sufficient powers to discharge the accused even before the stage to frame the charges comes, if for reasons to be recorded it considers the charge to be groundless. (Para 55)

Application disposed of. (E-14)

List of Cases cited:

1. S.M.S. Pharmaceuticals Ltd Vs Neeta Bhalla (2005) 8 SCC 89
2. Ch. Bhajan Lal Vs St.of Har. 1992 Supp (1) SCC 335
3. Syed Wasif Hussain Rizvi Vs Hasan Raza Khan & ors.: 2016 SCC OnLine All 175
4. Mathu Karuppan Vs Parithi Ilamvazhuthi (2011) 6 SCC 496
5. Amit Ahuja Vs Gian Prakash Bhambri : 2010 SCC Online P & H 4856
6. Ramveer Upadhyay Vs St.of U.P. 2022 SCC OnLine SC 484
7. Sunita Palita Vs Panchami Stone Quarry in (2022) 10 SCC 152
8. Ramjas Foundations Vs U.O.I.: (2010) 14 SCC 38
9. Ranjit Singh Vs St.of Punj. : (1998) 7 SCC 149
10. Raj Kishore Prasad Vs St.of Bihar : (1996) 4 SCC 495
11. Kishun Singh Vs St.of Bihar : (1993)2 SCC 16
12. Pepsi Foods Ltd. Vs Special Judicial Magistrate, (1998) 5 SCC 749
13. Sunil Bharti Mittal Vs CBI, (2015) 4 SCC 609
14. Shiv Kumar Jatia Vs St.of NCT of Delhi : (2019) 17 SCC 193

15. Kishori Singh & ors. Vs St.of Bihar & anr.: (2004) 13 SCC 11

16. M/s. India Carat Pvt. Ltd. Vs St.of Karn. & anr.: (1989) 2 SCC 132

17. Abhinandan Jha Vs Dinesh Mishra : AIR 1968 SC 117

18. H.S. Bains Vs St.(UT of Chandigarh) : (1980) 4 SCC 631

19. R.P. Kapoor Vs St.of Pun., AIR 1960 S.C. 866

20. St.of Haryana Vs Bhajanlal, 1992 SCC (Cri.)426

21. St.of Bihar Vs P.P. Sharma, 1992 SCC (Cri.)192

22. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cri.)283

23. S.W. Palankattkar & ors. Vs St.of Bihar, 2002 (44) ACC 168

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

1. Heard Shri Satish Chandra Mishra, the learned Senior Advocate assisted by Shri Purnendu Chakravarty and Ms. Soumya Chaturvedi, the learned counsel for the applicant, Shri Anurag Verma, the learned A.G.A. for the State-opposite party No. 1, Shri Prashant Chandra, the learned Senior Advocate assisted by Ms. Radhika Singh and Shri Nilish Anand, the learned counsel for the opposite party No. 2.

2. The present application under section 428 Cr. P.C. has been filed by the applicant-Shekhar Ramamurthy, seeking following prayer:-

"Wherefore it is most respectfully prayed that in the aforesaid facts and circumstances the application preferred under section 482 Cr.P.C. may kindly be allowed and the quashment of Order dated

17.10.2022 alongwith all consequential proceedings and effects arising out of FIR no. 260/2018 U/s 406, 420, 467, 468, 471 and 120-B of IPC P.S. - Hussain Ganj, District Lucknow, pending before the court of ACJM - III may kindly be quashed along with all consequential proceedings in respect of the applicant in the interest of justice."

3. Learned Counsel for the applicant submits that the facts of the case, in brief, are that the United Breweries Limited (hereinafter referred to as "UBL") is a company registered under the provisions of Companies Act, 1956, having its registered office at U.B. Tower V.B. City 24, Vittal Mallya Road, Bangalore, Karnataka. The Company is engaged in manufacturing and sale of beer and other alcoholic beverages in India and worldwide.

4. That the applicant was working with UBL as Managing Director and a First Information Report was lodged on 16.09.2018 by the informant Shri Sanjeev Jaiswal wherein certain allegations regarding some business disputes were made against three persons, namely, Akhil Sarda, Himanshu Tewari and Arvind Padhi. During the course of time applicant ceased to be a Director of the aforesaid company w.e.f. 31.07.2020 upon his superannuation and the information about his leaving the company was filed with the Ministry of Corporate Affairs in Form DIR-12 as required under the Companies Act, 2013.

5. As per the contents of the FIR lodged on a complaint moved by opposite party No. 2 at Police Station Husainganj, Lucknow, on 15.9.2018 and as per the case setup the complainant placed an order for three trucks of Beer on 07.09.2018 and on 11.09.2018 through e-mail to Akhil Sharda,

Branch Manager (Sales) Uttar Pradesh and Uttarakhand and made payment of Rs. 65,66,152/- on 7.9.2018 and Rs. 27,32,750/- on 11.9.2018, total amount of Rs. 92,98,902/- by his banker, Federal Bank Limited, Cantt. Road Lucknow. Despite making of payment for three trucks of Beer, Akhil Sarda did not ensure the supply of the ordered Beer, nor any proper reply was given by him. The complainant was apprehensive that three employees named in the FIR had no intention to supply the ordered Beer and they wanted to misappropriate the amount paid by the complainant and as per Excise Rules, the supply was to be made within 72 hours of the order.

6. The opposite party No. 2 placed a demand order for two trucks load of Beer through e-mail, total 2360 cases to the company on 07.09.2018. This e-mail was also sent to the Assistant Excise Commissioner Web Distillery, Aligarh. As the next two days, i.e., Saturday and Sunday were holidays, the process for supply of goods for which order was placed by the opposite party No. 2 was initiated on 10.9.2018. In pursuance of the indent/ demand order dated 07.09.2018 placed by opposite party No. 2, the Company directed its transporter Sical Logistics Limited to arrange vehicles for delivery of goods from its godown located at Noida to the Licensee at Lucknow. The transport permit (Form FL-36) was issued by the concerned Excise Officer on 11.9.2018 for supply of Beer by 13.09.2018. The consignment of Beer was dispatched on 11.9.2018 for delivery to the Licensee at Lucknow after payment of excise duty in advance through transporter of the company by Truck Nos. UP32 HN 3209 and UP32 FN 8048.

7. The aforesaid two trucks had to reach the destination on 13.9.2018. And on

13.9.2018, location of both the trucks was tracked through GPS upto the outer limit of the Lucknow city, which was near about one and a half kilometre from the hotel Ramada Palace of opposite party No. 2 and, thereafter, the GPS device of both trucks lost contact with GPS Tracker Agency, namely, QTS Solutions Private Limited after 11.41 hours on 13.09.2018. QTS Solutions Private Limited sent a message through e-mail on 14.9.2018 at 4.15 PM of one Mr. Dharam Chand, Depot In-charge of the company.

8. It is further submitted that Ashok Kumar Jaiswal, who manages the business of opposite party No. 2, also runs Hotel Ramada, Near Bani Junabganj, Banthara, Lucknow, which is located at a distance of 1.5 kilometres from the place from where the trucks loaded with Beer went missing and which is specifically the same place from where the GPS fitted in the trucks stopped giving the track of the two trucks on 13.09.2018.

9. The Depot In-charge also informed to the officers of the company as well as the transporter, Sical Logistics Limited about the loss of trucks. The officers of the company also inquired about the trucks' location from opposite party No. 2 through telephone, but opposite party No. 2 informed the company that the trucks had not yet reached the designated place i.e. 18, Station Road, Lucknow.

10. It was further submitted that the trucks loaded with Beer from the Depot of the company going missing, was brought to the notice of the District Excise Officer, who directed the company on 14.9.2018 to lodge the FIR at Police Station Badalpur, Gautam Budh Nagar. When the whereabouts of the trucks were not known,

on 21.9.2018 the company requested consent of the licensee, opposite party No. 2, through e-mail for re-supply of Beer against the order dated 07.09.2018 as the consent was required for issuance of transport permit (FL-36) afresh. The consent for re-supply was given by opposite party No. 2 through e-mail on 22.9.2018. The licensee also informed the company that criminal proceedings have already been initiated at Police Station Husainganj, Lucknow with regard to non supply of Beer and civil proceedings would be initiated for the losses suffered. After consent was given by the licensee on 22.09.2018, fresh Form FL-36 was issued by the concerned Excise Officer on 22.09.2018 itself and Beer was supplied on 22.09.2018 against the order dated 07.09.2018 after payment of excise duty in advance through transporter of the company. The supply of goods/ Beer were delivered at the address of the licensee at Lucknow on 24.09.2018, which were accepted by the licensee, however, acknowledgement was not given by the licensee even after receipt of the goods. As the licensee did not acknowledge the delivery of goods, the drivers of the trucks contacted Excise Department and the Excise Inspector was deputed to verify the delivery of beer. The concerned Excise Officer inspected the location of the licensee and submitted his report dated 27.9.2018 that Beer ordered was duly received by the licensee at his premises.

11. It was further submitted that the licensee had also placed another order dated 11.09.2018 at 8:30 PM through e-mail for delivery of 1180 cases of Beer at Varanasi. Since the vehicles of transportation of Beer to Varanasi could not be arranged and the transport Form FL-36 could not be issued, the licensee on

15.09.2018 modified its original order dated 11.09.2018 through e-mail instructing that the ordered beer be delivered at Lucknow instead of Varanasi. After receipt of revised order on 15.09.2018 with changed location, the vehicle was arranged and Form FL-36 was issued by the concerned Excise Officer on 17.09.2018 and on the same day, consignment of beer was dispatched after payment of excise duty in advance through transporter of the company, namely, Buland Logistic Limited by Truck No.UP81 BT 5285 from Aligarh to Lucknow and the consignment of beer was delivered and received by the licensee on 19.09.2018. It is stated that the goods were duly delivered as per the orders dated 07.09.2018 and 11.09.2018.

ARGUMENTS OF LEARNED COUNSEL FOR THE APPLICANT

12. Shri Satish Chandra Mishra, learned Senior Advocate representing the applicant has submitted that there is no evidence available on record to show any involvement of the applicant in the alleged offence. The criminal liability cannot be fixed only on the allegation that the accused was the Director of the company at the time of alleged incident without disclosing any role played by such a person in the entire transaction, which form part of the offence and subject matter of the FIR and the chargesheet. He has further submitted that the impugned proceedings against the applicant are nothing but a sheer abuse of process of law and are manifestly unjust and illegal. The investigation has also been closed, and no further investigation is pending in the offence and the continuation of proceedings against the applicant would result only in his further harassment for alleged offences, which are

not made out against him inasmuch as there is no evidence indicating his involvement in any manner for commission of alleged offences.

13. Learned Senior Counsel for the applicant further submits that pursuant to the FIR (case crime no. 260/2018, P.S. Husaain Ganj, Lucknow) the Investigating Officer had filed a charge sheet dated 10.02.2019 against four accused persons namely (i) Akhil Sarda, (ii) Himanshu Tewari, (iii) Arvind Padhai and (iv) United Breweries Limited. Thereafter cognizance on the said chargesheet was taken by the court below vide order dated 13.02.2019 to issue process against the then Managing Director Shekhar Ramamurthy vide order dated 13.02.2019 and there is no any whisper about his name in the aforesaid chargesheet and the order.

14. It was further submitted that Subsequently the investigation proceeded further and one more charge sheet No. 03 was filed by the Investigating Officer against nine Directors and Company Secretary of the Company. The court below vide order dated 03.04.2019 had taken cognizance on the said supplementary chargesheet, thereafter the investigation remained continued and a final chargesheet No. 04 dated 27.06.2019 was filed before the court below, whereupon cognizance was taken on 04.07.2019 by the court below. In the final chargesheet in the cloumn of the name of the accused at Serial No. 4 only the name of the company, i.e., United Breweries Limited, has been mentioned and the name of the applicant Shekhar Ramamurthy, Managing Director, has not been mentioned in any of the chargesheet. Thus entire proceedings initiated against the applicant is sheer abuse of process of law.

15. It was further argued that in the impugned summoning order dated 17-10-2022 it has been mentioned by the court below that earlier vide order dated 25.03.2019 non bailable warrants were issued against all the accused persons. The order sheet of this case reveals that the chargesheet was filed on 10.02.2019 and cognizance was taken on 13.02.2019 only against the company UBL and other three individual persons, namely (i) Akhil Sarda, (ii) Himanshu Tewari, (iii) Arvind Padhai. It is argued that the name of the applicant was not mentioned in the summoning order and summons were issued to other persons fixing the next date for appearance for 05.03.2019. Subsequently, on 15.03.2019 case was called out and service report on the summons was submitted to the court, thereafter, bailable warrants for Rs. 10,000/- were issued against three individuals and UBL as a Company by the court below. Neither the summons nor the bailable warrants were issued against present applicant Shekhar Ramamurthy and the processes were only issued against the Company. Subsequently, the date was fixed for 25.03.2019 as indicated in the order sheet as it has been mentioned that Vakalatnama for the accused was filed. Thereafter, non bailable warrants were issued against three individuals and UBL as a Company vide order dated 25.03.2019.

16. It is further submitted by Senior Advocate Shri Satish Chandra Mishra that from perusal of the aforementioned order sheet it is apparent that non bailable warrants were issued only in respect of aforesaid three persons who were named in the FIR and charge sheeted. The non bailable warrant cannot be issued against a juristic person which in this case is the company UBL. No otherwise meaning could be deciphered from these order

sheets that at any point of time the court below had issued any kind of process including non bailable warrant against the applicant-Shekhar Ramamurthy at any point of time.

17. It is further submitted that the learned court below in the impugned summoning order has mechanically followed the earlier order dated 25.03.2019 without going into the details of the material available on record that in previous order sheets which clearly indicate that no process have ever been initiated against the present applicant and neither he is an accused in the individual capacity.

18. It is further submitted that after filing of the chargesheet and after taking cognizance vide order dated 13.02.2019, the informant Sanjeev Jaiswal, opposite party no. 2 had filed an application dated 07.03.2019 for issuance of bailable warrant against the then Managing Director namely, Shekhar Ramamurthy, whereupon the learned court below passed the order on the application itself to the effect that Investigating Officer shall be present on the date fixed and also directed him to file his reply, and the application was fixed for 25.03.2019 and on the same date 07.03.2019 the Investigating Officer also moved an application before the learned court below submitting therein that vide order dated i.e., 07.03.2019 the learned court below has included UBL as an accused through Managing Director, Shekhar Ramamurthy in place of the name of Director and for rest of its shareholders/Directors a supplementary chargesheet shall be filed as investigation was continued.

19. It was further submitted that thereafter the name of applicant has been

inserted in handwriting in the chargesheet No. 2 but the same is not available in the certified copy of the said chargesheet issued on 20.02.2019. The certified copy was applied vide Folio No. 77(urgent) dated 20.02.2019 and the same was issued on the same day. This certified copy was filed before this Court by the other named accused persons including the company as a party as Annexure No. 01 to the Crl. Misc. Application U/s 482 Cr.P.C. No. 2005 of 2019, Akhil Sharda and others Vs. State of U.P. and others and the aforesaid application U/s 482 Cr.P.C. No. 2005 of 2019 was allowed by a coordinate Bench of this Court vide order dated 06.03.2020. Subsequently, the State of U.P. and the complainant had challenged separately the aforesaid order dated 06.03.2020 before the Hon'ble Supreme Court by filing their respective SLP(Crl) No. 5577 of 2020 and SLP (Crl) 5899 of 220 and the Hon'ble Supreme Court vide order dated 11.7.2022 restored the proceedings initiated against three accused persons and the Company, while setting aside the order dated 06.03.2020 passed by this Court with certain directions. The opposite parties namely, State of U.P. and the informant, never argued or intimated the Hon'ble High Court that the name of applicant has been inserted in handwriting at any subsequent date or if the name has been inserted/ included then when the said order was passed by the learned court below regarding inclusion of the name of applicant as an accused along with the company. Even though the name of the applicant was not arrayed as party by the state or the informant before the Hon'ble Supreme Court in the aforesaid SLP's.

20. Learned Senior Counsel for the applicant further submits that upto 25.03.2019 neither cognizance was taken

against the applicant nor any non bailable warrant was issued against the applicant and the non bailable warrant dated 25.03.2019 was issued only against three individuals and the Company and not against the present applicant.

21. It was further argued by the learned counsel for the applicant that the name of applicant was neither in the FIR nor in the chargesheet but his name came into light only after an application moved on behalf of Investigating Officer before the court concerned after which the learned court below without due process of law inserted the name of applicant and issued process vide impugned order dated 17.10.2022.

22. It was further stated that on the application moved on behalf of Company under Section 305 Cr.P.C., the learned court below issued non bailable warrant and thus has caused a manifest illegality on the ground that it is the prerogative of the company to appoint its representative/ authorized person under section 305 Cr. P.C. for participation in the criminal prosecution for and on behalf of the company and the said person would be representative of the said company.

23. It was further argued by the learned counsel for the applicant that the learned trial court has no power for naming any particular person with name and designation for prosecution on behalf of company. It is settled principle of law that whenever a company is named in any prosecution then as per the provisions of Section 305(2) Cr. P.C. the company may appoint a representative for the purpose of inquiry or trial and such appointment need not be under the seal of corporation and the counsel has placed the

provision of Section 305 Cr.P.C. which is reproduced here in below:-

305. Procedure when corporation or registered society is an accused.-(1) In this section, "corporation" means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub- section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

24. Learned counsel for the applicant further stated that a Director of a company who was not in charge or responsible for the conduct of business of the company at the relevant time, will not be liable under those provisions. As held by Hon'ble Supreme Court in **S.M.S. Pharmaceuticals Ltd Vs Neeta Bhalla (2005) 8 SCC 89**, relevant portion is quoted below:

"Section 141 of the Act does not say that a Director of a Company shall automatically be vicariously liable for commission of an offence on behalf of the Company. What is necessary is that sufficient averments should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an offence by the Company must be incharge and shall also be responsible to the Company for the conduct of its business".

25. That learned counsel for the applicant further submits that liability depends on the role one plays in the affairs of a company and not on designation or status alone and was pleased to refer the judgment passed by the Apex Court in the case of a **S.M.S. Pharmaceuticals Ltd Vs Neeta Bhalla(Supra)**.

26. Learned counsel for the applicant has vehemently submitted that in the facts and circumstances of the case and after having satisfied that the ingredients of Sections 406, 420 IPC are not made out against the applicant and the case falls

within the parameters laid down by this Hon'ble Court in the case of **Ch. Bhajan Lal v. State of Haryana** 1992 Supp (1) SCC 335 which are required to be considered while quashing the criminal proceedings. He further argued that from the material available on record it is apparent that the applicant is not involved in the day-to-day affairs of the company or in running of the company, thus, he prays that it is a fit case for quashing of the impugned order dated 17.10.2022 and all the consequential proceedings of the case so far as the present applicant is concerned.

27. Per contra, Shri Anurag Verma, the learned Additional Government Advocate for the State-opposite party No. 1 has submitted that learned court below has not committed any error or illegality in issuing non bailable warrant order dated 17.10.2022 against the applicant including other accused persons and the present application is liable to be dismissed as all the Factual aspects has been argued.

ARGUMENTS OF LEARNED COUNSEL FOR RESPONDENT No. 2

28. Sri Prashant Chandra, learned Senior Advocate assisted by Ms. Radhika Singh, learned counsel for the complainant/ opposite no. 2 raised preliminary objection by stating that the present application under Section 482 Cr. P.C. is not maintainable as once the Hon'ble Supreme Court has already quashed the order of Hon'ble High Court and restored the charge sheet filed by the Investigating Officer and directed the court below to proceed in the case.

29. Learned Counsel for the complainant/ opposite party No. 2 further stated that there are material concealment of facts on behalf of the applicant and the

applicant has not come with clean hands before this Hon'ble Court and first non bailable warrant issued against the applicant on 25.03.2019 is not challenged in this instant application under Section 482 Cr.P.C.

30. Learned counsel for the complainant/ opposite party No. 2 further stated that the present application under section 482 Cr.P.C. has been filed by the applicant but the affidavit in support thereof is made by his attorney which is not maintainable. Learned Counsel for the opp. party No. 2 also repudiated the remaining submissions made by the counsel for the applicant and prays that the present application filed by the applicant be dismissed.

31. Learned Counsel for the complainant / opposite party No. 2 has relied on the judgment of this Hon'ble Court in **Syed Wasif Hussain Rizvi Vs Hasan Raza Khan and 6 Others: 2016 SCC OnLine All 175**, and placed reliance on para-25 of the judgment wherein this Court has observed as under:

25. Having held so, we must, at the same time, emphasize the necessity of observing adequate safeguards where a writ petition is filed through the holder of a power of attorney. These safeguards should necessarily include the following:

(1) The power of attorney by which the donor authorises the donee, must be brought on the record and must be filed together with the petition/application;

(2) The affidavit which is executed by the holder of a power of attorney must contain a statement that the donor is alive and specify the reasons for the inability of the donor to remain present before the Court to swear the affidavit; and

(3) The donee must be confined to those acts which he is authorised by the power of attorney to discharge.

32. The learned counsel for the complainant / opposite party No. 2 further argued that under the Rules of the Court, under Chapter IV, the person swearing the affidavit in support of any application or affidavit has to state with precision and sufficient particularity details about himself and he must also be aware of the facts deposed to in the affidavit filed by him. Inconsistent affidavits filed in a casual manner and not bringing true and correct facts on the record can be treated to be false affidavits. The person swearing the affidavit is consequently rendered liable for criminal contempt. As this Hon'ble Court decides cases on the basis of evidence brought on record by way of affidavit, and filing false affidavits is a serious matter and calls for stringent punishment. It would be a greater disaster that if the fountain of Justice is allowed to be poisoned by anyone resorting to filing of false affidavit or giving a false statement and fabricating false evidence in court of law. Further it was submitted that in the case of **Mathu Karuppan Vs Parithi Ilamvazhuthi (2011) 6 SCC 496**, the Hon'ble Apex Court held that filing a false affidavit should be effectively curbed with a strong hands.

33. It was further argued by learned counsel for the complainant/ opposite party No. 2 that no person, howsoever, high in hierarchy, has a right to impede the course of justice and to ridicule the dignity and majesty of this Hon'ble Court and repeated filing of false affidavits call for stringent punishment in order to ensure that such nefarious activities are nipped in the bud and dignity and majesty of this Hon'ble

Court is not subjected to ridicule and jeopardy.

34. It was further argued by learned counsel for the complainant/ opposite party No. 2 that the applicant has indulged in clever drafting by twisting material facts. Beside concealing relevant facts germane to the matters in issue, even vital material facts and documents have not been brought on record with due deliberation and the criminal cases initiated against the other accused including the applicant are interconnected and part of main conspiracy.

35. Learned counsel for the complainant / opposite party No. 2 has further placed reliance upon the judgment in the case of **Amit Ahuja Vs. Gian Prakash Bhambri : 2010 SCC Online P & H 4856**, and relied on paras-6 to 9, wherein it has been observed as under:

"6. On the other hand, the counsel for the respondent submitted that petition under Section 482 Cr.P.C. filed by the petitioner, through his attorney, is not maintainable. She also repudiated the remaining submissions, made by the counsel for the petitioner.

7. After giving my thoughtful consideration to the rival contentions raised by the Counsel for the parties, in my considered opinion, the petition is liable to be dismissed, being not maintainable, for the reasons, to be recorded, hereinafter. Admittedly, the aforesaid complaint, was filed against the petitioner and his co-petitioners, in the Courts, at India. There is no dispute about the factum, that Amit Ahuja, petitioner, is residing in Dubai. In *Janata Dal v. H.S. Chaudhary*, JT 1991 (3) SC 497 it was held, as under:—

"Even if there are million questions of law to be deeply gone into and examined in

a criminal case registered against specific accused persons, it is for them and they alone to raise all such questions and challenge the proceedings initiated against them at the appropriate time before the proper forum and not for third parties under the garb of public interest litigants. It was further held that the petitioner in that case (H.S. Chaudhary) had no locus standi to invoke the extraordinary jurisdiction of the High Court, under Section 482 Cr.P.C. for quashing the FIR and all other proceedings arising therefrom on the plea of preventing the abuse of process of the Court. In the above mentioned case the accused persons were alive and were capable of defending themselves and protecting their interests and it was also not shown that the petitioner Mr. H.S. Chaudhary had any particular or special interest in the accused persons."

(8) In **Simranjit Singh Mann v. Union of India: 2 AIR 1993 SC 280**, the Apex Court, held as under:—

"Ordinarily, the aggrieved party which is affected by any order has the right to seek redress by questioning the legal validity or correctness of the order, unless such party is a minor, an insane person or is suffering from any other disability which in law recognized as sufficient to permit any other person e.g. next friend, to move the Court on his behalf. It was also held that if a guardian or a next friend initiates proceedings for and on behalf of such a disabled aggrieved party, it is, in effect, proceedings initiated by the party aggrieved and not by a total stranger, who has no direct personal stake, in the outcome thereof. In the above mentioned case, a leader of a political party approached the Supreme Court under Article 32 of the Constitution of India, challenging the conviction and sentence of

the assassins of Gen. Vaidya. The two convicts were alive but did not file any appeal against the conviction and sentence. The Apex Court held that the petitioner, in that case, had locus standi to invoke the jurisdiction under Article 32 of the Constitution."

(9) The plain reading of ratio of law as laid down in the aforesaid cases, clearly goes to reveal that it is only the accused person, against whom a criminal case has been registered or a criminal complaint, has been filed, can file a petition under Section 482 Cr.P.C. in the High Court, for quashing the complaint, the summoning order and/ or the subsequent proceedings, if any, and no third person can fight a proxy war on his behalf under the garb of public interest litigant. The aggrieved party, which is affected by an order, is required to seek redress of its grievance, by questioning the legal validity or correctness of the same. It is another thing, if the aggrieved party, is suffering from some disability, i.e., unless such party is a minor, or an insane person, or is suffering from any other disability, which, in law, is recognized as sufficient to permit any other person, e.g., next friend, to move the Court, on his behalf. On behalf of minor, or insane person, a guardian or a next friend, initiates proceedings, so as to challenge the legality and validity of the order, passed against him, to seek redressal of the grievance, as under law, such a person having disability, cannot be said to be competent, to file a petition, except through next friend or guardian. In the instant case, there is nothing on the record, that Amit Ahuja, petitioner, is suffering from any disability, recognized by the provisions, of law. He is an accused, in the aforesaid complaint. It is he, who is aggrieved against the complaint and the summoning order. It is he, who can challenge the same,

on any ground which may be available to him, under the provisions of law. If, in criminal cases, until and unless a person, is allowed to fight the proxy war, then the very purpose of criminal justice system, shall be defeated. In the event, the Courts, would be mushroomed, by public interest litigants. In this view of the matter, the present petition, under Section 482 Cr.P.C. filed by the petitioner, through his attorney, is not maintainable. On this ground alone, the same is liable to be dismissed."

36. The learned counsel for the complainant/ opposite party No. 2 further submitted that in spite of issuance of bailable and non bailable warrants applicant is deliberately and consciously evading the summons and is circumventing the process of law. In a catena of decisions the Hon'ble Apex Court has held that criminal proceedings cannot be nipped in the bud by exercising jurisdiction under section 482 Cr.P.C. in the recent decision rendered by the Hon'ble Supreme Court in the case of Ramveer Upadhyay vs State of U.P. 2022 SCC OnLine SC 484 and placed reliance on para 39 which read as under:

"39 In our considered opinion criminal proceedings cannot be nipped in the bud by exercise of jurisdiction under Section 482 of the Cr.P.C. only because the complaint has been lodged by a political rival. It is possible that a false complaint may have been lodged at the behest of a political opponent. However, such possibility would not justify interference under Section 482 of the Cr.P.C. to quash the criminal proceedings. As observed above, the possibility of retaliation on the part of the petitioners by the acts alleged, after closure of the earlier criminal case cannot be ruled out. The allegations in the complaint constitute offence under the

Atrocities Act. Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. The Complaint Case No. 19/2018 is not such a case which should be quashed at the inception itself without further Trial. The High Court rightly dismissed the application under Section 482 of the Cr.P.C.”

37. The learned counsel for the complainant/ opposite party No. 2 has further submitted that the present applicant before this Hon’ble Court was the Managing Director of M/s United Breweries Limited and he continued to be the Managing Director of the said Company at the time of alleged incident and the said applicant resigned in the year 2020 thus he is liable to face the proceedings of the case.

38. Learned counsel for the complainant/ opposite party No. 2 further submitted that it is not necessary to make an averment in the complaint that the applicant is in charge of, and is responsible to the company for the conduct of business of company. This is because the prefix “Managing“ to the word “Director” makes it clear that the Director was in charge of and responsible to the company, for the conduct of the business of the Company as held by Hon’ble Supreme Court in **Sunita Palita Vs Panchami Stone Quarry in (2022) 10 SCC 152.**

39. Learned counsel for the respondent No. 2 has further stated that

recently in **Ramjas Foundations Vs. Union Of India : (2010) 14 SCC 38** the case law on the subject was discussed, wherein it was held that if a litigant does not come to the court with clean hands, he is not entitled to be heard and indeed such a person is not entitled to any relief from any judicial forum and placed reliance on paragraph No. 21 of the aforesaid judgment which is being reproduced as under:-

“21. The Principle that a person who does not come to the court with clean hands is not entitled to be heard on merits of his grievance and in any case such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in other courts and judicial forums.”

40. Learned Counsel for the complainant/ opposite party No. 2 while relying upon the judgment of Hon’ble Supreme Court rendered in **Ranjit Singh v. State of Punjab : (1998) 7 SCC 149**, where a Three Judges Bench was dealing with the issue that whether the Sessions Court can add a new person to the array of the accused in a case pending before it at a stage prior to collecting any evidence, the three-Judges Bench was dealing with the said issue as reservations were expressed by a Division Bench in **Raj Kishore Prasad v. State of Bihar : (1996) 4 SCC 495** with regard to the ratio laid down in **Kishun Singh v. State of Bihar : (1993) 2 SCC 16**. The conclusion recorded in **Ranjit Singh (supra)** reads as follows: -

“19. So from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code, that court can deal with only the accused referred to in Section 209 of the Code. There is no intermediary stage till then for

the Sessions Court to add any other person to the array of the accused.

20. Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

OBSERVATIONS OF THE COURT

41. I have considered the rival submissions of the learned counsel for the parties and the judgments referred herein above and perused the material available on record and also the prayer made in the present application filed under Section 482 Cr.P.C. by the applicant.

42. The powers of the High Court to quash criminal proceedings in exercise of its jurisdiction under Section 482 Cr.P.C. is well known. The High Court may not enter into determination of the disputed questions of fact at the stage of its exercise of powers under section 482 Cr.P.C, however, the Court may examine and take note of the facts and allegations in order to find out whether the impugned proceedings are in abuse of the process of the court and law and their continuance would result in miscarriage of justice or not.

43. In the present case the facts, as noted above, are not in dispute. The FIR and the charge-sheet discloses as to how

and in what manner the applicant was responsible for day-to-day conduct of business of the Company or otherwise responsible in its day-to-day functioning.

44. The question which arises for consideration in the present case is that whether the applicant was liable for any offence even if the allegations in the FIR and charge-sheet are taken on their face value to be correct in entirety. The Company is a body incorporated under the Companies Act. Vicarious criminal liability of its Directors and Shareholders would arise provided any provision exists in that behalf in the statute. The Statute must contain provision fixing such a vicarious liability. Even for the said purpose, it would be obligatory on the part of the complainant and the investigating agency to make requisite allegations and collect evidence in support thereof which would attract provisions constituting vicarious liability.

45. In the facts of the present case, it is not in dispute that order for supply of beer by complainant/ opposite party No. 2 was placed through Akhil Sarda, Depot Manager. The applicant was the Managing Director who has been appointed under the provisions of Section 149/ 150 of the Companies Act, 2013, having regard to his qualification, expertise etc. If the applicant was involved in the alleged transaction at any point of time, vicarious criminal liability can be fixed upon the applicant.

46. The Hon'ble Supreme Court in the case of ***Pepsi Foods Ltd. v. Special Judicial Magistrate, (1998) 5 SCC 749*** has held that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set in motion as the matter of course for alleged offences and was pleased

to observe in para-28 of the aforesaid judgment which reads as under:-

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

47. The Hon'ble Supreme Court also in the case of **Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609** while dealing with the issue of vicarious liability of the Officers, Directors, Managing Directors, Chairman of the Company was pleased to observe in paras- 42 to 44 and 48 to 50 of the aforesaid judgment, which read as under:-

"42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would

normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241]*, the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other

person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."

48. Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not.

49. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or FIR registered. Their names may transpire during investigation or afterwards.

50. Person who has not joined as accused in the charge-sheet can be summoned at the stage of taking cognizance under Section 190 of the Code. There is no question of applicability of Section 319 of the Code at this stage (see *SWIL Ltd. v. State of Delhi* [(2001) 6 SCC 670 : 2001 SCC (Cri) 1205]). It is also trite that even if a person is not named as an accused by the police in the final report submitted, the court would be justified in taking cognizance of the offence and to

summon the accused if it feels that the evidence and material collected during investigation justifies prosecution of the accused (see *Union of India v. Prakash P. Hinduja* [(2003) 6 SCC 195 : 2003 SCC (Cri) 1314]). Thus, the Magistrate is empowered to issue process against some other person, who has not been charge-sheeted, but there has to be sufficient material in the police report showing his involvement. In that case, the Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer."

48. The Hon'ble Supreme Court also in the case of **Shiv Kumar Jatia Vs. State of NCT of Delhi : (2019) 17 SCC 193** while dealing with vicarious liability of Managing Director of the Company was pleased to observe in paras-21 and 22 as under:-

"21. By applying the ratio laid down by this Court in *Sunil Bharti Mittal* [*Sunil Bharti Mittal v. CBI*, (2015) 4 SCC 609 : (2015) 2 SCC (Cri) 687] it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in *Maksud Saiyed v. State of Gujarat* [*Maksud Saiyed v. State of Gujarat*, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] this Court has examined the vicarious liability of Directors for the charges levelled against

the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a company. It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further held that statutes indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

22. In the judgment of this Court in *Sharad Kumar Sanghi v. Sangita Rane* [*Sharad Kumar Sanghi v. Sangita Rane*, (2015) 12 SCC 781 : (2016) 1 SCC (Cri) 159] while examining the allegations made against the Managing Director of a Company, in which, company was not made a party, this Court has held that when the allegations made against the Managing Director are vague in nature, same can be the ground for quashing the proceedings under Section 482 CrPC. In the case on hand principally the allegations are made against the first accused company which runs Hotel Hyatt Regency. At the same time, the Managing Director of such company who is Accused 2 is a party by making vague allegations that he was attending all the meetings of the company and various decisions were being taken under his signatures. Applying the ratio laid down in the aforesaid cases, it is clear that principally the allegations are made only against the company and other staff members who are incharge of day-to-day affairs of the company. In the absence of specific allegations against the Managing Director of the company and having regard to nature of allegations

made which are vague in nature, we are of the view that it is a fit case for quashing the proceedings, so far as the Managing Director is concerned."

49. Thus, an Officer, Director, Managing Director or Chairman of the Company can be made an accused along with the Company only if there is sufficient material to prove his active role coupled with criminal intent. Indian Penal Code does not contain any provision for vicarious liability. For Managing Director or Director to be accused and their implications in the offence allegedly committed on behalf of the company, when the accused is a Company, the complaint/ FIR or Charge-sheet must contain requisite allegations of commission of the offence by such individual(s).

50. The Hon'ble Supreme Court in the case of **Kishori Singh and others v. State of Bihar and another** : (2004) 13 SCC 11, while dealing with the issue whether when some evidence or material are brought on record in course of trial the person can be arrayed as "accused persons" and was pleased to observe in para-10 as under: -

"10. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as "accused persons" in exercise of powers under Section 319 CrPC when some evidence or materials are brought on record in course of trial or they could also be arrayed as "accused persons" only when a reference is made either by the Magistrate while passing an order of commitment or by the learned Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge-

sheet, as has been explained in the latter three-Judge Bench decision. Neither of the contingencies has arisen in the case in hand."

51. In M/s. India Carat Pvt. Ltd. v. State of Karnataka and another : (1989) 2 SCC 132, the Hon'ble Court, after analyzing the provisions of the Code, referred to the decisions in Abhinandan Jha v. Dinesh Mishra: AIR 1968 SC 117 and H.S. Bains v. State (UT of Chandigarh) : (1980) 4 SCC 631 and, eventually was pleased to observe as under:

16. "The position is, therefore, now well settled that upon receipt of a police report under Section 173(2)a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused."

52. Thus, this Court is of the view that all the contentions raised by the applicant's counsel relate to disputed questions of fact. The court has also been

called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded. In the process of invoking its inherent jurisdiction, this court cannot be persuaded to have a pre trial before the actual trial begins. The submissions made by the learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case.

53. At this stage of issuing process the court below is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not. The quashing of charge sheet, summoning order and entire proceedings can also be done only if it does not disclose any offence or if there is any legal bar which prohibits the proceedings on its basis. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases and make the position of law in this regard clear:-
(i) **R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866**, (ii) **State of Haryana Vs. Bhajanlal, 1992 SCC (CrL)426**, (iii) **State of Bihar Vs. P.P. Sharma, 1992 SCC (CrL)192** and (iv) **Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.)283**.

54. The power of High Court is very wide but should be exercised very

cautiously to do real and substantial justice for which the court alone exists. Hence the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankatkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) *to give effect an order under the Code*; (ii) *to prevent abuse of the process of the court*; (iii) *to otherwise secure the ends of justice*.

55. In absence of any of the grounds recognized by the Apex Court which might justify the quashing of summoning order dated 17.10.2022 or consequential proceedings, **the prayer for quashing the same is refused**, as I do not see any abuse of the courts process either. The court below has been vested with sufficient powers to discharge the accused even before the stage to frame the charges comes, if for reasons to be recorded it considers the charge to be groundless.

56. However, in view of the above discussions and observations, it is directed that the applicant shall appear before the concerned court below, within a period of three weeks from today and move an application claiming discharge, the concerned court below shall after hearing the counsel for the parties decide the aforesaid discharge application on merits in accordance with law within a period which shall not exceed a period of three months from today without granting any unnecessary adjournment to either of the parties, unless there is some legal

impediment or unless there is any order passed by the higher court staying the proceedings of the case.

57. It is further directed that till the disposal of the aforesaid discharge application no coercive action shall be taken against the applicant.

58. With the above observations and directions, this application filed by the applicant under Section 482 Cr.P.C. for the relief claimed stands **disposed of**.

(2023) 5 ILRA 1920
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.04.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI
(THAKUR), J.

Application u/s 482 No. 11669 of 2018

Prashant Tyagi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Sanjay Singh, Sri Amrendra Nath Rai

Counsel for the Opp. Parties:
G.A., Sri Abhinav Gaurav, Sri Anoop Trivedi, Sri Vibha Rai

Criminal Law - Criminal Procedure Code, 1973 - Section 482 - Entire proceedings under section 138 Negotiable Instruments Act under challenge- Allegation- Opposite parties issued cheque in favour of complainant- cheque dishonoured- applicants had resigned from the directorship on the date the cheque was issued- for promotion of justice or to prevent injustice or abuse of process- Court may look into the materials which have significant bearing on the matter at prima facie stage- applicant no.1 had

resigned from the Company much prior to the issuance of the cheque in question- cheque did not bear the signatures of any of the applicants- On the date of issuance of the cheque the applicants were mere the shareholders of the Company- no active participation of the applicants in the day to day business and transactions of the Company-complaint also silent about the role of the applicants- travesty of justice to drag the persons to face the prosecution- no way connected with the issuance of the cheque or its being dishonour thereof-summoning order quashed-Application allowed.

HELD:

Thus on the basis of the discussion and the judgments placed above, it is found that applicant no.1 had resigned from the Company much prior to the issuance of the cheque in question. Admittedly, the cheque did not bear the signatures of any of the applicants. On the date of issuance of the cheque the applicants were mere the shareholders of the Company. There was no active participation of the applicants in the day to day business and transactions of the Company and in the complaint itself, it is not mentioned that as to how and in what manner the applicants were in-charge or were responsible to the accused Company for the conduct of its business. Thus, in the opinion of the Court, as on the face of the record, participation of the applicants is not found in the day to day functioning of the Company, hence, on the basis of the version that the defence would be seen at the time of evidence, it would be travesty of justice to drag the persons to face the prosecution who are no way connected with the issuance of the cheque or its being dishonour thereof.

On the basis of above discussion, the summoning of the applicants to face trial under Section 138 of Negotiable Instruments Act is found to be against the mandate of law laid down by the Apex Court in above mentioned judgments.

Application allowed. (E-14)

List of Cases cited:

1. Smt. B Devi (Basanti Devi) Vs St.of U.P., 2016 (94) ACC 90
2. Sunita Palita & ors. Vs M/S Panchami Stone Qaurry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019], decided on 01.08.2022
3. S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla, (2005) 8 SCC 89
4. Harshendra Kumar D. Vs Rebatilata Koley & ors., (2011) 3 Supreme Court Cases 351
5. Pooja Ravinder Devidasani Vs St.of Maharashtra & anr., (2014) 16 SCC 1

(Delivered by Hon'ble Mrs. Sadhna Rani
(Thakur), J.)

1. Heard learned counsel for the applicants, learned counsel for opposite party no.2 and perused the record.

2. By moving this application under Section 482 Cr.P.C., the prayer is made to quash summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad in C.C. No.66/2016 under Section 138 Negotiable Instruments Act and also to set aside order dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in Criminal Revision No.18 of 2017.

3. As per facts of the case, a complaint was filed by opposite party no.2 on 13.10.2016 against the applicants and six other persons with the version that opposite party no.2 was a limited Company registered under Companies Act and Vijay Kumar son of late Sri Satpal was authorized to filed complaint on behalf of the Company. The opposite party no.2 was indulged in the business of purchasing, selling and the construction of properties. Opposite party no.1 (in the complaint) M/S

C.S.K. Infrastructure Pvt. Ltd. was a registered Company. Opposite parties no.2 to 6 were its Directors and officers and opposite parties no.7 to 9 were the Company's authorized representatives. Opposite party nos.2 to 9 were responsible for all the day to day business and transactions of opposite party no.1, M/S C.S.K. Infrastructure Pvt. Ltd.

4. The opposite parties (in the complaint) had assured the complainant/opposite party no.2 herein that they would make available a land to the complainant/opposite party no.2 at a reasonable price. Having faith in the opposite parties the complainant/ opposite party no.2 on 16.08.2014 paid Rs. 5,00,00,000/- to the opposite parties, which were received by the opposite parties. When as per their assurance the opposite parties could not arrange the land for the complainant/opposite party no.2 and the complainant gave them a threat of lodging FIR, then opposite parties promised to pay Rs. 7,00,00,000/- in pursuance of the principal amount of Rs. 5,00,00,000/- with interest. Opposite parties issued a cheque of Rs.2,00,00,000/- in favour of the complainant/ opposite party no.2. This Cheque No.243328 valued Rs.2,00,00,000/- dated 12.07.2016 got dishonoured despite of the assurance of opposite parties that it would get encashed. The information of which was received by the complainant/opposite party no.2 on 29.08.2016 and after due procedure, a complaint under Section 420 I.P.C. was filed by the complainant/opposite party no.2 against the nine accused persons including the Company itself.

5. After the statements under Sections 200 Cr.P.C. and 202 Cr.P.C., the trial court vide order dated 25.11.2016 summoned all

the nine accused persons to face trial under Section 138 of Negotiable Instruments Act 1881. Against this order dated 25.11.2016, three of the opposite parties/ present applicants named Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi, filed a revision before the Sessions Court, which was rejected vide order dated 22.02.2018.

6. Feeling aggrieved by the summoning order dated 25.11.2016 and revisional court's order dated 22.02.2018, the present application has been moved by the applicants Prashant Tyagi, Smt. Neeta Tyagi and Smt. Shweta Tyagi only with the version that the applicant no.1, who was earlier the Director of M/S C.S.K. Infrastructure Pvt. Ltd. had resigned from his post on 26.09.2014, much prior to the issuance of the cheque no.243328 dated 12.07.2016 to the opposite party no.2. He has filed a certified copy of the form DIR-12 (earlier known as Form 32) to this effect. He had neither signed the cheque nor the amount was received in his bank account, thus, applicant no.1 is the ex-director in the accused Company. Applicant nos.2 and 3 are the mother and sister of the applicant no.1. They had no relation with the functioning of the accused company in any manner. They could not be the in-charge and responsible for the conduct and the business of the Company. Without any specific averment that what role they have played in the functioning and the business of the accused Company they can not be implicated for the offence under Section 138 N.I. Act. The summoning order has been passed without considering section 141 of N.I. Act, hence, the prayer is made accordingly.

7. Counter affidavit has been filed on behalf of the opposite party no.2, wherein it has been mentioned that all the applicants

alongwith co-accused persons are the shareholders of the Company and belong to the one and the same family. The present applicant Prashant Tyagi is the son of Ram Sevak Tyagi, applicant no.2 Smt. Neeta Tyagi is the wife of Ram Sevak Tyagi and applicant no.3 Smt. Shweta Tyagi, is the wife of Gaurav/ daughter of Ram Sevak Tyagi and Ram Sevak, is the person who is the authorized representative of the accused company and had issued the cheque in favour of the complainant/ opposite party no.2 on 12.07.2016. When an annual general meeting was called on 30.08.2013 the shares of all the shareholders in the disputed Company were as under:-

8. Ram Sewak Tyagi was having 20000 shares, Prashant Tyagi applicant no.1 was having 25000, Smt. Neeta Tyagi was having 20000 and Smt. Shweta Tyagi was having 10000 and Ram Kishan is said to have 5000 shares, thus, all the applicants here are the shareholders of the accused Company.

9. All the applicants are the blood relatives of Ram Sevak Tyagi and Ram Kishan, is the brother-in-law of Ram Sevak, who is the master mind of the aforesaid fraud. Ram Sevak was handling the financial as well as accounts affairs of the Company alongwith other Directors and the shareholders of the Company and was acting as authorized signatory of the Company on behalf of the Directors, authorized representatives as well as other shareholders of the Company. All the applicants are the over all incharge of the day to day business of the Company. A revision of the applicants was also rejected by the trial court. Applicant no.1 is a Joint Director of the Company and still a Director of the Company and for a very short time he was not there on the Board of

Directors. All the applicants looking after the day to day business/ functions of the Company and being the authorized representatives of the Company are liable for the offence, hence, cognizance has been rightly taken by the court.

10. The applicants filed a rejoinder affidavit wherein the version of the counter affidavit was denied and the version of the complaint was reiterated.

11. Learned counsel for the applicants has argued that the trial court has not gone through the Section 141 of N.I. Act, which deals with the offences by the companies. Without going through this section the impugned order cannot be said to be a complete and affective order.

12. It is further submitted that the applicant no.1 had resigned on 26.09.2014, while impugned cheque is said to have been issued on 12.07.2016. Regarding his resignation Form DIR-12 has been filed, which is a public document. Applicant nos.2 and 3 are the mere shareholders in the Company and are the ladies. Their participation cannot be said to be active in the Company and in the complaint there is bald averment that the accused nos.2 to 6 being the Directors and shareholders of the Company are responsible for the day to day business of the accused Company. Accused No.7 to 9 including applicant no.2 and 3 are the authorized representatives of the Company and thus all the accused persons including all the three applicants are responsible for all the transactions and overall business of the Company. But no particulars or the specific role of the persons, which must be explained in the complaint, has been explained. Admittedly the cheque was not issued by any of the applicants. The applicant no.2, the mother

of the applicant no.1 is a senior citizen. Hence, the prayer is made accordingly.

13. While, learned counsel for the opposite party no.2 opposed the version of the learned counsel for the applicants and submitted that the applicants are the shareholders in the Company and family members of Ram Sevak, who is said to have issued the impugned cheque and being the wife, son and daughter of the person issuing cheque all the applicants must have knowledge of the works done by Ram Sevak Tyagi, accused no.7 in the complaint. As the whole fraud/ cheating has been done with the consent and connivance of the applicants, so with the help of section 141 of the N.I. Act all the applicants would be liable for the acts done by the Company. The defence of the applicants cannot be adjudicated at this stage of summoning. Liability of the applicants can only be decided after the evidence, because as per sub-section 2 of Section 141 of the Act if the offence is found to be **proved** committed with the consent or connivance of the applicants they shall also be liable for the same and punished accordingly. Thus for proving the offence of the applicants evidence of the parties is to be adduced and at this nascent stage the liability of the applicants cannot be fixed.

14. Placing reliance over the judgment of this Court in **Smt. B Devi (Basanti Devi) Versus State of U.P., 2016 (94) ACC 90**, it is argued by the learned counsel for opposite party no.2 that at the stage of summoning, defence of the accused which they may adduce subsequently cannot be seen since there was no occasion to look into such probable defence, which may come when the accused would appear and place their case before the magistrate. At the stage of

issuing summons Court has to see whether a prima facie commission of offence has been shown and appropriate material has come justifying summoning of the accused persons against whom complaint has been made. The role assigned to the applicants in clear and specific words is referred in paragraph 4 of the complaint, that all the accused persons are responsible for the day to day business and functioning of the Company.

15. On the basis of this judgment, it is further argued that all the officers of the Company are responsible for the acts done in the name of Company and are sought to be made personally liable for the acts which resulted in criminal action being taken against the Company. Thus, it is claimed that all the applicants are liable to face trial under the aforesaid sections.

16. Learned counsel for the applicants drew the attention of the Court towards the judgment in **Sunita Palita & Others Versus M/S Panchami Stone Quarry, Criminal Appeal No. of 2022 [Arising out of SLP (Crl.) No.10396 of 2019]**, decided on 01.08.2022 and the judgment in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89**, mentioned therein wherein para-10 the Apex Court held that-

"every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The

liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status."

17. The attention of the Court is further drawn towards judgment in ***Harshendra Kumar D. Versus Rebatilata Koley & Others, (2011) 3 Supreme Court Cases 351*** wherein it was held by the Apex Court that as dishonour of the cheques through the complainant banker was subsequent to his resignation so the applicant no.1 could not be said to have any concern with the Company at that time.

18. It is further argued by the learned counsel for the applicants that mere bald averment in the complaint that the "applicants are looking after the day to day business of the Company, hence, they are liable for the offence committed" is not enough to prove the offence. This averment is devoid of any particulars.

19. In judgment ***Pooja Ravinder Devidasani Versus State of Maharashtra & Anr., (2014) 16 SCC 1***, the Apex Court held that to fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business.

Simply because a person is a Director of a Company.....Every person connected with the Company will not fall into the ambit of the provision.

20. Thus, it is argued that the applicant no.1 was not a Director of the Company on the date when the cheque was issued and regarding his resignation Form DIR-12 has been placed on record. Applicant nos.2 and 3 are admittedly mere shareholders in the Company. They cannot be said to actively participate in the working of the Company.

21. So far as the argument of the learned counsel for the opposite party no.2 that a defence of the applicants shall be seen at the time of arguments is concerned in this regard, the Apex Court opined in judgment ***Harshendra Kumar D. Versus Rebatilata Koley & Others (supra)*** that if on the face of the documents which are beyond suspicion or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. If we go through the judgment in ***Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)*** placed by the learned counsel for opposite party no.2, the facts of that case are different from the facts of the present case, wherein as per facts of that case the cheques were issued in the presence of the petitioner and other Directors, while in the present case cheques were never issued in the presence of the complainant rather till then applicant no.1

had resigned from the Company. While as per facts of the case of **Smt. B Devi (Basanti Devi) Versus State of U.P. (supra)** the resignation and the documents with regard to the resignation were alleged to be the forged documents, but in the case in hand resignation of applicant no.1 has not been challenged, hence, the counsel for the opposite party no.2 cannot take benefit of the judgment of this Court, in the presence of various Apex Court judgments placed above by the counsel for the applicants.

23. Thus on the basis of the discussion and the judgments placed above, it is found that applicant no.1 had resigned from the Company much prior to the issuance of the cheque in question. Admittedly, the cheque did not bear the signatures of any of the applicants. On the date of issuance of the cheque the applicants were mere the shareholders of the Company. There was no active participation of the applicants in the day to day business and transactions of the Company and in the complaint itself, it is not mentioned that as to how and in what manner the applicants were in-charge or were responsible to the accused Company for the conduct of its business. Thus, in the opinion of the Court, as on the face of the record, participation of the applicants is not found in the day to day functioning of the Company, hence, on the basis of the version that the defence would be seen at the time of evidence, it would be travesty of justice to drag the persons to face the prosecution who are no way connected with the issuance of the cheque or its being dishonour thereof.

24. On the basis of above discussion, the summoning of the applicants to face trial under Section 138 of Negotiable Instruments Act is found to be against the

mandate of law laid down by the Apex Court in above mentioned judgments.

25. The summoning order dated 25.11.2016 passed by the Upper Nyayalaya Pratham, Ghaziabad and the judgment dated 22.02.2018 passed by the Additional Session Judge, Court No.15, Ghaziabad in criminal revision are quashed.

26. The application under Section 482 Cr.P.C. is, hereby, **allowed**.

(2023) 5 ILRA 1926
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.04.2023

BEFORE

THE HON'BLE VIVEK KUMAR SINGH, J.

Crl. Misc. Bail Application No. 21849 of 2021

Jai Bajpai @ Jay Kant Bajpai ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:

Sri Deepak Singh, Sri Shiva Kant Dixit, Sri N.I. Jafari (Sr. Advocate)

Counsel for the Respondent:

G.A.

A. Criminal Law – Criminal Procedure Code, 1973 - Section 439 CrPC- Indian Penal Code,1860 - Sections 420, 467, 468, 471 & 120-B - applicant has virtual possession of vehicles used in the offence in question – forged gate pass of Secretariat- St.ments in case diary reveal- applicant helped gangster Vikas Dubey- St.ment of dead man-legal effect under Section 32(3) of the Indian Evidence Act,1872-incident took place in the area notified under Dacoity Act- Section 10 of U.P. dacoity Affected Area Act-conspiracy is integral part of organised crime-offence is heinous in nature-trial expedited- Bail

application rejected. (Paras 24, 25, 26, 33,34, 42, 43 and 45)**HELD:**

Perusal of the above shows that the accused applicant certainly helped Vikas Dubey and always closed his eyes towards the criminal activities of the gang of Vikas Dubey. He, during the incident, maintained distance. In case of such an organized crime where even members of police force were assisting the gangster and his group, it is not possible to have a direct evidence. Moreover, in a case of conspiracy, there is no possibility of direct evidence. The evidence which can be available is only circumstantial in nature and may be in the form of inaction on the part of the accused applicant who, in his endeavour to assist the accused persons, kept himself out from the picture. Therefore, the conclusion of conspiracy is to be drawn from the circumstances of the case and the situation that the applicant being a criminal minded person was indulged in assisting gangster Vikas Dubey and his gang, and all the paper work was done with the assistance of the applicant. (Para 24)

It is clear from the reading of section 32(3) that St.ment of a dead man has been legally recognized and used in evidence even though the same does not relate to the cause of his death. Although, a final view is not required to be expressed at this stage as the same will be considered by the trial court, yet, this much is clear that the St.ment is of a dead man and the same has legal relevance in view of the provision of the Evidence Act. (Para 34)

Crime, corruption and population are three major problems the society is facing at present. While against crime and corruption, particularly when it is organized crime and corruption, strict St. action and intervention is necessary to restrict and minimize the same to maximum extent, control over population growth requires legal steps and strategy inclusive of motivation, spread of education and awareness and some positive incentive to those who opt for family planning. Against crime and corruption, the St. must continue with the policy of zero tolerance. The political parties should rise above board against crime and corruption without being influenced by consideration of "his man" and "our man" as this approach will not only

undermine rule of law but will also damage the democratic set up of the nation. (Para 42)

The pursuit of life, liberty and peace includes freedom from crime. The St.'s foremost duty is to provide these basic rights to each citizen. The success of a Criminal Justice System can only be measured by how successful it is in ensuring these rights in word and spirit. The extent to which these rights are successfully protected, will be reflected in the confidence of the public in the system. The organized crime should be treated differently from traditional individual criminality. Conspiracy is an integral aspect of organized crime. There cannot be a direct evidence of conspiracy in such cases and the law has to deal with organized crime on a footing different from that of individual or conventional crime, as regards admissibility and appreciation of the evidence. (Para 43)

The discussion aforesaid certainly goes to show that the nature of offence and amount of culpability is serious, heinous, shocking and unprecedented. (Para 44)

Bail Application rejected. (E-14)**List of Cases cited:**

1. Dataram Singh Vs St. of U.P. & anr., reported in (2018) 2 SCC 22
2. Vinod Kumar Vs St. of Pun. reported in 2015 (3) SCC 220
3. Hussain & anr. Vs U.O.I.; 2017 (5) SCC 702

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

Written Arguments filed by learned counsel for the respective parties pursuant to order dated 28.3.2023 are taken on record.

1. Heard Sri N.I. Jafri, learned Senior Counsel assisted by Sri Shiv Kant Dixit, learned counsel for the applicant and Sri Abhijeet Mukherjee, Sri D.P.S. Chauhan

and Sri Mithilesh Kumar, learned A.G.A. for the State and perused the record.

2. The present bail application has been filed by the accused-applicant Jay Bajpai @ Jay Kant Bajpai to release him on bail in Case Crime No.238 of 2020, under sections 420, 467, 468, 471, 120-B IPC, Police Station - Kakadev, District - Kanpur Nagar.

3. The first information report of the incident was lodged by the Sub Inspector Ravi Shankar Pandey on 22.7.2020 as Case Crime No.238 of 2020, under Section 420, 467, 468, 471, 120-B I.P.C., Police Station Kakadev, District Kanpur Nagar. The version of the first informant is that the applicant have virtual possession of vehicles used in the offence in question dated 4/5.7.2020 at Village Tikuri, Police Station Chaubepur, District Kanpur Nagar.

4. The statement of the first informant under Section 161 Cr.P.C. was recorded on 24.7.2020 in which he stated that the accused/applicant is the virtual owner of the vehicle used in the offence in question but could not produce any evidence except, oral. The Investigation Officer also noted down the alleged statements of owners of vehicles who have stated that they are the owner of the vehicle in question which were used by the applicant, he further investigated that the entry pass of the Secretariat at Lucknow is forged. The vehicles were allegedly recovered on 5.7.2020 but the first information report was lodged on 22.7.2020 having extraordinary delay of 17 days. Admittedly as per prosecution case the applicant is not the owner of Audi Car, Fortuner Car and Hyundai Car. The Audi Car and Hyundai Verma car belongs to Pramod Kumar Verma and Kapil Singh Chauhan who are

not accused in the present case whereas the Fortuner car belongs to Rahul Singh (who has already been enlarged on bail by the Co-ordinate Bench of this Court vide order dated 1.12.2021 passed in Criminal Misc. Bail Application No.40006 of 2021, a copy of said order has been produced by learned counsel for the applicant, which is taken on record) on which fake entry pass of Secretariat at Lucknow was pasted who is co-accused. However, as per the prosecution version all the above owners voluntarily deposed that the above cars were used by the applicant. It is worth to mention here that neither the applicant is owner of the above vehicles nor he had used the same at any point of time nor the above cars were recovered from the possession of the applicant. All the above vehicles were recovered from the same place and the applicant was not present in the vehicles in question, but police with malicious intention has shown recovery of some forged number plates from the custody of the applicant, despite the facts that applicant was in jail since 20.7.2020 and FIR in the present offence was lodged on 22.7.2020.

5. Submission of the learned counsel for the applicant is that being businessman and having only political rivalry with some local high level politicians, applicant has been roped with the said offence by fabricating false and frivolous documents and witness, nothing is available on the record to show that the alleged entry pass pasted over wind shield of vehicle no. U.P. 78 EW 7070 was prepared by the applicant nor there is any evidence or witness who claimed to be well known that applicant prepared the fake gate pass of secretariat further the vehicle no. U.P. 78 FC 7070 and U.P. 78 FI 9595 do not belong to the applicant at any point of time and statement

made by owner of vehicle that applicant is owner of vehicle is totally false and have no evidentiary value. Further the person who is registered owner of vehicle no. U.P. 78 EW 7070 have liability of alleged sticker which was prepared by police under conspiracy for false and fabricated prosecution of the applicant. The vehicle owner Mr. Kapil Singh and Rahul Vishwakarma has been left on sacrifices of applicant whereas it is crystal clear that despite to right down on writing that though the vehicle were registered in names but same was not used by them has no logical explanation which clearly shows that applicant has falsely been roped in the aforesaid offence.

6. It is stated that investigation is not free, fair and impartial and applicant has been victimized by the illegal act and conduct of the police as the police is acting in rival manner and political pressure of politicians who want to ruin the whole life of applicant only to take revenge of business rivalry. It is self admitted case of prosecution that applicant have no direct role or participation in case crime no.192 of 2020. As stated on proceeding paragraph that as per the prosecution case the applicant is not the owner of Audi car, Fortuner Car and Hundai Verna Car. The Audi car and Hundai Verna Car belong to Pramod Kumar Verma and Kapil Singh Chauhan who are not accused in the present case whereas, the Fortuner car belongs to Rahul Singh on which fake entry pass of Secretariat was pasted who is co-accused in the present case and as per the prosecution version all above owners voluntarily deposed that the above cars were used by the applicant. The aforesaid statement of vehicle owner is not admissible further it is not investigated by the Investigating Officer that who is the beneficiary of fake

gate pass issued by the secretariat. Law is settled that the liability of any offence goes over the owner not user and it is established from the record that the fake gate pass having serial no.828 was affixed on wind shield of U.P. 78 EW 7070 so vehicle of this owner should establish that he was not beneficiary of fake gate pass having serial no.828 which shows that investigation is faulty and has been conducted only for the purpose of accusation of applicant.

7. It is further stated that neither applicant is owner of said vehicles nor any such recovery was made from his pointing out, the entire story setup by the police is absolutely false and concocted on the face of record.

8. It is further stated that neither applicant confessed his guilt nor his complicity has been proved by the police but as applicant is a common man and police having power of the State falsely roped the applicant at behest of politicians.

9. It is further stated that the entire prosecution story is based upon the ownership of the applicant hence release application moved by the owner of vehicle would effectively effect the decision.

10. It is further stated that no evidence is available on record except forced vehicle owner Rahul Singh who alleged that applicant was using Toyota Fortuner further it is very surprising that Investigating Officer without touching Rahul Singh had directly connect the applicant in the present case without any evidence.

11. It is further stated that applicant has specifically explained his criminal antecedent on affidavit in support of bail application, it is totally wrong to allege that

the applicant has any role in case crime no.192 of 2020 neither there is any evidence available on record which may prove the complicity of applicant in the said case. Nothing is available on record to show that the applicant is connected with Vikas Dubey nor there is any evidence to show the complicity of the applicant that he actively directly and physically committed the offence further the investigation is not reliable and not supported with credible evidences, the applicant has no concern with any history sheet.

12. It is further stated that neither applicant was close associate of history sheet Vikas Dubey nor had interacted with him at any point of time nor there is any evidence regarding the averment made in answering paragraph, the evidence collected by the Investigation Officer are created evidence and not sufficient or credible for conviction of applicant.

13. On the contrary, learned A.G.A. has argued that it is not a case of simple crime, the applicant has used forged entry passed of the Secretariat, State of Uttar Pradesh by affixing the same on the vehicle having No.UP78 -EW 7070; this vehicle was used by the applicant to provide the safe passage to the slain dacoit Vikas Dubey who was the author of Bikru Massacre wherein several Police personnel were assaulted by Vikas Dubey and his gang, after which the said Police personnel were mercilessly done to death on the intervening night of 2/3/7.2020. It is pertinent to note that for the said Bikru Massacre the provisions of National Security Act has already been imposed against the applicant on the grounds inter alia prejudicing public order and the NSA was imposed on the applicant from

4.9.2021 to 1.9.2022 and applicant has criminal history of 14 cases.

14. During the course of investigation, in case crime No.192 of 2020, Police Station Chaubeypur, District Kanpur Nagar, it was revealed that Jay Kant Bajpayee was present in the meeting, in which it was planned how to safely escape Vikas Dubey after the Bikru Massacre after killing the police personnel and for the same Jay Kant Bajpayee had provided money and ammunitions alongwith cars to slain gangster Vikas Dubey, this information was provided by Vikas Dubey when he was arrested at Ujjain and during transit his statement was recorded which was subsequently made part of Case Diary, Parcha No.10 dated 17.10.2020 which is statement of Vikas Dubey stating his closeness with Jay Kant Bajpayee and planning for his escape relevant part whereof is reproduced below :-

".....
.....

मैंने अपने नजदीकी घर की औरतों रेखा अम्मीहोत्री, क्षमा पत्नी संजय दुबे उर्फ संजू, खुशी पत्नी अमर दुबे शांति देवी पत्नी रमेश को पुलिस को चोर डकैत कहकर चिल्लाने व गांव वालों को इकट्ठा करने के लिये लगा रखा था। मेरे मामा की बहु मनु पाण्डेय पत्नी सोनू पाण्डेय को भी प्लानिंग की पूरी जानकारी थी तथा फोन से सबको सजग कराने व सूचना देने के लिये मैंने बता रखा था। इसके बाद मैं भागकर शिवली चला गया था। इस दौरान मेरे अति नजदीकी जयकान्त उर्फ जय बाजपेई पुत्र लक्ष्मीकान्त बाजपेई नि० ब्रह्मानगर और प्रशान्त शुक्ला उर्फ डब्बू नि० आर्य नगर कोहना ने गाड़ी व पैसा देकर मेरी मदद की उन्हें भी मेरी प्लानिंग की कुछ कुछ जानकारी थी। जय बाजपेई से मैंने कारतूस भी लिया था। वहां से फिर बचते बचते उज्जैन महाकाल मन्दिर आ गया था। सड़क पर जे०सी०बी० लगाकर जाम करने के लिये मैंने सुल्तान अहमद नि० कस्बा चौबेपुर की जे०सी०बी० जो मेरे यहां करीब डेढ़ माह से काम कर रही थी को रात में करीब 12 बजे अपने

मामा राजाराम उर्फ रामकुमार पाण्डेय को भेजकर ड्राइवर राहुल पाल से मंगवाया था और सड़क पर खड़ी करके सड़क अवरुद्ध करा दिया था ताकि पुलिस एका एक हमारे घर तक ना आ सके।"

15. Further he has drawn the attention of this Court towards C.D. Parcha No.19 of Case Crime No.192 of 2020 which reads as under :-

"ब्यान अभियुक्त जयकान्त बाजपेयी पुत्र स्व० लक्ष्मीकान्त बाजपेयी निवासी 111/478 ब्रह्मा नगर थाना नजीराबाद जनपद कानपुर नगर उम्र करीब 37 वर्ष ने पूछने पर बताया कि हम 05 भाई है मेरे माता पिता का स्वर्गवास हो गया है मेरा मो० नं० 9336249793 है मेरे पास रिवाल्वर का लाइसेन्स है जो मैंने 2008 में लिया था। मेरे पिता जी के हिस्से में 06 बीघा जमीन आती है। पहले मैं टायर पेन्चर की दुकान करता था वर्ष 2013 में मेरी मूलाकात प्रशान्त शुक्ला उर्फ डब्बू के माध्यम विकास दुबे से हो गई थी विकास दुबे ने मुझे कुछ पैसा देकर ब्याज पर पैसे देने काम शुरू करा दिया थाए विकास दुबे को मैं 3 प्रतिशत पर ब्याज देते था तथा लोगों से 10 प्रतिशत का ब्याज लेते था इसके बाद मैंने कमेटी डालनी शुरू कर दी थी जिससे मेरा काम ठीक ठाक चल निकला जिससे मैंने 04 मकान अशोक नगर में खरीदे तथा जिसके अलावा मेरे करीब 56 प्लॉट है जो करीब डेढ़ करोड़ की कीमत से ज्यादा के है उसके बाद मेरा विकास दुबे से लगातार मिलना जुलना रहा हम लोग फोन से भी आपस में बात करते थे परन्तु वाट्सकाल या चैट से ज्यादा बाते करते थे दिनांक 01.07.2020 को विकास दुबे का मेरे पास फोन आया कि कुछ पैसे व कारतूस लेकर मेरे पास आ जाओ मैं दिनांक 02.07.2020 को प्रशान्त शुक्ला उर्फ डब्बू के साथ ग्राम विकरू गया था जहां पर विकास दुबे हमें मिला विकास दुबे ने हमें बताया कि पुलिस मुझे बहुत परेशान कर रही है मुझे पुलिस का काम तमाम करना है तो हमने कहा कि ठीक रहेगा। एक बार पुलिस से भिड़ गये तो फिर हमारी दबंगई पूरे जिले में चलेगी। तो मैंने विकास दुबे को 2 लाख रुपये नगद व 25 कारतूस रिवाल्वर के दिये थे उसी दौरान विकास दुबे ने मुझे व डब्बू को बताया था कि आप दोनों को घटना के बाद जब भी मैं सूचना भेजूंगा अपनी गाड़ी भेजनी होगी ताकि हम सुरक्षित निकल सके मेरे पास एक गाड़ी ऑडी जिसका नम्बर UP 78 FY 9555 जो मैंने प्रमोद कुमार पुत्र कन्हैया लाल विश्वकर्मा निवासी 16/18 न्यू ईदगाह कालोनी थाना नवाबगंज के नाम से निकाली थी तथा दूसरी

गाड़ी फार्चुनर नं UP 78 EW 7070 है जो मैंने राहुल पुत्र इन्द्रपाल नि० 193/243 सकरपुर चक (किसान नगर) थाना सचेण्डी कानपुर नगर के नाम से निकाली थी तथा तीसरी गाड़ी वरना जिसका नम्बर UP 78 FC 7070 है जो मैंने कपिल सिंह चौहान पुत्र चन्द्रभान सिंह नि० 111ए/24 अशोक नगर थाना नजीराबाद के नाम से निकाली थी तीनों गाड़ियों की किशत मैं स्वयं भरता हूँ तथा तीनों मेरे पास ही रहती है। इन गाड़ियों से विकास दुबे अक्सर घटना में जाया करता था घटना के बाद दिनांक 04.07.2020 को डब्बू के माध्यम से मेरे पास सूचना आई थी कि विकास दुबे व उसके साथियों को शिवली से दिल्ली तक छोड़ना है जिसका कारण मैं इन गाड़ियों को अपने ड्राइवर से चलवाकर विकास दुबे के पास ले जा रहा था कि पुलिस की सक्रियता देखकर मैं घबरा गया तथा जल्दबाजी में मैंने तीनों गाड़ियों काकादेव क्षेत्र में विजय नगर चौराहा के पास नम्बर प्लेट पलट करके लगा दी थी ताकी कोई गाड़ियों को पहचान न पाये साहब मुझे इस घटना की पूरी जानकारी थी मैंने इस कार्य में विकास दुबे की मदद की है मुझसे गलती हो गई है।

ब्यान अभियुक्त प्रशान्त शुक्ला उर्फ डब्बू पुत्र श्रीकृष्ण कान्त शुक्ला निवासी 8/119 आर्य नगर थाना कोहना कानपुर नगर उम्र करीब 47 वर्ष ने पूछने पर बताया कि साहब वर्ष 2005 में मेरी शादी ग्राम विकरू में ओम प्रकाश दुबे की पुत्री रंजना दुबे से हुई तभी से मेरी जान पहचान विकास दुबे से हो गई थी क्योंकि विकास दुबे मेरी पत्नी के परिवार का ही है विकास दुबे कई बार जेल गया तो मैंने इसकी मदद की दिनांक 02.07.2020 को वाट्स अप काल द्वारा विकास दुबे ने मुझे बताया कि मुझे पुलिस वालों को ठिकाने लगाना है तुम मेरी मदद करो तथा जयकान्त बाजपेयी को अपने साथ लेकर मेरे गांव आ जाओ तो मैं जयकान्त बाजपेयी को लेकर दिनांक 02.7.2020 को शाम के समय ग्राम विकरू गया था वहां पर जयकान्त बाजपेयी ने विकास दुबे 2 लाख रुपये व 25 कारतूस दिये थे मैंने भी अपने पास से 50 हजार रुपये विकास दुबे को दिये थे ताकि जरूरत पड़ने पर मुकदमा आदि में वकील आदि को देने में काम आ सके, विकास दुबे ने हम बताया था कि पुलिस वालों ने मुझे पकड़ने का प्लान बनाया है परन्तु जैसे ही पुलिस वाले मेरे घर पर आयेगे मैं उनको मौत की नींद सुला दूंगा एक को भी जिंदा नहीं जाने दूंगा तब मैंने कहा था कि ठीक रहेगा हम से जो मदद होगी हम करेंगे तो विकास दुबे ने कहा कि जब मैं खबर भेजूंगा तो जयकान्त बाजपेयी की तीनों गाड़ियां लेकर जहां मैं बताऊंगा वहां आ जाना हमने कहा कि ठीक है हम आ जायेंगे। इसके बाद हम लोग वहां से चले आये थे। अगले दिन सुबह खबर मिली थी कि विकास दुबे ने 8

पुलिस वालों के मौत के घाट उतार दिया है उसके बाद दिनांक 04.07.2020 को मुझे सूचना मिली थी विकास दुबे ने जयकान्त वाजपेयी की गाड़ियां शिवली में मंगाई है तो मैंने जयकान्त बाजपेयी को पूरी बात बताई जयकान्त बाजपेयी गाड़ियां लेकर विकास दुबे व उसके गैंग को लेने जा रहा था कि पुलिस की सक्रियता के चलते वह गाड़ी कानपुर नगर से बाहर नहीं ले जा पाया तथा गाड़ियों को डर के मोरे काकादेव क्षेत्र में छोड़कर चला आया था साहब मुझसे गलती हो गयी जो मैंने विकास दुबे का षड्यन्त्र में साथ दिया।"

16. He has further drawn the attention of this Court toward C.D. Parcha No.107 of Case Crime No.192 of 2020 which is reproduced as under :-

"अभियुक्त विपुल दुबे पुत्र स्व० अतुल दुबे नि० ग्राम बिकरू थाना चौबेपुर जनपद कानपुर नगर उम्र 23 वर्ष पूछने पर बता रहा है विकास दुबे हमारे खानदान के थे

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मीटिंग में तय योजना के अनुसार विकास दुबे ने असलाह कारतूस व बमों की व्यवस्था की व हम सभी लोगों को असलाह कारतूस उपलब्ध कराये गये मैंने विकास दुबे से मिलते हुये व कारतूस असलाह व पैसे देते हुये विकास पण्डित जी के परिचित जयकान्त वाजपेयी, प्रशान्त शुक्ला, अरविन्द त्रिवेदी उर्फ गुड्डन व सुशील तिवारी योजना में शामिल रहे। असलाह व पैसे व कारतूस उपलब्ध कराये तथा भविष्य में भी पुरी सहायता करने का वचन दिया था। अक्सर जयकान्त वाजपेयी, प्रशान्त शुक्ला, अरविन्द त्रिवेदी उर्फ गुड्डन व सुशील तिवारी विकास दुबे के पास आया करते थे तथा यह चारों लोग विकास दुबे के रूपयों को ब्याज पर लोगों को दिया करते थे। इन चारों लोगों की विकास दुबे से बहुत अधिक घनिष्ठता थी। यह चारो लोग उस समय मौजूद नहीं थे जब हम लोगों द्वारा पुलिस वालों पर फायरिंग की जा रही थी।"

17. He has further drawn the attention of this Court toward C.D. Parcha No.8 of Case Crime No.0238 of 2020 relating to the incident of the Car purchased and used by the applicant on the basis of fabricated documents, which is reproduced as under :-

"श्रीमानजी मुकदमा उपरोक्त में पर्चा नं 7 दिनांक 29.07.2020 को किता कर सेवा में प्रेषित किया जा चुका है आज मैं विवेचक पुनः कार्य सरकार से फुर्सत पाकर मसरूफ विवेचना होकर सन्नी मोटर्स प्राईवेट लिमिटेड के सोरूम फुलबाग आया जहां पर सोरूम के मेनेजर पियूष शुक्ला मिले उनके द्वारा वाहन क्रय किये जाने हेतु दिये गये वाहन स्वामी राहुल सिंह का पेन कार्ड नं० CIVPS2090B, आधार कार्ड नं० 428795632093, यूनियन बैंक द्वारा सन्नी मोटर्स प्राईवेट लिमिटेड के नाम जारी बैंक ड्राफ्ट संख्या 47660 तथा बीसी नं. 32447660 जो दिनांक 17.07.17 का 2400000 (चौबीस लाख) का है तथा बैंक ड्राफ्ट संख्या 44766 तथा बीसी नं० 32447661 जो रूपया 547022 रूपये जो सन्नी मोटर्स प्राईवेट लिमिटेड के एकाउण्ट पेयी है तथा सन्नी मोटर्स प्राईवेट लिमिटेड एनएच2 रूमा ई० एरिया के सर्विस सेन्टर द्वारा दि० 09.03.2020 का वाहन सं० यूपी 78 ईडब्लू 7070 फार्चूनर की सर्विस की डिटेल जो कि नामित अभियुक्त जयकान्त बाजपेयी के सगे भाई शोभित बाजपेयी जिसका मो०नं० 8953655574 है। के द्वारा सर्विस कराया जाना प्राप्त कराया गया है। तथा अन्य तारीख को कराये गये सर्विस का कुल 4 वर्क दिये गये तथा उनके द्वारा बताया गया कि उपरोक्त वाहन की सर्विस शोभित बाजपेयी द्वारा ही कराये जाते थे सर्विस सेन्टर पर उसी के मो० नं० सर्विस लेने वाले दिन अंकित है। बाद अवलोकन उपरोक्त प्रपत्र संलग्न सीडी किया जा रहा है। तब पश्चात थाना हाजा आया वहां पर थाना कार्यालय से प्राप्त यूनियन बैंक ऑफ इन्डिया सिविल लाइन ब्रान्च के खाता संख्या 686804010000009 जो कि राहुल सिंह के नाम है जिसके उपरोक्त एकाउण्ट से भी उपरोक्त वाहन फार्चूनर के लिये गये लोन के एकाउण्ट में पैसे ट्रांसफर किये गये है का डिटेल प्राप्त हुआ जिसमें दि. 15.07.2017 को रूपया 200000 नरायन सिंह तथा इसी दिन 200000 रूपये अवधेश सिंह के एकाउण्ट से ट्रांसफर आया है तथा दि० 30.01.2018 को 1000000 अवधेश सिंह तथा दि० 29.01.2018 को कैश 1000000 रूपया जमा किया गया है तथा दि० 31.01.2018 को अनुशका एन्टर प्राईजेज से 55000 रूपये आया है। तथा दि. 29.05.2018 को 7500000 एकाउण्ट नं० 686803030000203 से एफडी का ट्रांसफर आया है। तथा दि० 29.09.2018 श्रेष्ठ बिल्डर प्रा० लि० से 4415500 रूपया उपरोक्त एकाउण्ट में आया है। तथा उसी दिन अनुशका एन्टर प्राईजेस से उपरोक्त 4415500 रूपया ट्रांसफर किया गया है।"

18. He further draws the attention of this Court toward C.D. Parcha No.09 of Case Crime No.0238 of 2020 relating to the delivery of the car was received by present applicant namely Jay Kant Bajpayee, which is reproduced as under :-

"श्रीमानजी मुकदमा उपरोक्त में पर्चा नं० 8 दिनांक 03.08.2020 को किता कर सेवा में प्रेषित किया जा चुका है आज मैं विवेचक पुनः कार्य सरकार से फुर्सत पाकर मसरूफ विवेचना हुआ थाना कार्यालय से आडी कम्पनी से दिनांक 04.08.2020 का नोटिस अन्तर्गत धारा 91 सीआरपीसी का जवाब प्राप्त हुआ जिसके अनुसार रूपया नौ लाख पचास हजार रुपये प्रमोद कुमार विश्वकर्मा के द्वारा नेफ्ट आरटीजीएस आईसीआईसी आर 52019102500679827 कम्पनी को की गयी है। डिलीवरी चालान पर प्रमोद विश्वकर्मा के हस्ताक्षर है वाहन की चाबी जय वाजपेई को दी गयी है। तथा डिलीवरी के बाद दिनांक 15.06.2020 को जय वाजपेयी के भाई शोभित वाजपेयी जिसका मोन० 8953655574 है के द्वारा सर्विस सेंटर पर आडी का सर्विस कराया गया है तथा रूपया 5500/- शोभित वाजपेयी द्वारा क्रेडिट/ डेबिट कार्ड जिसके अन्त में 8407 है से भुगतान किया गया है। वाद अवलोकन उपरोक्त प्रपत्र संलग्न सीडी किया जा रहा है।
..... थाना कार्यालय से वाहन संख्या यूपी 78 एफसी 7070 हुण्डई वर्ना के लोन हेतु लिये गये 883034 रू० एकाउन्ड नम्बर 413908411000150 विजय बैंक ,वर्तमान बैंक आफ बडौदा) अशोक नगर द्वारा भेजा गया स्टेटमेंट क अवलोकन से कपिल सिंह चौहान के दूसरे सेविंग एकाउंट 713901011001187 से उपरोक्त किस्त का रूपया 10460/- रुपये लोन की कटौती होती है। जिसका वाद अवलोकन संलग्न सीडी किया जाता है। विधानसभा सचिवालय उत्तर प्रदेश द्वारा दिनांक 30 जुलाई 2020 का पत्र संख्या 935/वि०स/प०का०/02(प)/20 प्राप्त हुआ जिसे बाद अवलोकन संलग्न सीडी किया जाता है।"

19. He further draws the attention of this Court toward C.D. Parcha No.31 of Case Crime No.0238 of 2020 which statement present applicant namely Jay Kant Bajpayee, who states that he used the vehicle with fabricated documents of

the Secretariat, which is reproduced as under :-

"बयान अभियुक्त जय वाजपेयी उर्फ जयकान्त बाजपेयी पुत्र लक्ष्मी कान्त बाजपेयी नि० 11/478 बहमनगर थाना नजीराबाद जनपद कानपुर नगर अस्थाई पता ग्राम दिलीप नगर थाना शिवली कानपुर देहात उम्र 37 वर्ष ने पूछने बताया कि मैं कुल पांच भाई व दो बहने जिनके नाम क्रमशः 1 अजय कान्त 2 रजय कान्त 3 मैं स्वयं जयकान्त 4 राहुल 5 शोभित तथा बहने 1 मधु 2 नेहा है शोभित के अलावा सभी की शादी हो गयी है। मैं जमीन जायदात व ब्याज पर पैसे देने का कार्य करता हूं लक्ष्मी इलैक्ट्रीक की दुकान मेरी ही है। टोयोटा कम्पनी का फार्च्यूनर जिसका नम्बर यूपी 78 ई डब्लू 7070 है पर विधायक विधानसभा सचिवालय का कूटरचित पास प्रयोग किये जाने के सम्बन्ध में पूछा गया तो उसने और कहा कि अब हमसे जो गलती हो गयी सो हो गयी और अपनी गलती की माफी मांगते हुये इधर उधर की बातें करने लगा। उपरोक्त विधानसभा पास के विषय में पूछा गया तो उसने बताया कि मैं व राहुल सिंह लखनऊ में विधानसभा के पास गये थे वहां पर हम लोगो ने विधानसभा पास स्कैन कर लिया था स्कैन करने के बाद मैं विधानसभा पास हूबहू बनाकर उस पर फार्च्यूनर का नम्बर लिख दिया था। जिससे कही आने जाने पर रोका टोकी न हो व बैरियर आदि से बिना रोक टोक के आ जा सके व पैसा भी न देना पड़े।....."

20. He has again drawn the attention of this Court toward C.D. Parcha No.36 of Case Crime No.0238 of 2020 which shows that the recovery made on the pointing out of Jay Kant Bajpayee of 10 fabricated number plates of the cars amongst recovery, which is reproduced as under :-

"श्रीमान जी मुकदमा उपरोक्त में पर्चा नं० 35 दिनांक 29.10.2020 को किता कर सेवा में प्रेषित किया जा चुका है आज मैं विवेचक पुनः कार्य सरकार से फुर्सत पाकर मसरूफ विवेचना होकर माननीय न्याया० सीएमएम कानपुर के आदेश से अभि० जयकान्त वाजपेयी की पुलिस कस्टडी हेतु जिला जेल माती आया नियमानुसार समय 08.35 बजे अपनी कस्टडी में लेकर थाना हाजा उपस्थित आया व पूछताछ के बाद वउम्मीद बरामदगी थाना हाजा से रपट नं० 23 समय 9.40 बजे प्रस्थान कर विजय नगर रोशनी चरमे के सामने दूसरी पट्टी माहसेठ किराना स्टोर के सामने आया जहां पर पीसीआर बन्दी उपरोक्त ने गाडी रोकने का

इशारा किया तो टाटा सूमो सरकारी रोकी गयी। पीसीआर बन्दी उपरोक्त को हमराह गण की निगरान में नीचे उतारा गया। मौके पर जनता के काफी लोग आ गये जिन्हें मकसद बताकर उनके कर्तव्यों का बोध कराते हुये गवाही को कहा गया तो विनोद मिश्रा पुत्र स्व० रामदुलारे नि० 203/8 विजय नगर काकादेव कानपुर नगर तैयार हैं। हम पुलिस वालों ने आपस में एक दूसरे व गवाह की जामा तलाशी ले देकर विश्वास किया कि किसी के भी पास बरामदगी से सम्बन्धित कोई वस्तु नहीं है। पीसीआर बन्दी उपरोक्त आगे आगे चलकर डिवाइडर के अन्दर ग्रीन बेल्ट पर मौजूद झाड़ियों के अन्दर जहां पर कूड़ा पड़ा है। को हटाकर एक काले रंग की प्लास्टिक की पन्नी निकालकर जिनके अन्दर रखी कुल 10 अदद कूटरचित नम्बर प्लेट जिनमे से एक पर कोई नम्बर नहीं है। तथा कुछ पर फर्जी व कूटरचित नम्बर जो कि पूर्व से दाखिल गाड़ियों के नहीं है। निकालकर देते हुए बताया कि साहब गाड़ी खड़ी करने के बाद पुलिस के डर से छिपा दिया था इसमें फार्चुनर और आडी के नम्बर है बाकी सभी पर कूटरचित फर्जी नम्बर अंकित है। को मुझ विवेचक व हमराहीगण तथा गवाह को दिखाया गया तो बरामद नम्बर फोटो का विवरण निम्नवत है। 1. वाहन संख्या यूपी 78 ईडब्लू 7070 जिसके पीछे फार्चुनर लिखा है। 2 अदद 2. वाहन संख्या यूपी एफवाई 9555 जिसके पीछे आडी ए3 लिखा है 1 अदद तथा 3. बिना नम्बर की प्लेट जिसके पीछे आडी ए3 लिखा है। 1 अदद तथा कूटरचित प्लेट 4. वाहन संख्या यूपी 78 डीवाई 1188 सफेद रंग 2 अदद 5. वाहन संख्या यूपी 32 एफटी 1444 सफेद रंग की 2 अदद 6. वाहन संख्या यूपी 32 एफक्यू 1632 सफेद रंग 1 अदद तथा 7. वाहन संख्या यूपी 3 एफक्यू 632 सफेद रंग जिसके दो अंक मिटाये गये है 1 अदद उपरोक्त सभी नम्बर प्लेटों की लम्बाई 2 बालिस्ट 3 अंगुल तथा चौड़ाई 7 अंगुल है। पीसीआर बन्दी द्वारा बरामद कराये गये सभी नम्बर प्लेटों को उसी काली पन्नी में रखकर सफेद कपड़ा में सील सर्व मोहर कर नमूना मोहर तैयार किया गया। दौरान कार्यवाही व बरामदगी सर्वोच्च न्यायालय व मानवाधिकार आयोग के आदेश निर्देशों का अनुपालन किया गया फर्द बरामदगी मौके पर लिखकर पढकर सुनाई सर्व सम्बन्धित व गवाहि के अलामात बनवाये गये। उपरोक्त नम्बर प्लेट समय करीब सुबह 10.00 बजे कबजा पुलिस में लिया गया। तत्पश्चात अभियुक्त को थाने के लाकप में नियमानुसार लेकर बाद मेडीकल मा० न्यायालय उपस्थित आया अभियुक्त की आज न्याययिक अभिरक्षा रिमाण्ड की भी तिथि है मुकदमा उपरोक्त में साक्ष्य संकलन हुआ अन्य अभियुक्त की गिरफ्तारी शेष है। अतः मा० न्यायालय से अनुरोध है कि अभियुक्त का 14 दिवश का न्यायिक अभिरक्षा रिमाण्ड प्रदान करने की कृपा करें।"

21. He further draws the attention of this Court toward C.D. Parcha No.46 of Case Crime No.0238 of 2020 which is the statement of independent witnesses stating therein that he saw the applicant using the Fortuner car on which entry pass of Secretariat was pasted, which is reproduced as under :-

"बयान गवाह हे० का० 934 फूलन सिंह पाल थाना काकादेव कानपुर नगर ने पूछने पर बताया कि मेरी दिनांक 04/5 जुलाई 2020 को रात्रि अधिकारी की हमराह डियूटी थी को सुबह लगभग 07.55 बजे डायल 112 की सूचना पर हम सभी लोग विजय नगर तिराहा पर स्टार हाऊस के सामने पहुंचा तो वहां पर श्रीमती ऊषा जुनेजा व उनके पति विनय जुनेजा मौजूद थे। काले रंग की तीन बिना नम्बर की वाहन क्रमशः हुण्डई वरना, आडी तथा टोयटा की फार्चुनर खड़ी थी। फार्चुनर पर विधानसभा सचिवालय लखनऊ का पास लगा था। कुछ देर बाद चौकी प्रभारी शास्त्रीनगर मय हमराह भी मौके पर आ गये। उसके बाद हम सब वापस थाना हाजा आ गया। इस प्रकार बयान दिये।

बयान गवाह का० 1613 सुभाष चन्द थाना काकादेव कानपुर नगर ने पूछने पर बताया कि मेरी दिनांक 04/5 जुलाई 2020 को सरकारी वाहन चलाने की डियूटी थी तो सुबह लगभग 07.55 बजे डायल 112 की सूचना पर हम सभी लोग विजय नगर तिराहा पर स्टार हाऊस के सामने पहुंचा तो वहां पर श्रीमती ऊषा जुनेजा व उनके पति विनय जुनेजा मौजूद थे। काले रंग की तीन बिना नम्बर की वाहन क्रमशः हुण्डई वरना, आडी तथा टोयटा की फार्चुनर खड़ी थी। फार्चुनर पर विधानसभा सचिवालय लखनऊ का पास लगा था। कुछ देर बाद चौकी प्रभारी शास्त्रीनगर मय हमराह भी मौके पर आ गये। उसके बाद हम सब वापस थाना हाजा आ गया। इस प्रकार बयान दिये।"

22. He further draws the attention of this Court toward C.D. Parcha No.50 of Case Crime No.0238 of 2020 which is the statement of the Samiksha Adhikari, Vidhansabha Sachivalaya, which is reproduced as under :-

बयान गवाह श्री आशीष सोनकर समीक्षा अधिकारी विधान सभा सचिवालय उ० प्र० लखनऊ पटल कार्यालय ने

पूछने पर उपरोक्त वाहन की पास की जांच पत्रांक सं० 932/वि०सध०का०/02(प)/20 दि० 22.07.2020 को जारी श्री बृजभूषण दुबे विशेष सचिव विधानसभा सचिवालय उ०प्र० पटल कार्यालय लखनऊ द्वारा हस्ताक्षर कर जारी किया गया है। जिसकी मूल प्रति मैंने आपको प्राप्त करा दी है। उपरोक्त वाहन के सम्बन्ध में विधान सभा सचिवालय से कोई पास जारी नहीं किया गया था।

23. He further draws the attention of this Court toward C.D. Parcha No.63 of Case Crime No.0238 of 2020 which is the statement of the Rahul Singh, who states that he had nothing to do with the car in question and also that Jay Kant Bajpayee had purchased the car in question and using the same, which is reproduced as under :-

"बयान अभियुक्त: राहुल सिंह उर्फ डिपी पुत्र इंदपाल सिंह निवासी 19/246 चकरपुर थाना सचेडी जनपद कानपुर नगर हाल पता शिव धाम अपार्टमेंट फ्लैट नंबर 203 थाना पनकी कानपुर नगर उम्र लगभग 46 वर्ष ने पूछने पर बताया कि मैं तीन भाई और बहन हूं सबसे बड़ा मैं हूं तथा मैं एक स्कूल सचेन्दी में चलाता हूं तथा प्रपटी तथा चिटफंड का व्यापार भी करता हूं मेरे परिचित आलोक शुक्ला जो मेरे साथ प्रपटी का व्यापार करते हैं तथा पनकी में रहते हैं उन्होंने ही मुझे जयकान्त बाजपेई से मिलाया था तथा बताया था कि जय कान्त बाजपेई को दे दिया जयकांत मेरा साला है तथा ब्याज पर पैसा चलाता है इसके पास बहुत पैसे हैं जो हम लोगो के काम आया तथा यह गाडी लेना चाहता है तो मैंने अपने नाम पर गाडी 2017 में लेकर जयकांत बाजपेई को दे दिया जय कांत ने स्वयं शोरूम में जाकर गाडी रिसीव की थी जय कांत कभी कभी मुझसे मिलता था जो गाडी पर विधान सभा सचिवालय की कूट रचित पास थी वह पास जय कांत बाजपेई ने बनवाया था गाडी किस्त पर थी किस्त का पैसा मेरे यूनियन बैंक अकाउंट से कटता था दिनांक 05/07/2020 को जब जय कांत बाजपेई की 3 गाडिया विजयनर राहुल स्वीट के पास से काकादेव पुलिस लेकर थाने पर गई थी और पंजीकृत गाडा मालिक को पूछताछ के लिए बुला रही थी तो मुझे मालूम था कि मेरे नामन की फर्च्यूर गाडी पर कूट रचित फर्जी पास लगा है इसलिए पुलिस मुझे गिरफ्तार करते जेल भेज ना दे मैं थाने पर नहीं आया था और पुलिस से बचने के लिए लुक छिप कर स्थान बदल बदल कर रह रहा था जब पुलिस मेरे घर पर जाकर डगडुगी आदि बजाई तथा मेरे पिता से पूरे घर की कुर्की करने की बात कही तब मैं न्यायालय में आकर हाजिर हो गया कूट रचित पास कहा

से बना जब यह पूछा गया तो राहुल सिंह चुप रहा और बोला कि मुझे नहीं मालूम पास जय कांत ने ही बनवाया था और कहा था इसका बहुत लाभ है और हम लोगो का भावकाल भी रहेगा साहब मुझसे गलती हो गई मैं पैसे के लालच में आ गया था मुझे माफ कर दीजिए इस प्रकार बयान दिया। अभियुक्त का बयान लेने के बाद अस्थाई जेल चौबेपुर के जीडी नम्बर 44 समय 19.15 बजे नियमानुसार रवानगी दर्ज कराया गया।"

24. Perusal of the above shows that the accused applicant certainly helped Vikas Dubey and always closed his eyes towards the criminal activities of the gang of Vikas Dubey. He, during the incident, maintained distance. In case of such an organized crime where even members of police force were assisting the gangster and his group, it is not possible to have a direct evidence. Moreover, in a case of conspiracy, there is no possibility of direct evidence. The evidence which can be available is only circumstantial in nature and may be in the form of inaction on the part of the accused applicant who, in his endeavour to assist the accused persons, kept himself out from the picture. Therefore, the conclusion of conspiracy is to be drawn from the circumstances of the case and the situation that the applicant being a criminal minded person was indulged in assisting gangster Vikas Dubey and his gang, and all the paper work was done with the assistance of the applicant.

25. Moreover, it has been also pointed out on behalf of the State that, on being arrested, gangster Vikas Dubey gave statement to the Investigating Officer revealing that the accused applicant use to assist gangster Vikas Dubey by providing him money and ammunition. The gangster is dead and his statement given to police is legally admissible as the same is statement of a dead man. Therefore, it has been submitted that taking into consideration over all circumstances, the culpability is

writ large and the accused applicants do not deserve to be released on bail.

26. This case raises certain serious questions which relate to administration of criminal justice system in the country with reference to organized crime and criminals and the role and efficiency of police force in combating the problem. The police force is one of the most important force with great potential, easily approachable to the people facing criminal wrong and law and order problem and the most visible component of the criminal justice system. Like other departments, there has been a general fall and deterioration in the standard of functioning of the police force also. With time, it has been seen that the police force, not as a whole, but in small groups, has gone through a phase of moral and professional deterioration. There are black sheep also in the police force and they reflect upon the whole department which has led to growing concern, and a number of attempts have been made to mend this situation. In this direction, the past few years have been particularly eventful, with a number of positive developments having taken place towards a solution of the problem and the State appears to have observed zero tolerance policy towards organized crime and criminals. Strict and rigorous steps have been taken to break and demolish financial network of gangsters. In future, this shall certainly bring about more and more positive results towards restricting criminal activities and organized crime.

27. Organized crime is not confined to a single state, or any one country and has become an international problem in view of their wide spread network and sometimes they have been also found to be a natural ally of terrorist groups. Organized

crime is an act of threat involving murder, kidnapping, gambling, arson, robbery, burglary, extortion or dealing in narcotics or dangerous drugs and other crime. The basic features of organized crime involves a group of individuals that is structured, sophisticated and widely spread across nations; it is a section of society that seeks to operate outside control of the people and government and it is a self-perpetuating, continuing criminal conspiracy for profit and power, using fear and corruption and seeking protection from law. The focus areas of organized crime are smuggling, drug trafficking, women and child trafficking, arms trade, hawala, circulation of fake currency, extortion and contract killing. With financial solidarity, these criminals have entered into business of film financing, hotel business, house building, government contracts and the like. The gangsters are divided into three categories, namely, sharp shooters, money collectors and liaison agents. The liaison agents deal with lawyers and law enforcement officials to resolve legal problems and to ensure easy bail to gangsters.

28. The police force faces some real difficulty in combating with organized crime and criminal activities. The police personnels are mostly not provided with that kind of sophisticated arms which are available in plenty to the gangsters and their gang members. The police stations are mostly under-manned and the strength of police force is remarkably less in comparison to the population. The police has to act in accordance with legal norms and while acting so, they are required to avoid any excesses and human rights violation. They have to behave like a disciplined force actuated to uphold rule of law and motivated by sense of public security and service. The force also face the

problem of some police personnels who may be close and in collusion with the local mafia. They can leak the confidential informations and strategy of police for taking action and conducting raid to arrest the gangsters. On the contrary, the organized criminals keep with them all kinds of sophisticated weapons, they use the same indiscriminately and they can cause any amount of damage to the human life and property. Where they are having support from some members of police force, their potential to execute criminal act is adequately enhanced.

29. The problems of police force has been time and again highlighted by several Law Commissions appointed for making recommendations for police reforms and needless to point out that several recommendations have been suggested from time to time. The police in the country faces tremendous challenges and works under extreme pressure due to a number of reasons such as growing unemployment, deterioration in educational environments, conflicting claims of socio-economic components, fluctuations in political order, rampant corruption etc. Frequent transfers to unfavorable positions or locations have demoralizing effects on the police force and it becomes a survival technique for police to have close relationship with one or other political person.

30. The purpose of the above discussion is to show the prevalent conditions in which the police has to perform the complicated and difficult job of ensuring law and order, maintaining security and peace, preventing crime and taking action against and causing arrest of offenders. These all require home work and team work and if any member of police force starts giving clues about and leak the

police strategy, the strategies are bound to fail and shall certainly result sometimes, particularly when police is confronting against organized crime and criminals, in disastrous situation as has resulted in this case. In such situation, policing such police personnels is a big task and it requires early identification of such black sheep, monitoring of their conduct, isolating them and taking immediate strict disciplinary action against them.

31. Now coming to the facts of this case. The accusation against the accused-applicant is that he had close friendly relationship with the gangster Vikas Dubey who used forged entry passed of the Secretariat, State of Uttar Pradesh by affixing the same on the vehicle having No.UP78-EW7070; this vehicle was used by the applicant to provide the safe passage to the slain dacoit Vikas Dubey who was the author of Bikru Massacre.

32. Submission, in this respect, from the side of accused-applicant is that the statement of Vikas Dubey is not relevant against accused-applicant.

33. From the side of State, it has been contended that the statement of Vikas Dubey is statement of a dead man and it has legal effect under section 32(3) of the Indian Evidence Act and therefore, the statement can be well considered against the applicant. Section 32(3) provides as follows:

"32 Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant. -- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose

attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:--(3) or against interest of maker. --When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages."

34. It is clear from the reading of section 32(3) that statement of a dead man has been legally recognized and used in evidence even though the same does not relate to the cause of his death. Although, a final view is not required to be expressed at this stage as the same will be considered by the trial court, yet, this much is clear that the statement is of a dead man and the same has legal relevance in view of the provision of the Evidence Act.

35. C.D. Parchas has been drawn to the attention of the Court to show the relationship of accused-applicants with the gangster.

36. From the side of the State it has been also pointed out that the incident took place in the notified area under the UP Dacoity Affected Area Act and due attention is required to be given to the law provided under section 10 of the Act. The relevant part of Section 10 is as below:

"10. Special provisions regarding bail. - Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused or convicted of a scheduled offence shall, if in custody, be released on bail or on his own bond, unless-

(a) the prosecution has been given an opportunity to oppose the application for bail, and

(b) where the prosecution opposes the application for bail, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence:....."

37. Submission is that after investigation, finding sufficient evidence, charge-sheet has been already submitted by police and at this stage there is no reason to believe that the accused - applicant is innocent.

38. From the side of accused-applicant, it has been pointed out that the allegations have been made by the witnesses mostly in the last part of their statements and a reading thereof shows that the words and expressions used are same and similar which is not possible if statements have been given by the witnesses individually and separately. This contention appears to have no weight as it has been rightly pointed out on behalf of the State that all the statements are part of CD and a view at this stage has to be taken after due consideration to all the material on record.

39. It has been also argued from the side of accused-applicant that investigation has been completed and charge-sheet has been already filed in this matter. The applicants are in jail from the last more than two years. Their pretrial detention for such a long period is resulting in deprivation of their right to liberty and freedom. The learned Senior counsel for applicant and larger mandate of the Article 21 of the Constitution of India, the dictum of Apex Court in the case of **Dataram Singh v. State of U.P. and another, reported in (2018) 2 SCC 22 .** Therefore, it has been requested that, taking into consideration overall circumstances and the

long period to which applicant is in jail, the court should take sympathetic view and the applicant should be released on bail.

40. This court is not oblivious about the fact that the release on bail is crucial to the accused as the consequences of pretrial detention are grave. If release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt, he would be subjected to the psychological and physical deprivations of jail life. The jailed accused loses his job and is prevented from contributing effectively to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family. But, if the accused is involved in a conspiracy for commission of a heinous offence by a hardened criminal, his release on bail will give him an opportunity to abscond or temper with witnesses. Against such crime, social reaction is also sharp. Therefore, a balance between the need for protection of individual liberty which is so important and the requirements of the society for being shielded from the hazards of being exposed to the misadventures of organized crime has to be maintained.

41. The criminal justice system is often criticized for its pro-active approach towards the accused. The rights of the accused are protected not only during trial but also during investigation and even after the delivery of judgment, more particularly when the case has resulted in conviction. The accused cannot be kept in police custody unless with the order of Magistrate and that too is possible only within first fifteen days of his arrest. The bail provisions are liberal and for arresting the accused there must be prima facie evidence

collected by the Investigation Officer. He can also be released on anticipatory bail. The accused cannot be put to cruel or inhuman treatment at any stage. There is a strong presumption of innocence in favor of accused and consequently, it creates a heavy burden on prosecution to establish the guilt beyond any shadow of reasonable doubt. The accused has been given constitutional protection against self incrimination and he has right to keep silence throughout and his silence will not be taken adversely against him. Moreover, he enjoys all the rights associated with his fair trial claim including free legal aid and impartial justice delivery. Thus, protection of rights of accused is natural feature of democracy which is accorded for the simple reason that the criminal law machinery is controlled by the State.

42. Crime, corruption and population are three major problems the society is facing at present. While against crime and corruption, particularly when it is organized crime and corruption, strict state action and intervention is necessary to restrict and minimize the same to maximum extent, control over population growth requires legal steps and strategy inclusive of motivation, spread of education and awareness and some positive incentive to those who opt for family planning. Against crime and corruption, the State must continue with the policy of zero tolerance. The political parties should rise above board against crime and corruption without being influenced by consideration of "his man" and "our man" as this approach will not only undermine rule of law but will also damage the democratic set up of the nation.

43. The pursuit of life, liberty and peace includes freedom from crime. The

State's foremost duty is to provide these basic rights to each citizen. The success of a Criminal Justice System can only be measured by how successful it is in ensuring these rights in word and spirit. The extent to which these rights are successfully protected, will be reflected in the confidence of the public in the system. The organized crime should be treated differently from traditional individual criminality. Conspiracy is an integral aspect of organized crime. There cannot be a direct evidence of conspiracy in such cases and the law has to deal with organized crime on a footing different from that of individual or conventional crime, as regards admissibility and appreciation of the evidence.

44. The discussion aforesaid certainly goes to show that the nature of offence and amount of culpability is serious, heinous, shocking and unprecedented.

45. In view of the above discussion, the serious and heinous nature of the offence, complicity of the accused-applicant in the conspiracy and taking into consideration overall circumstances of the case, I do not find any reason sufficient to allow the bail application. Hence, the bail application of accused-applicant Jay Bajpai @ Jay Kant Bajpai is hereby, **rejected**.

46. However, it is directed that the trial of the aforesaid case pending before the concerned court below be concluded expeditiously, preferably within one year in accordance with Section 309 Cr.P.C. and in view of principle as has been laid down in the recent judgment of Hon'ble Apex Court in the case of Vinod Kumar v. State of Punjab reported in 2015 (3) SCC 220 and Hussain and Another v. Union of India;

2017 (5) SCC 702, if there is no legal impediment.

47. It is also made clear that no observation of this Court in this order will have any binding effect on the trial court and the case shall be decided on the basis of evidence adduced during trial.

(2023) 5 ILRA 1940
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2019

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-C No. 62905 of 2014
 Connected with other cases

M/s Vishwaleela Steel Tube Industries,
Ghaziabad **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Mayank Agarwal

Counsel for the Respondents:
 C.S.C.

Civil Law – Deficiency of stamp duty as well as penalty and also interest @ 1.5% per annum- Indian Stamp Act, 1899 - Section 47-A - as applicable in the St. of U.P.-grievance of the petitioners-denial of benefit of GOS granting exemption from payment of stamp duty- special statute-effective alternative remedy under Section 56 (1) A of the Indian Stamp Act-both the principles of natural justice and questions of law can be considered-petitioners relegated to alternative remedy of appeal—Petition disposed of. (Paras 10, 18, 19, 26, 29, 31, 33, 34 and 35)

HELD:

Thus, the remedy of appeal in the stamp cases under the Indian Stamp Act, 1899 not only takes full care of the appellate authority deciding the matter in consonance with the principles of natural justice but also empowers the authority to stay the amount of recovery subject to deposit of 1/3rd amount directed to be recovered. The provision as is worded under the Section and gives power to the appellate authority clearly spells out the intendment of the legislature that remedy of appeal is a substantive remedy provided under the Act against the order passed by the Chief Controlling Revenue Authority and any factual and legal error is liable to be cured / remedied in appeal by the appellate authority. (Para 18)

Thus, the argument if any, with regard to non-availability of efficacious remedy is certainly misplaced and further the argument that since a question of law is involved such a remedy can be bypassed, in my considered opinion, that is neither the intendment of the legislature nor, the propriety demands for this Court to entertain a writ petition in a routine manner only because a question of law is involved. The forum of appeal is not only in respect of the factual dispute but is also an appropriate and competent forum to deal with legal issues involved in a case. The law as has emerged through authorities of Apex Court and this Court till now, is that there is no absolute rule for the High Court to either refused to entertain a petition under Article 226 of the Constitution of India or necessarily entertain a petition and decide the same in spite of there being a statutory remedy of appeal. It is all a self imposed limitation with which the High Court has clothed itself and except for exceptional cases a litigant should as a rule be asked to first pursue the alternative remedy, especially the statutory appeal. So the general rule is that one should first exhaust available alternative statutory remedy before approaching the high court under Article 226 of the Constitution of India. The Apex Court has drawn exception to this general rule in certain cases from time to time. (Para 19)

Thus, from the above decisions, I do not find that the principles laid down in the judgment of the Constitution Bench of Apex Court and in subsequent judgments, referred to above, have

not been in any manner diluted and, therefore, the said judgment still holds the field. It is worth mentioning that neither in the case of Dr. Bal Krishna Agrawal nor, in the case of Dhani Ram, cited by learned counsel for the petitioner, the said judgment was even referred to. (Para 26)

The issue in the present case relates to the definition of allottee to avail the benefit of exemption from Stamp duty in the cases of industrial leases and once the authority acting under Section 47-A had decided the matter against the petitioner, he could have preferred the appeal easily to raise his grievance and could have equally obtained stay order by merely depositing 1/3rd of the disputed amount. In the legislation governing the field of taxes, the Court should honour the spirit behind the fiscal measures taken and a decision is arrived at after due adjudication, unless there are cases of infringement of fundamental rights which are guaranteed under the Constitution and the Constitutional Courts are guardian to protect such rights. The disputed questions involving adjudication on the issue arising out of such measures adopted and availing benefits thereunder, should always be left open for the forum created under such statute to adjudicate upon. (Para 33)

Petition disposed of. (E-14)

List of Cases cited:

1. Dhani Ram Vs Chief Engineer & ors. (2013) 6 AWC 5705
2. Dr. Bal Krishna Agrawal Vs St. of U.P. & ors. (1995) 1 SCC 614
3. Surya Dev Rai Vs Ram Chander Rai & ors.(2003) 6 SCC 675
4. Government of Andhra Pradesh & ors.Vs P. Laxmi Devi (Smt) (2008) 4 SCC 720
5. Cicily Kallarackal Vs Vehicle Factory (2012) 8 SCC 524
6. Union of India & ors.Vs M/s. Cottage Arts Emporium & ors.1991 Supp (2) SCC 723
7. Thansingh Nathmal & ors. Vs Superintendent of Taxes, Dhubri & ors. AIR 1964 SC 1419

8. M. Naina Mohammed Vs K.A. Natarajan & ors.(1975) 2 SCC 352

9. Ghan Shyam Das Gupta & anr. Vs Anant Kumar Sinha & ors. (1991) 4 SCC 379

10. St. of U.P. & anr.Vs Labh Chand (1993) 2 SCC 495

11. Union of India & ors.Vs M/s. Cottage Arts Emporium & Ors, 1991 Supp (2) SCC 723

12. Cicily Kallarackal Vs Vehicle Factory (2012) 8 SCC 524

13. Mohd. Swalleh Vs Addl. District Judge, Meerut (1988) 1 SCC 40 : AIR 1980 SC 94

14. Himmatlal Harilal Mehta Vs St. of M. P. & ors.AIR 1954 SC 403

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

1. Heard Sri Mayank Agrawal, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. In this bunch of writ petitions, the petitioners of the respective writ petitions are aggrieved against the order passed by the Assistant Commissioner (Stamp), Ghaziabad in purported exercise of power under Section 47-A of the Indian Stamp Act as applicable in the State of Uttar Pradesh, whereby, deficiency has been imposed along with penalty and also interest @ 1.5% per annum and that has been directed to be recovered. The deficiency and the penalty vary in these writ petitions but in every case it is more than Rs. 10 lacs as deficiency in stamp Rs. 50,000/- as penalty.

3. The grievance raised by the petitioners is that they have been illegally denied the benefit of Government Orders/ Notifications dated 12.06.2009, 26.10.2009

and 30.09.2010, whereunder, exemption has been prayed for from payment of stamp duty on the amount of duty chargeable on the consideration as set forth in each such instrument of lease. The petitioners are lease holders and second transferee from the original allottees and by the U.P. State Industrial Development Corporation Limited as well.

4. While the writ petition was entertained by the order of the high court dated 24.11.2014 in spite of the fact that the petitioner had not availed of statutory remedy of appeal under Section 56-A of the Indian Stamp Act as applicable in the State of U.P., the Court did not admit the petition but ***entertained it subject to the directions that petitioner shall deposit the entire amount of deficient stamp duty within four weeks from the date the order was passed by the Court i.e. 24.11.2014 and 26.11.2014 in respectively petitions.*** Orders passed on two different dates are identical. The order dated 24.11.2014 is reproduced hereunder:

"Three weeks' time is granted to the respondents to file counter affidavit. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List thereafter.

The petitioner has approached this Court challenging the order dated 27.09.2014 passed by the respondent no. 2, Assistant Commissioner (Stamp), District Ghaziabad in Stamp Case No. 40 of 2013-14.

The petitioner has not approached the Chief Controlling Revenue Authority under Section 56 of the Indian Stamp Act and the notifications relied upon

have been wrongly interpreted and the case is covered under the notification. There is no disputed question of fact.

In support of his submission, learned counsel for the petitioner has relied upon Government of Andhra Pradesh and another Versus P. Laxmi Devi, 2008(4) SCC 720 and judgment dated 21.02.2014 passed in Writ Petition No. 17213 of 2013, Krishna Pal Verma Versus State of U.P. and others.

Submission requires consideration.

Subject to the petitioner depositing entire amount of the deficient stamp duty within four weeks from today, the effect and operation of the impugned order dated 27.09.2014 passed by the respondent no. 2, Assistant Commissioner (Stamp), District Ghaziabad in Stamp Case No. 40 of 2013-14, shall remain stayed till the next date of listing. Any amount already deposited by the petitioner towards deficient stamp duty shall be adjusted.

It is made clear that in case of default, the interim order shall automatically stand vacated."

(Emphasis supplied)

5. Nothing transpires from the record that the aforesaid order of this Court dated 24.11.2014 was ever complied with and instead, a Misc. Application was moved on 10.12.2014 bearing no. 408394 of 2014 wherein the following prayer was made:

"It is, therefore, most humbly prayed that this Hon'ble Court may very kindly be pleased direct the registry to list the matter/ aforesaid/ instant writ petition

on a particular date so that applying the doctrine of non-traverse, the writ may be heard on merits and the petitioner may not be tormented by the condition of pre-deposit as per the interim order dated 24.12.14 and / or pass such other and further orders as this Hon'ble Court may deem fit in the facts and circumstances of the case."

6. This above application dated 10.12.2014 was directed to be listed with previous papers at an early date by this Court vide order dated 12.12.2014. Thereafter, the matter was listed on 12.01.2015 directing the State to file counter affidavit to the writ petition and the interim order was extended and then on 09.02.2016 petitioner was granted three weeks' time to file rejoinder affidavit and the matter was directed to be listed on 02.03.2016 and further interim order was extended till then.

7. On 24.05.2019 this Bunch of writ petitions was listed along with leading case bearing Writ Petition No. 62910 of 2014. In leading case on preliminary objection being raised by the learned Standing Counsel regarding availability of efficacious alternative remedy of appeal, the learned counsel for the petitioner who had instruction in the said case, did not dispute the same and conceded to the argument and accordingly this Court proceeded to pass the following order and this bunch of writ petitions was segregated on the request of learned counsel for the petitioner and directed to be listed on 27.05.2019 passing separate order in the present writ petition no. 62905 of 2014. The order passed in Writ - C no. 62910 of 2014 is reproduced hereunder:

"Sri Mayank Agrawal, learned counsel for the petitioner states that he has no instruction in the matter.

Heard Sri Sumit Daga, learned counsel for the petitioner.

This writ petition is directed against the order dated 27.09.2014 under Section 47-A of the Indian Stamp Act.

Learned Standing Counsel has raised preliminary objection that there is an efficacious remedy of appeal provided under Section 56 of the Indian Stamp Act and the petitioner having approached this Court directly in spite of availability of statutory remedy of appeal, he should be relegated to the remedy of appeal only.

To the above preliminary objection in the present case, learned counsel for the petitioner does not dispute.

In view of the above, the writ petition at this stage is not entertained on the ground of efficacious alternative remedy available under the Indian Stamp Act against the order impugned dated 27.09.2014.

It is made clear that since the writ petition is pending since long over here, in case if the appeal is preferred within a period of four weeks from today, the same shall be considered and decided on merits of the case as expeditiously as possible preferably within a period of three months from the date of presentation of appeal along with the certified copy of this order before it.

The writ petition thus stands disposed of."

8. The order sheet in all the connected matters, herein this bunch, contains similar directions of counter and rejoinder affidavits and at no point of time the misc.

application filed by the petitioner for granting exemption from deposit of the deficient stamp duty, was allowed.

9. Thus, the petitioner having not complied with the directions dated 24.11.2014, the interim order dated 24.11.2014 has stood vacated in terms of the operative portion of the order dated 24.11.2014 quoted herein above.

10. The remedy under Article 226 of the Constitution is equitable remedy. One who knocks the door for this extraordinary relief bypassing statutory remedy, must show his bonafides in the first instance, and then must demonstrate that the remedy of statutory appeal provided under the Act is not the efficacious one. Learned counsel for the petitioner has argued that in view of the legal point involved in the present case and there being no disputed question of fact, this Court may not relegate the petitioner to alternative remedy of appeal in the light of judgment of Division Bench in the case of **Dhani Ram v. Chief Engineer and Ors (2013) 6 AWC 5705** and of the Apex Court in the case of **Dr. Bal Krishna Agrawal v. State of U.P. and others (1995) 1 SCC 614**.

11. According to the petitioner, once the writ petition has been entertained and counter and rejoinder affidavits have been exchanged, the petition should be decided on merits and any direction for relegating to the alternative remedy of appeal would seriously prejudice the petitioner's right to approach this Court where any point of law is involved.

12. Per contra, learned Standing Counsel relied upon the judgment of Apex Court in **Surya Dev Rai v. Ram Chander Rai & Ors (2003) 6 SCC 675**;

Government of Andhra Pradesh & Ors v. P. Laxmi Devi (Smt) (2008) 4 SCC 720; Cicily Kallarackal v. Vehicle Factory (2012) 8 SCC 524; and also Union of India & Ors v. M/s. Cottage Arts Emporium & Ors 1991 Supp (2) SCC 723. Learned Standing Counsel has argued that statutory remedy of appeal by way of U.P. Amendment 56(1)A is not an empty formality and the issues claimed / raised by the petitioner could have been agitated before the authority. The learned Standing counsel has further argued that the petitioner had directly approached this Court only because he was required to make statutory deposit for seeking remedy of stay in appeal under the first proviso to Section 56(1)A but since this Court also directed for the deposit of the amount of deficient stamp duty under the order impugned, the petitioner instead of complying with this order, after getting stay, moved an application seeking exemption from deposit and then merely on the basis of such misc. application he lingered on the matter and avoided to file rejoinder affidavit and ultimately when a cost was imposed in one such connected matter in Writ - C No. 62909 of 2014 that rejoinder affidavit was filed. He therefore, argues that the petitioner's intention is not to get the issues resolved but the intention was always to avoid payment of proper stamp duty and therefore, he did not approach this Court with clean hands and bypassed the remedy of appeal only to get stay order to avoid making statutory deposit.

13. Having heard learned counsels for the parties and their arguments advanced across the bar and having carefully gone through the pleadings raised by respective parties as well as the order impugned, I find it necessary to refer to the relevant

provisions of Indian Stamp Act, 1899 with reference to the State Amendment of the Uttar Pradesh (For short 'U.P. '), in order to deal with the arguments on the point of availability of alternative remedy and the discretion to be exercised by this Court when a petitioner approaches this Court bypassing such a remedy.

14. In the present case after inviting objection from the lessees the Assistant Commissioner (Stamp), Ghaziabad passed the order holding that there is deficiency in stamp duty paid and accordingly directed for payment of the deficient amount and the penalty has also been imposed along with simple rate of interest @ 1.5% per annum. This power has been exercised by the officer concerned under Section 47-A inserted under the U.P. Amendment vide U.P. Act No. 22 of 1998 (w.e.f. 01.09.1998) and runs as under:

"47-A. Under-Valuation of the instrument.--[(1) (a) If the market value of any property which is subject of any instrument, on which duty is chargeable on the market value of the property as set forth in such instrument is less than even the minimum value determined in accordance with the rules made under this Act, the registering officer appointed under the Registration Act, 1908, shall, notwithstanding anything contained in the said Act, immediately after presentation of such instrument, and before accepting it for registration and taking any action under Section 52, of the said Act, require the person liable to pay stamp duty under Section 29, to pay the deficit stamp duty as computed on the basis of the minimum value determined in accordance with the said rules and return the instrument for presenting again in its accordance with Section 23 of the Registration Act, 1908.

(b) When the deficit stamp duty required to be paid under clause (a), is paid in respect of any instrument and the instrument is presented again for registration, the registering officer shall certify by endorsement thereon, that the deficit stamp duty has been paid in respect thereof and the name and the residence of the person paying them and register the same.

(c) Notwithstanding anything contained in any other provisions of this Act, the deficit stamp duty may be paid under clause (a) in the form of impressed stamps containing such declaration as may be prescribed.

(d) If any person does not make the payment of deficit stamp duty after receiving the order referred to in clause (a) and presents the instrument again for registration, the registering officer shall, before registering the instrument refer the same to the Collector for determination of market value of the property and the proper duty payable thereon.

(2) On receipt of reference under sub-section (1), the Collector shall, after giving the parties a reasonable opportunity of being heard, and after holding an inquiry in such manner as may be prescribed by rules made under this Act, determine the market value of the property which is the subject of such instrument, and the proper duty payable thereon.

(3) The Collector may, suo motu, or on a reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorised by the State Government

on that behalf, within four years from the date of registration of that instrument on which duty is chargeable on the market value of the property not already referred to him under Sub-Section (1), call and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property, which is the subject of such instrument and the duty payable thereon, and if after such examination he has reason to believe that the market value of such property has not been truly set forth in such instrument, he may determine the market value of such property and the duty payable thereon:

Provided that with the prior permission of the State Government an action under this sub-section may be taken after a period of four years but before a period of eight years from the date of registration of the instrument on which duty is chargeable on the market value of the property.

Explanation - The payment of the deficit stamp duty by any person under any order of the registering officer under sub-section(1) shall not prevent the Collector from initiating proceedings on any instrument under sub-section(3).

(4) If on enquiry under sub-section(2) and examination under sub-section(3), the Collector finds the market value of the property -

(i) truly set forth and instrument duly stamped, he shall certify the endorsement that it is duly stamped and return it to the person who made the reference:

(ii) not truly set forth and instrument not duly stamped, he shall

require the payment of proper duty or the amount required to make up the deficiency in the same, together with a penalty of the amount not exceeding four times the amount of the proper duty or the deficient portion thereof.

(4-A) The Collector shall also require along with the deficit stamp duty or penalty required to be paid under clause(ii) of Sub-Section(4), the payment of a simple interest at the rate of one and half percent per mensem on the amount of deficit stamp duty calculated from the date of execution of the instrument till the date of actual payment.

Provided that the amount of interest under this sub-section shall be recalculated if the amount of deficit stamp duty is varied on appeal or revision or any order of a competent court or authority.

(4-B) The amount of interest payable under sub-section (4-A) shall be added to the amount due and be also deemed for all purposed to be part of the amount required to be paid.

(4-C) Where realisation of the deficit stamp duty remained stayed by any order of any court of authority and such order of stay is subsequently vacated, the interest referred to in sub-section (4-A) shall be payable also for any period during which such order of stay remained in operation.

(4-D) Any amount paid or deposited by or recovered from, or refundable to, a person under the provision of this Act, shall first be adjusted towards the deficit stamp duty or penalty outstanding against him and the excess if

any, shall then be adjusted towards the interest, if any due from him.

(5) The instrument produced before the collector under sub-Section(2) or under sub-Section(3) shall be deemed to have come before him in the performance of his functions.

(6) In case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty on the copy of the instrument in accordance with the procedure laid down in sub-section(2) and (4)]."

15. Section 48 of the Act provides for recovery of duties and penalties which runs as under:

"48.--Recovery of duties and penalties.--All duties, penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the person from whom the same are due, or by any other process for the time being in force for the recovery of arrears of land-revenue."

16. Section 56 of the Central Act prior to the U.P. Act No. 38 of 2001 only provided for reference in revision but with the insertion of Sub-Section 1(A) to section 56 of the Central Act under the U.P. Amendment there seems to be provision of statutory remedy of appeal against an order passed by the Collector under Chapter IV and V of the Stamp Act. Section 47-A false under Chapter IV which deals with the instrument not duly stamped, whereas, Chapter V deals with allowances of stamp in certain cases. Section 56 of the Stamp

Act after the U.P. Amendment vide U.P. Act No. 38 runs as under:

56. Control of, and statement of case to Chief Controlling Revenue Authority - (1) The powers exercisable by a Collector under Chapter IV and Chapter V and under clause (a) of the first proviso to Section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority.

(1-A) Notwithstanding anything contained in any other provisions of this Act, any person including the Government aggrieved by an order of the collector under Chapter IV, Chapter V or under clause (a) of the first proviso to section 26 may, within sixty days from the date of receipt of such order, prefer an appeal against such order to the Chief Controlling Revenue Authority, who shall, after giving the parties a reasonable opportunity of being heard consider the case and pass such order thereon as he thinks just and proper and the order so passed shall be final.

Provided that no application for stay of recovery of any disputed amount of stamp duty including interest thereon or penalty shall be entertained unless the applicant has furnished satisfactory proof of the payment of not less than one third of such disputed amount.

Provided further that where the Chief Controlling Revenue Authority passes an order for the stay of recovery of any stamp duty, interest thereon or penalty, or for the stay of the operation of any order appealed against, and such order results in the stay of recovery of any stamp duty, interest thereon, or penalty, such stay order shall not remain in force for more than

thirty days unless the appellant furnishes adequate security to the satisfaction of the Collector concerned for the payment of the outstanding amount.

(2) If any Collector, acting under Section 31, Section 40 or Section 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a Statement of the case, and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue Authority.

(3) Such authority shall consider the case and a copy of its decision to the Collector who shall proceed to assess and charge the duty (if any) in conformity with such decision."

(Emphasis added)

17. A bare reading of the provisions quoted herein above, makes it quite explicit that the appellate authority shall consider the case in appeal and shall pass such order as it thinks just and proper and that too after giving for that purpose a reasonable opportunity of being heard. The only rider by the proviso is where a party insists for stay of the order passed by the controlling revenue authority as in the present case the Assistant Commissioner (Stamp), and wants stay of the recovery of the disputed amount, such person is required to make a deposit 1/3rd of the disputed amount.

18. Thus, the remedy of appeal in the stamp cases under the Indian Stamp Act, 1899 not only takes full care of the appellate authority deciding the matter in consonance with the principles of natural justice but also empowers the authority to stay the amount of recovery subject to deposit of 1/3rd amount directed to be

recovered. The provision as is worded under the Section and gives power to the appellate authority clearly spells out the intendment of the legislature that remedy of appeal is a substantive remedy provided under the Act against the order passed by the Chief Controlling Revenue Authority and any factual and legal error is liable to be cured / remedied in appeal by the appellate authority

19. Thus, the argument if any, with regard to non availability of efficacious remedy is certainly misplaced and further the argument that since a question of law is involved such a remedy can be bypassed, in my considered opinion, that is neither the intendment of the legislature nor, the propriety demands for this Court to entertain a writ petition in a routine manner only because a question of law is involved. The forum of appeal is not only in respect of the factual dispute but is also an appropriate and competent forum to deal with legal issues involved in a case. The law as has emerged through authorities of Apex Court and this Court till now, is that there is no absolute rule for the High Court to either refused to entertain a petition under Article 226 of the Constitution of India or necessarily entertain a petition and decide the same in spite of there being a statutory remedy of appeal. It is all a self imposed limitation with which the High Court has clothed itself and except for exceptional cases a litigant should as a rule be asked to first pursue the alternative remedy, especially the statutory appeal. So the general rule is that one should first exhaust available alternative statutory remedy before approaching the high court under Article 226 of the Constitution of India. The Apex Court has drawn exception to this general rule in certain cases from time to time.

20. Constitution Bench of the Apex Court in the case of **Thansingh Nathmal & Others v. Superintendent of Taxes, Dhubri & others AIR 1964 SC 1419** has held that High Court under Article 226 of the Constitution does not sit in appeal and that being so, ordinarily if there is an alternative remedy under the statute created by the legislature, the litigant should be asked to first exhaust the same. Vide para 7 of the judgment, the Court held thus:

"7. Against the order of the Commissioner an order for reference could have been claimed if the appellants satisfied the Commissioner or the High Court that a question of law arose out of the order. But the procedure provided by the Act to invoke the jurisdiction of the High Court was bypassed, the appellants moved the High Court challenging the competence of the Provincial Legislature to extend the concept of sale, and invoked the extraordinary jurisdiction of the High Court under Article 226 and sought to reopen the decision of the taxing authorities on questions of fact. The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Article. But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy which, without being

unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit, by entertaining a petition under Article 226 of the Constitution, the machinery created under the statute to be by-passed, and will leave the party applying to it to seek resort to the machinery so set up."

21. The Constitution Bench of the Apex court in the case of **M. Naina Mohammed v. K.A. Natarajan & Ors (1975) 2 SCC 352** vide para 2 of the said judgment clearly and quite unequivocally held as under:

"2. The boundaries of the High Court's jurisdiction under Article 226 are clearly and strongly built and cannot be breached without risking jurisprudential confusion [Sir Rama Vilas Service (P) Ltd. v. C. Chandrasekaran, (1964) 5 SCR 869 : AIR 1965 SC 107. The power is supervisory in nature, although the Judges at both the tiers, in the instant case, have unwittingly slipped into the subtle, but fatal error of exercising a kind of appellate review."

22 . Further in the case of **Ghan Shyam Das Gupta and another v. Anant**

Kumar Sinha and others (1991) 4 SCC 379, two judges Bench of the Apex Court vide para 8 held thus:

"8. The principle as to when the High Court should exercise its special jurisdiction under Article 226 and when to refuse to do so on the ground of availability of an alternative remedy has been settled by a long line of cases. The remedy provided under Article 226 is not intended to supersede the modes of obtaining relief before a civil court or to deny defences legitimately open in such actions. As was observed in State of Andhra Pradesh v. Chitra Venkata Rao [1976] 1 SCR 521 the jurisdiction to issue a writ of certiorari is supervisory in nature and is not meant for correcting errors like an appellate court."

23. Again in the case of **State of U.P. & another v. Labh Chand (1993) 2 SCC 495**, the Apex Court held that when a statutory forum or Tribunal is specially created by statute for the redressal of specified grievances of persons on certain matters, the High Court should not normally permit such persons to ventilate their specified grievances before it by entertaining petitions under Article 226 of the Constitution is a legal position which is too well settled. The Apex Court in the said judgment had also relied the earlier judgment of the larger Bench in the case of Thansingh Nathmal (supra) and vide para 16 of the judgment held thus:

"16. The respondent had since filed, in the High Court of Judicature at Allahabad, his first Writ Petition, W.P. No. 1980 of 1990, challenging the validity of the Order of the State Government by which he had been compulsorily retired from Government service and claimed several relief thereto against the State

Government, we have to find whether the U.P. Public Service Tribunal if had been approached by the respondent here, could not have, if warranted, invalidated the Order challenged in the Writ Petition and given the reliefs sought for therein. If we have regard to the high status of the members constituting the Tribunal, expertise possessed by such members to consider the claims of employees in matters of their employment, vast powers invested in them to hold exhaustive enquiries and to grant full reliefs in matters relating to their employment, we cannot but hold that that Tribunal is the highest forum created by the Act to give full and complete relief to public servants in matters of their employment, that too, with expedition. The claims in the Writ Petition since related purely to matters relating to employment of the respondent under the State Government, the Division Bench of the High Court refused to entertain the Writ Petition on its view that it had been filed by the respondent here bye-passing the U.P. Public Services Tribunal. When the Division Bench had refused to entertain the Writ Petition of the respondent, in exercise of its discretionary jurisdiction under Article 226 of the Constitution on its view that the respondent could not have invoked its extraordinary jurisdiction under Article 226 of the Constitution for the redressal of his grievances, bye- passing the special forum created specifically by a statute for redressal of such grievances, efficaciously and adequately, it is not possible for us to think that such exercise of discretion was unwarranted, particularly when we have due regard to the settled legal position governing such matters, to which we have already adverted."

24. Again in the case of **Union of India & Ors v. M/s. Cottage Arts**

Emporium & Ors, 1991 Supp (2) SCC 723, a three judges Bench of the Apex Court has held that where an order arises out of adjudication proceedings and their lies statutory appeal, then the writ remedy would be inappropriate one and the party aggrieved must avail the remedy of appeal. Vide para 4 of the order, the Apex Court has held thus:

"4. In the meanwhile, pursuant to certain interlocutory directions made by this Court during the pendency of the special leave petition, the Statutory Authority has concluded the adjudication proceedings and has passed an order of confiscation, penalty etc., on 5-10-1990. Appellants submit that after this adjudication the main writ-petition before the High Court does not survive as respondents have their statutory remedies by way of appeal against the adjudication. Respondents say that it is doubtful whether, in the facts found in the adjudication proceedings, respondents have such a right and that at all events it may not be an equally efficacious remedy in the facts of the present case. Appellants do not dispute that if respondents consider themselves aggrieved by the result of the adjudication they are entitled to prefer an appeal against that adjudication. In view of these developments, we think that the remedy by way of writ petition must be held to have now become inappropriate."

25. In a yet another judgment of two judges Bench of Apex Court in the case of **Cicily Kallarackal v. Vehicle Factory (2012) 8 SCC 524** has been observed that where the legislature has provided for statutory appeal, the High court cannot bypass such statutory appeal. In the said judgment the Court considered the earlier judgment of the Apex Court in the case of

Mohd. Swalleh v. Addl. District Judge, Meerut (1988) 1 SCC 40 : AIR 1980 SC 94, wherein the Court held that the High court is justified in setting aside an invalid and improper order, where there was no appeal against the decision of the Prescribed Authority to the District Judge and therefore, the Court observed that it was not always necessary to set aside an order if it is found to have been passed that an authority or Court having no jurisdiction. Vide paras 3 & 4 the Apex Court has held thus:

"3. So far as the issue of jurisdiction is concerned, the learned counsel for the petitioner is right that the High Court had no jurisdiction to deal with the matter against the order of the Commission. However, while dealing with a similar issue this Court in Mohammad Swalleh & Ors. v. IIIrd All. District Judge, Meerut & Anr., AIR 1988 SC 94, observed:

"7. It was contended before the High Court that no appeal lay from the decision of the Prescribed Authority to the District Judge. The High Court accepted this contention. (sic no appeal lay)... On that ground the High Court declined to interfere with the order of the learned District Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Art. 226 of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High Court itself could have set it aside. Therefore in the facts and circumstances of the case justice has been done though, as mentioned hereinbefore,

technically the appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under Art. 226 of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, no objection can be taken."

(Emphasis added)

In view of the above, it is not always necessary to set aside an order if found to have been passed by an authority/court having no jurisdiction.

4. Despite this, we cannot help but to state in absolute terms that it is not appropriate for the High Courts to entertain writ petitions under Article 226 of the Constitution of India against the orders passed by the Commission, as a statutory appeal is provided and lies to this Court under the provisions of the Consumer Protection Act, 1986. Once the legislature has provided for a statutory appeal to a higher court, it cannot be proper exercise of jurisdiction to permit the parties to bypass the statutory appeal to such higher court and entertain petitions in exercise of its powers under Article 226 of the Constitution of India. Even in the present case, the High Court has not exercised its jurisdiction in accordance with law. The case is one of improper exercise of jurisdiction. It is not expected of us to deal with this issue at any greater length as we are dismissing this petition on other grounds."

26. Thus, from the above decisions, I do not find that the principles laid down in

the judgment of the Constitution Bench of Apex Court and in subsequent judgments, referred to above, have not been in any manner diluted and, therefore, the said judgment still holds the field. It is worth mentioning that neither in the case of **Dr. Bal Krishna Agrawal** nor, in the case of **Dhani Ram**, cited by learned counsel for the petitioner, the said judgment was even referred to.

27. In the case of **Dr. Bal Krishna Agrawal**, a pure legal issue was to the effect that as to whether a Professor directly recruited would be treated as appointed directly, or under promotion rules, though the promotion rules had not come into force at the time he faced Selection Committee for direct recruitment and recommendation of the Selection Committee was approved by the Executive Council. The issue was raised that the name of that petitioner in the said case was also under consideration under promotion rules. The Court observed that the promotion rules since had not come into force at the time when the petitioner faced selection and was appointed, he would be deemed to have been appointed under direct recruitment of selection facing the selection committee. So virtually at the end of University there was no adjudication as such.

28. In the case of **Dhani Ram (supra)**, the question again was whether one should be relegated to the remedy of labour laws or the Court exercising power under Article 226 of the Constitution of India could consider the grievance of the employee. It was a case where adjudication had yet not taken place.

29. One must bear in mind that in the matters where adjudication takes place by

virtue of a proceeding instituted under a special statute and a forum of appeal is provided for, the first course should be that the party aggrieved against the adjudication should prefer appeal. It is only when the case is such that a serious miscarriage of justice would occur because of the want of authority in adjudication that a recourse to the remedy of Article 226 of the Constitution should be permitted.

30. In a case where a person has to initiate a fresh proceeding under the labour laws and if he has already applied for a writ, such a case is quite distinguishable from the cases where proceedings are instituted at a first forum whose order is appealable like here under the Stamp Act, 1899.

31. However, while holding that the petitioner has an efficacious alternative remedy of appeal vide U.P. Amendment in the Stamp Act, 1899, I would be failing in my duty if I do not refer to the judgment of the another Constitution Bench in **Himmatlal Harilal Mehta v. State of Madhya Pradesh & Ors AIR 1954 SC 403** which is a case quite close to the one in hand, however, the only distinguishable feature on facts is, that in the said case the Court held the alternative remedy to be onerous and burdensome on the ground it required deposit of entire amount of tax sought for availing the alternative remedy and then the Court observed that such a provision would hardly be described as adequate alternative remedy. Hear in the present case, the party who has been held to have paid deficient stamp duty, is not required to pay the entire amount for availing the remedy of appeal and only in the event if such party seeks stay over the order by which he has been asked to make good the stamp duty, a disputed amount, it

is required to deposit only 1/3rd of the amount as condition.

32. In the case of **Himmatlal Harilal Mehta (supra)**, the Court had observed that the only exception to the general rule of availing alternative statutory remedy, is where the allegation has been made of violation of fundamental rights. The court quite unequivocally held *that the principle that a Court will not issue a prerogative writ when an adequate alternative remedy was available could not apply where a party came to the court with an allegation that his fundamental right had been infringed and sought relief under Article 226 of the Constitution.*

33. The issue in the present case relates to the definition of allottee to avail the benefit of exemption from Stamp duty in the cases of industrial leases and once the authority acting under Section 47-A had decided the matter against the petitioner, he could have preferred the appeal easily to raise his grievance and could have equally obtained stay order by merely depositing 1/3rd of the disputed amount. In the legislation governing the field of taxes, the Court should honour the spirit behind the physical measures taken and a decision is arrived at after due adjudication, unless there are cases of infringement of fundamental rights which are guaranteed under the Constitution and the Constitutional Courts are guardian to protect such rights. The disputed questions involving adjudication on the issue arising out of such measures adopted and availing benefits thereunder, should always be left open for the forum created under such statute to adjudicate upon.

34. In the present case, while I hold that the petitioners in the respective writ petitions have efficacious alternative

remedy of appeal, I have one more reason to relegate them for this remedy because the petitioners would have in ordinary course deposited 1/3rd of the amount while availing the remedy of appeal. In the present case, while entertaining the writ petition on 24.11.2014, the Court had directed them to deposit the entire amount paid towards the deficiency of stamp under the orders impugned in the respective petitions, but there is nothing on record to show that the said order has been complied with nor, any affidavit has been filed. There is yet another reason to relegate the petitioners to alternative remedy and that is that the leading writ petition being Writ - C No. 62910 of 2014, with which all these writ petitions were tagged, has already been disposed off with a direction to the petitioner therein to prefer the appeal under the Stamp Act vide order dated 24.05.2019 and further direction has been issued to dispose off the same within a period of three months. The legal issues and the issues of fact involved in all these petitions including the one which has already been disposed off, are common and therefore, the appellate authority can pass orders in these cases also if the direction is issued.

35. In view of the above, therefore, I decline to interfere in the matter on merits of the case on the ground of availability of efficacious alternative remedy of appeal to the petitioners under Section 56(1-A) of the Stamp Act, 1899 vide U.P. Amendment. It is further provided that in case the appeal is preferred within three weeks from the date of this order, the same shall be considered and disposed off by the appellate authority on merits, of course, strictly in accordance with law within a further period of three months from the date of production of certified copy of this order.

36. It is further provided that since the impugned orders were stayed initially by

this Court on 24.11.2014 and 26.11.2014 in respective writ petitions and stay orders were subject to the condition that the petitioners shall deposit the entire amount ordered to be paid thereunder, but there is nothing on record to demonstrate whether the said deposits have been made or not, it is hereby provided that in the event petitioners have not deposited under the order of this Court initially passed and the petitioners want interim stay on the order passed by the Stamp Authority during pendency of appeal, they may deposit 1/3rd of the disputed amount as provided for under the provisions and in the event they deposit the said amount within a period of four weeks from the date of this order, appropriate order on their stay application shall be passed by the appellate authority within a further period of two weeks.

37. With the aforesaid observations and directions all the writ petitions are disposed of.

(2023) 5 ILRA 1955
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.03.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Application U/S 482 No. 3982 of 2021

Kafeel **...Applicant**
Versus
State of U.P. & Ors. **...Opposite Parties**

Counsel for the Applicant:
 Sri Rahul Srivastava

Counsel for the Opposite Parties:
 G.A.

Criminal law – Criminal Procedure Code, 1973 - Section 482- Entire proceedings

under Section 3(1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986-challenged-FIR lodged under Sections 3, 5 and 8 of the Uttar Pradesh Prevention of Cow Slaughter Act, 1955- e accused-applicant has been apprehended while he was standing and holding 2 kg meat in his right hand- no allegation in the entire prosecution case that the alleged offence has been committed to make undue economic gain, to perpetrate some terror or to continue any such criminal activities which by and large are detrimental to the safety and security of the society-Section 2(b) of the Gangster Act-definition of gang-word "otherwise" used in Section 2(b) of the Act-used ejusdem generis- absence of allegation of violence, threat or show of violence or intimidation or coercion or otherwise-conditions for imposing Gangster Act not fulfilled-entire proceedings and chargesheet quashed-Application allowed. (Paras 10, 11, 12, 13 and 14)

HELD:

It is admitted case of the prosecution that the accused-applicant has been apprehended while he was standing and holding 2 kg meat in his right hand. The main accused Shahnawaj @ Shanu is admittedly a licensed butcher and was having a shop in the area. There is no allegation in the entire prosecution case that the alleged offence has been committed to make undue economic gain, to perpetrate some terror or to continue any such criminal activities which by and large are detrimental to the safety and security of the society. (Para 10)

A perusal of the definition of the gang shows that it is, a group of persons, who acting either singly or collectively by causing violence or threat or show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person. (Para 11)

A perusal of the entire prosecution case depicts that it is not the case of the prosecution that the accused has committed any violence, or extended any threat or has intimidated or has done coercion with the object of disturbing public order or the offence has been done for gaining any undue temporal pecuniary material or other advantage either for himself or any other person indulged in antisocial activities which are defined in Section 2(b)(1) of the Gangsters Act. The word or otherwise used in Section 2(b) of the Act has to be interpreted in context of the preceding words such as violence, threat, show of violence, intimidation or coercion, it cannot be assigned general meaning in order to invoke the Gangsters Act. In order to invoke the gangster in the case in hand, it has to be seen what was the object of the offence or the motive behind it. If the motive was of gaining undue temporal pecuniary or material advantage then the case is different. From the material gathered by the prosecution, it cannot be said that the accused had the aforesaid motive to interpret the general word used in section 2(d) of the Act i.e. 'other advantage'. The rule of 'Ejusdem Generis' has to be invoked. (Para 12)

It is settled that for a solitary case, the gangster can be imposed against the accused persons, if the offence is found to have been committed for any of the antisocial activity mentioned in Section 2(b) of the Act. It is not the case here. In the present case, there is nothing on the record to suggest that the charge sheet has been filed for any of the antisocial activities mentioned in Section 2(b) of the Act as discussed above. The accused may commit such kind of offence just once or he may commit several offences and could face more than one F.I.R.s in that connection, the numbers of the F.I.R.s are irrelevant. The motive behind the offence and the object has to be seen in order to arrive at a conclusion whether the provision of the gangsters act can be invoked in a given case or not. The motive and the object are clearly missing, thus, the case could not have been brought under the provision of the Act. (Para 14)

Application allowed. (E-14)

List of Cases cited:

1. Shraddha Gupta Vs St. of U.P., 2022 SCC OnLine SC 514

2. Asstt. Collector of Central Excise Vs Ramdev Tobacco Co., (1991) 2 SCC 119

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

1. By this petition, the petitioner has prayed for quashing the entire proceedings of CNR No. UPJB010048152019 (State Vs Shahnawaj alias Shanu & others) pending before the Sessions Judge/Fast Track Court-11, Amroha including Charge Sheet No. 01/2019 dated 11.09.2019 submitted by the Investigating Officer before the Sessions Judge/Fast Track Court-11, Amroha in Case Crime No.0193/2019 under Section 3(1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 Police Station Amroha City, District Jyotiba Phule Nagar, order of cognizance dated 27.09.2019 passed by the Additional District & Sessions Judge, Court No. 4, Amroha in CNR No. UPJB010048152019 (State Vs Shahnawaj alias Shanu & others) as well as Non- Bailable Warrants dated 28.08.2020, 21.10.2020 and 10.12.2020 issued by the Additional District & Sessions Judge, Court No. 4, Amroha against the applicant. Further prayer has also been made for quashing the approval order dated 19.03.2019 passed by the District Magistrate, Amroha upon the gang chart which has been recommended by the Superintendent of Police, Amroha on 19.03.2019 so far as it relates to the applicant.

2. Brief facts of the case are that an F.I.R. dated 13.08.2018 was lodged under Sections 3, 5 and 8 of the Uttar Pradesh Prevention of Cow Slaughter Act, 1955 at Police Station Amroha City, District

Jyotiba Phule Nagar which was registered as Case Crime No. 0492/2018. The prosecution version as contained in the First Information Report dated 13.08.2018 is being translated into English and quoted as under:-

"The police party in its regular check and patrolling reached Kakar Saral Mod where a tip was received that in Mohalla Moti Shah one Shahnawa) alias Shanu son of Shafeek and others are selling cow meat after slaughtering it, if they immediately reach, the accused can be nabbed. No one agreed to be a prosecution witness and therefore, the police party reached the house of Shahnawaj alias Shanu. It was a two-storied house. The tip informed that Shahnawaj alias Shanu was slaughtering the cow and selling its meat, thereafter the tip went away. Three persons were arrested; one of them disclosed his Identity as Shahnawaj alias Shanu from whom a knife was recovered. Another person named Naeem was also arrested from whom another knife recovered. Third person named Kafeel (applicant) was arrested from whom two Kilogram of cow meat was recovered from his right hand in a polythene bag. 60 kilogram cow meat was lying on floor. Shahnawaj and Naeem told that they have procured the cow meat with the help of another accused person Rafi Ahmad. Veterinary Doctor was contacted on phone, who arrived at the crime scene. The Veterinary Doctor prima facie expressed his opinion of cow meat on Inspection of the meat lying on floor. Two knives, two gandasa, and iron hook, one large needle and a wooden plank were recovered".

3. Learned counsel for the applicant submits that the co-accused Shahnawaj @ Shanu has a slaughter license under Food

Safety and Standard Authority of India which is on record as Annexure No. 7 to the petition.

4. It is further submitted on behalf of the applicant that from perusal of the license, it is apparent that Shahnawaj @ Shanu is a valid license holder and is a licensed butcher having a shop in the name and style of Shahnawaj Buffalo Meat Shop. As per the prosecution case, knives were recovered from the possession of Shahnawaj @ Shanu. It is also submitted that since he is licensee butcher, therefore, the recovery of knife shown from him is nothing but a police heroic. The investigating officer has investigated the case and the statements of the witnesses were recorded which are on record as annexure No. 8. He further submits that from perusal of the statements, it is evident that there is no independent witnesses to the incident. Charge sheet in the aforesaid crime No. 0492/2018 came to be filed on 11.10.2018 before the CJM, Amroha against the four named accused persons including the applicant, upon which the cognizance was taken on 12.10.2018 and the accused persons were summoned before the trial court.

5. It is further submitted on behalf of the applicant that from the prosecution case in the police report, it is evident that the only allegation against the applicant is that he was caught with 2 kg of meat in his right hand in the polythene. It is also submitted that there is no independent witness to testify the alleged crime as the F.I.R. explicitly states that none was ready to be witness of the said raid. All the prosecution witnesses are members of the police party who raided the house of Shahnawaj @ Shanu who is a licensed butcher. It is next submitted that the alleged recovery of 2 kg meat from the applicant is planted.

6. Learned counsel for the applicant further submits that there is no material collected by the Investigating Officer to invoke the Gangsters Act. The gang chart has been prepared in cyclostyle manner which shows total non-application of mind. In the gang chart, only one case of cow slaughter has been shown. The applicant has no criminal history except the sole case i.e. case crime No. 492/2018, under Sections 3/5/8 of the U.P. Prevention of Cow Slaughter Act, 1955. There is no input in the police report and no material at all to bring this offence under the definition of gang. No subjective satisfaction has been recorded by the District Magistrate, Amroha. Gang chart has been prepared and recommended by the various authorities in a very short time in a mechanical manner without there being any subjective satisfaction.

7. It is further submitted on behalf of the applicant that there is no report of any veterinary doctor and no sampling of the alleged recovered meat has been sent for the forensic science laboratory. The ingredients to invoke of Section 2(d) of the Act are absent. In support of his contention, learned counsel for the applicant has relied on the judgments of this High Court passed in the case of Tej Singh and others Vs. State of U.P., in Application U/S 482 No. 3239/2005, Arjun Vs. State of U.P. in Writ Petition No. 642 of 2021 and Pankaj Singh Vs. State of U.P. in criminal Misc. Writ Petition No. 5707/2021.

8. Per contra, learned A.G.A. has opposed the petition submitting that on the basis of a solitary case, gangster can be invoked. In support of his contention, he has relied on the judgment of the Apex Court passed in the case of **"Shraddha Gupta v. State of U.P., 2022 SCC OnLine SC 514"**.

9. Heard learned counsel for the applicant and learned A.G.A. for the State.

10. It is admitted case of the prosecution that the accused-applicant has been apprehended while he was standing and holding 2 kg meat in his right hand. The main accused Shahnawaj @ Shanu is admittedly a licensed butcher and was having a shop in the area. There is no allegation in the entire prosecution case that the alleged offence has been committed to make undue economic gain, to perpetrate some terror or to continue any such criminal activities which by and large are detrimental to the safety and security of the society. The definition of the gang has been provided under Section 2(b) of the Gangsters Act which is reproduced as under:-

.....2. Definitions. - In this Act,-

(a) "Code" means the Code of Criminal Procedure, 1973 (Act No. 2 of 1974);

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or

cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

[(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities.

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966:

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in

contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xvv) indulging in crimes that impact security of State, public order and even tempo of life.]

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;

(d) "public servant" means a public servant as defined in Section 21 of the Indian Penal Code (Act No. 45 of 1860), or any other law for the time being in force, and includes any person who lawfully assists the police or other authorities of the State, in investigation or prosecution or punishment of an offence punishable under this Act, whether by giving information or evidence relating to such offence or offender or in any other manner;

(e) "member of the family of a public servant" means his parents or spouse and brother, sister, son, daughter, grandson, granddaughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a pen on in whose welfare the public servant is interested;

(f) words and phrases used but not defined in this Act and defined in the Code of Criminal Procedure, 1973, or the Indian Penal Code shall have the meanings respectively assigned to them in such Codes.

11. A perusal of the definition of the gang shows that it is, a group of persons,

who acting either singly or collectively by causing violence or threat or show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person.

12. A perusal of the entire prosecution case depicts that it is not the case of the prosecution that the accused has committed any violence, or extended any threat or has intimidated or has done coercion with the object of disturbing public order or the offence has been done for gaining any undue temporal pecuniary material or other advantage either for himself or any other person indulged in antisocial activities which are defined in Section 2(b)(1) of the Gangsters Act. The word or otherwise used in Section 2(b) of the Act has to be interpreted in context of the preceding words such as violence, threat, show of violence, intimidation or coercion, it cannot be assigned general meaning in order to invoke the Gangsters Act. In order to invoke the gangster in the case in hand, it has to be seen what was the object of the offence or the motive behind it. If the motive was of gaining undue temporal pecuniary or material advantage then the case is different. From the material gathered by the prosecution, it cannot be said that the accused had the aforesaid motive to interpret the general word used in section 2(d) of the Act i.e. 'other advantage'. The rule of 'Ejusdem Generis' has to be invoked. The Coordinate Bench of this Court while relying on the judgment of the Apex Court passed in the case of "**Asstt. Collector of Central Excise v. Ramdev Tobacco Co., (1991) 2 SCC 119**" and while invoking the rule of Ejusdem Generis has interpreted the word 'other advantage' which finds place in Section 2

of the Act and has held that the phrase 'other advantage' must take its hue from the accompanying words which immediately precede the same and which have a qualifying effect. The relevant part of the judgment of Tej Singh (supra), is extracted below:-

After having perused the record, this Court finds itself in agreement with the submissions made by the learned counsel for the applicants that though the accused are facing the allegations of having committed murder but they cannot be said to have committed the crime because they were gangsters. There was no motive of making any wrongful economic gains. This Court also does not see any material on the basis of which it may be held that the prime object behind committing the crime in question was so as to disturb the public order. Whenever some grave crime is committed it always leads to a consequential result of some kind of disturbance in society. Such normal disturbance in society and disturbing the public order or creating panic or terror are different species. Ordinary law and order problems can not be clubbed with phenomenon of break of public order. The crime in question does not appear to have been committed with the object of gaining any undue temporal, pecuniary, material or other similar kind of advantage for itself or for any other person indulged in anti-social activities.

Here in this context it may also be seen that in the definition of 'gang' as provided under Section -2(b) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as Act) reference to the words 'gaining any undue temporal, pecuniary, material or other advantage' for himself or any other person has been given. One

might argue that the words 'other advantage' is an all inclusive term and all kinds and categories of advantages will come under its title, and therefore, there is hardly any need to see the facts of the case with a fine class in order to find whether the object of the gang is or was of gaining undue temporal, pecuniary and material advantage or not. If the violence or offence committed was inspired to get any kind of advantage for himself or for any other person, the letter of definition as provided by the Act shall stand satisfied. But in the considered opinion of this Court such kind of approach will lead to complete misinterpretation of the Statute. If the Legislature in its wisdom has used a number of qualifying words with regard to Anti Social Activity as has been referred to and contemplated in the Act, then its whole purpose shall stand defeated by providing such an all sweeping meaning to the words 'other advantage' as has been used in the definition. If the term 'other advantage' was meant to include all advantages or was meant to include any kind of advantage whatsoever where was the need to use different other defining words like 'temporal, pecuniary and material' which immediately precede the words 'or other advantage' ! It is self evident that the use of the preceding words have a qualifying effect and must be seen lending its complexion to the subsequently used words 'other advantage'. The words 'other advantage' has got to be seen in the context and perspective and with reference to the preceding aforesaid words and must be understood in the same light. Just as a man is often known by the company he keeps, the import of words in Statute also are often to be seen and understood by the company of the words in which they appear. In this regard this Court deems it appropriate to keep in perspective the rule

of 'Ejusdem Generis' in order to correctly appreciate the scope and the actual ambit of the general words which follow the aforesaid specific words used in the Statute. The Court is of the view that the aforesaid preceding words 'temporal, pecuniary and material' are constituting a genus and the words 'other advantage' has to be read as an species of the same. Though ordinarily the general words must be provided to bear their natural and larger meaning but they have to be confined Ejusdem generis to the class of things previously enumerated by certain specific words because it is not difficult to see clearly the intention of the Statute which it spells out by using a specific class and category of qualifying words. This Court sees reasons and therefore feels persuaded to limit the scope of the meaning of the general words 'other advantage' because if we provide to it a larger all embracing meaning it is likely to lead to absurd and unforeseen results. The general expression has to be read contemplating to imply the things of the same kind which have been referred to by the preceding specific class of things constituting a genus. If we do not adhere to this rule and do not impute specific complexion to the general words in the light of the preceding words the blatant misuse and plain absurdity to which it shall lead is that the administrative executives and the police would feel free to impose the provisions of this Act upon anybody and everybody who is facing the charge of committing any sort of offence or any breach of law howsoever trivial it be because hardly any violence or threat or show of violence or intimidation or coercion is done without having the object of gaining some kind of advantage himself or for any other person. The word 'advantage' has an all sweeping natural meaning and may include material and

psychological both kinds of advantages. In that view of the matter the use of the words 'other advantage' will bring in its mischief everything under the sun. It is therefore very expediently needed to read these words in right perspective and read them Ejusdem generis with the things or words previously enumerated by the Statute. In order to substantiate its view this Court finds strength from the pronouncement given by the Apex Court in the case of Assistant Collector of Central Excise, Guntur vs. Ramdev Tobacco Company, 1991 AIR (SC) 506. In this case the principle of Ejusdem generis was expatiated upon at some length and was also brought into application while giving interpretation to the issues involved in the case with which it was dealing. It would be profitable to extract the relevant portion of the pronouncement which reads as under:-

"5. But the question is whether the issuance of a show cause notice and the initiation of the consequential adjudication proceedings can be described as 'other legal proceedings' within the meaning of sub-section (2) of section 40 of the Act? If the said departmental action falls within the expression 'other legal proceeding' there can be no doubt that the action would be barred as the same indisputably was initiated six months after the accrual of the cause action. So the crucial question is whether the issuance of the show cause notice dated August 30, 1972 and the passing of the impugned order in adjudication proceedings emanating therefrom constitutes 'other legal proceeding' within the meaning of section 40 (2) of the Act to fall within the mischief of that sub-section which bars such proceedings if commenced after a period of six months from the accrual of the cause of action. The learned Additional Solicitor General submitted that the expression

'other legal proceeding' must be read ejusdem generis with the preceding expressions 'suit' and 'prosecution' and if so read it becomes crystal clear that the department's action cannot come within the purview of 'other legal proceeding'. How valid is this contention is the question which we are called upon to answer in the present appeal.

6. The rule of ejusdem generis is generally invoked where the scope and ambit of the general words which follow certain specific words (which have some common characteristic and constitute a genus) is required to be determined. By the application of this rule the scope and ambit of the general words which follow certain specific words constituting a genus is restricted to things ejusdem generis with those preceding them, unless the context otherwise requires. General words must ordinarily bear their natural and larger meaning and need not be confined ejusdem generis to things previously enumerated unless the language of the statute spells out an intention to that effect. Courts have also limited the scope of the general words in cases where a larger meaning is likely to lead to absurd and unforeseen results. To put it differently, the general expression has to be read to comprehend things of the same kind as those referred to by the preceding specific things constituting a genus, unless of course from the language of the statute it can be inferred that the general words were not intended to be so limited and no absurdity or unintended and unforeseen complication is likely to result if they are allowed to take their natural meaning. The cardinal rule of interpretation is to allow the general words to take their natural wide meaning unless the language of the statute gives a different indication or such meaning is likely to lead to absurd results in which case their

meaning can be restricted by the application of this rule and they may be required to fall in line with the specific things designated by the preceding words. But unless there is genus which can be comprehended from the preceding words, there can be no question of invoking this rule. Nor can this rule have any application where the general words precede specific words.

7. There can be little doubt that the words 'other legal proceeding' are wide enough to include adjudication and penalty proceedings under the Act. Even the learned Additional Solicitor General did not contend to the contrary but what he said was that since this wide expression is preceded by particular words of a certain genus, namely, words indicating reference to proceedings taken in courts only, the wide words must be limited to things ejusdem generis and must take colour from the preceding words and should, therefore, receive a limited meaning to exclude proceedings of the type in question. There can be no doubt that 'suit' or 'prosecution' are those judicial or legal proceedings which are lodged in a court of law and not before any executive authority, even if a statutory one. The use of the expression 'instituted' in section 40 (2) strengthens this belief. Since this sub-section has been construed by this Court in Raju's case (supra) not to be confined in its application to only Government servants but to extend to others including the assesseees and since the words 'for anything done or ordered to be done under this Act' are found to be comprehensive enough to include acts of non-compliance or omissions to do what the Act and the Rule enjoin, the limitation prescribed by section 40(2) would undoubtedly hit the adjudication and penalty proceedings unless the expression 'other legal proceeding' is read ejusdem

generis to limit its ambit to legal proceedings initiated in a court of law.

8. The scope of section 40(2) as it stood before its amendment pursuant to Raju's case came up for consideration before a Division Bench of the Madhya Pradesh High Court in *Universal Cables Ltd. v. Union of India*, [1977 Tax LR 1825]: 1977 ELT (J92) wherein the question raised for determination was whether penalty proceedings taken under Rule 173Q for the infraction of Rule 173C with a view to evading payment of duty fell within the expression 'other legal proceeding' used in the said sub-section. The High Court conceded that the expression when read in isolation is wide enough to include any proceeding taken in accordance with law, whether so taken in a court of law or before any authority or tribunal but when read with the preceding words 'suit' or 'prosecution' it must be given a restricted meaning. This is how the High Court expressed itself at page J 106 (at page 1838 of Tax. L.R.):

"Now the language of section 40(2) is: 'no suit, prosecution or other legal proceeding shall be instituted'. 'Suit' and 'prosecution' which precede the expression 'other legal proceeding' can be taken only in a Court of Law".

After stating the expanse of the ejusdem generis rule, as explained in *Amar Chandra v. Excise Collector, Tripura*, AIR. 1972 SC 1863 at 1868 (Sutherland, Volume 2 pages 399-400) the High Court observed that there was no indication in the said sub-section or elsewhere in the Act that the said general words were intended to receive their wide meaning and were not to be construed in a limited sense with the aid of the ejusdem generis rule. A departmental proceeding like penalty proceedings were, therefore, placed outside the scope of the said sub-section. This view was quoted with

approval by a learned Single Judge of the Bombay High Court in *C.C. Industries & Others v. H.N. Ray*, 1980 ELT 442 at 453. These two cases, therefore, clearly support the view canvassed before us by the learned Additional Solicitor General.

9. We have given our careful consideration to the submission made on behalf of the appellant, reinforced by the view expressed in the aforesaid two decisions. In considering the scope of the expression 'other legal proceeding' we have confined ourselves to the language of sub-section (2) of section 40 of the Act before its amendment by Act 22 of 1973 and should not be understood to express any view on the amended provision. On careful consideration we are in respectful agreement with the view expressed in the aforesaid decisions that the wide expression 'other legal proceeding' must be read ejusdem generis with the preceding words 'suit' and 'prosecution' as they constitute a genus. In this view of the matter we must uphold the contention of the learned Additional Solicitor General that the penalty and adjudication proceedings in question did not fall within the expression 'other legal proceeding' employed in section 40(2) of the Act as it stood prior to its amendment by Act 22 of 1973 and therefore, the said proceedings were not subject to the limitation prescribed by the said sub-section."

Illumined by the aforesaid view adopted by the Hon'ble Supreme Court this Court sees good reason to hold that the use of phrase 'other advantage' as it finds place in the Act must take its hue from the accompanying words which immediately precede the same and which have a qualifying effect.

13. Thus, in absence of allegation of violence, threat or show of violence or

intimidation or coercion or otherwise, I am of the view that first information report registered against the applicant under Section 3(1) of the Act cannot be sustained. Further the words "or otherwise" used in the first part of section 2(b) of the Act, shall derive its meaning from the preceding words and it shall not include all general acts/offences which are trivial in nature, for the purpose of the Section 2(b) of the Act. So far as the contention of learned A.G.A. that on a solitary case, the gangsters can be invoked is concerned, there is no quarrel on this point. The law is settled. The Apex Court has already settled the controversy in the case of *Shraddha Gupta (supra)* wherein in para 10 it has been held that there can be prosecution against a person even in a case of a single offence/F.I.R./charge sheet for any of the antisocial activities mentioned in Section 2(b) of the Act provided such antisocial activity is by violence or threat or by show of violence or intimidation or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal pecuniary material or advantage for himself or any other person. In the present case, it is alleged that the petitioner herein was apprehended with 2 kg meat in his right hand. There is no allegation of any of the antisocial activities mentioned in Section 2 of the Act such as violence, threat, show of violence, intimidation, coercion etc., therefore, it cannot be said that the said offence was committed by the applicant for object of disturbing public order or of gaining undue temporal pecuniary material or other advantage for himself or any other person.

14. It is settled that for a solitary case, the gangster can be imposed against the accused persons, if the offence is found to have been committed for any of the

antisocial activity mentioned in Section 2(b) of the Act. It is not the case here. In the present case, there is nothing on the record to suggest that the charge sheet has been filed for any of the antisocial activities mentioned in Section 2(b) of the Act as discussed above. The accused may commit such kind of offence just once or he may commit several offences and could face more than one F.I.R.s in that connection, the numbers of the F.I.R.s are irrelevant. The motive behind the offence and the object has to be seen in order to arrive at a conclusion whether the provision of the gangsters act can be invoked in a given case or not. The motive and the object are clearly missing, thus, the case could not have been brought under the provision of the Act.

15. In view of the aforesaid reasons, the entire criminal proceedings as well as charge sheet under the Act as well as consequential proceedings are quashed. The application is allowed.

Let copy of this order sent to the learned trial court forthwith

(2023) 5 ILRA 1965
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.05.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Government Appeal No. 1624 of 2004
 AND
 Criminal Revision No. 221 of 2004

State of U.P.

...Appellant

Versus

Ajai Mishra @ Taini & Ors.

...Accused-Respondents

Counsel for the Appellant:

A.H. Rizvi, Avanindra Singh Parihar, Govt. Advocate, Nagendra Mohan, Sushil Kumar Singh

Counsel for the Respondents:

S.K. Shukla, Armendra Pratap Singh, Brij Mohan Sahai, Pradeep Chaurasia, Parnendu Chakravarty, Salil Kumar Srivastava, Sumit Kumar Singh

Criminal Law – Criminal Procedure Code, 1973 - Section 378 - de facto Complainant has preferred revision under Sections 397 r/w 401 under Cr.P.C. against order of acquittal of all four accused- Sessions Trial under Sections 302, 302/34 IPC- murder of one Prabhat Gupta alias Raju- FIR lodged by father- occurrence probable in the background of some political rivalry and enmity-commission of offence and complicity of offenders are two different realities-acquittal order cannot be lightly interfered by the Appellate Court-presumption of innocence is further strengthened by the acquittal of an accused-if two views are possible on the evidence adduced in the case-view favourable to the accused should be adopted- St.ment of hostile witness can be examined by the court to reach a correct conclusion- St.ment of star witness PW-3 cannot be believed to be true-inordinate delay in recording the St.ment of PW-10 is unexplainable-FIR is ante-timed-gun-shot fired from a distance-not from the range of one step-no blackening and charring on the body of the deceased-presence of the eye witnesses on the spot of incident doubtful- trial court judgement upheld - Appeal dismissed. (Paras 20,21,23, 43, 59,61, 62, 66, 70, 72, 74 and 75)

HELD:

This Court while dealing with the case is conscious of the fact that the commission of an offence and complicity of the offenders are two different realities. The complicity of an offender must provenly be established connected to the commission of charged offence, then only it is

permissible for a court of law to derive the product of conviction failing which the acquittal is the rule. (Para 20)

The law stands settled that any acquittal order cannot be lightly interfered with by the Appellate Court, though this Court has wide powers to review the evidence and to come to its own conclusion. However, the power to grant leave must be exercised with care and caution because the presumption of innocence is further strengthened by the acquittal of an accused. (Para 21)

Further, it is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. (Para 23)

On a careful analysis of the evidence available on records, we do not find that the St.ment of star witnesses PW-3 about the meeting of PW-2 at his house can be believed to be true, therefore the testimony of PW-3 to have met at home and accompanied with PW-2 by following the deceased, after having meal, remains doubtful. The facts of dharna was introduced to make the presence of PW-2 at the house of the informant as natural but the truth of the matter is that no such dharna was called on 08.07.2000 as is corroborated by the St.ment of PW-8. (Para 59)

Moreover, it has come in evidence that one bullet was found inside the body of deceased. If bullet could not pass through the body, this shows that velocity of bullet was not very high. This further shows that it was not possible to cause such injury from a distance of 1 step or for that matter from 3-4 steps. Apparently, if fire is made from a close range of one step, the entrance wound would be big whereas a fire made from distant range the wound would be smaller in size. In the present case, as per St.ment of P.W.9, the entry wound is of two

categories, one being of 0.5 x 0.5 cm & anr. of 1 cm x 1 cm in size which demonstrates that story of firing from a distance of merely one step is highly unlikely and impossible. The test regarding close range gunshot wound was considered in catena of judgments. (Para 66)

In the instant case, the entry wound of deceased does not show of any blackening, the doctor had opined that gunshot must have been caused from a distance. If we examine this finding on the basis of analysis made by the Apex Court, we will not be able to hold that the story of prosecution that gunshot injury was caused from a distance of merely one step to be trustworthy. Thus keeping in view the aforesaid observations of the apex court vis-a-vis the opinion of the doctor, the gunshots must have been made from a distance of more than six feet. (Para 70)

This court finds that all the aforesaid aspects have been considered threadbare by the Trial Court. The evidence recorded in the present case has been appreciated in its correct perspective and the Trial court has at no point of time missed the woods of the tree. Thus, we do not find any perversity in the order of acquittal passed by the Trial Court and in any case, the law presumes double presumption in favour of the accused after a due adjudication by the trial Court. Further, on recording of the findings as aforesaid, we find that the prosecution has utterly failed to establish the chain of events which can be said to exclusively lead to the one and only conclusion, i.e., the guilt of the accused persons. In that view of the matter, we find that the judgment and order of the learned Sessions Judge to be a plausible and sustainable view, especially when the Trial Court had the advantage of seeing and assessing the demeanour of witnesses. (Para 74)

This court has also recorded its independent finding and holds that the theory put forth by prosecution that the four accused persons were liable for causing death of the deceased is unconvincing and shorn of evidence proved beyond reasonable doubt. (Para 75)

Appeal dismissed. (E-14)

List of Cases cited:

1. Chandrappa & ors. Vs St. of Karn. (2007) 4 SCC 415
2. Ravi Sharma VS St. (Government of NCT of Delhi & Anr. (2022 SCC Online 859)
3. Mohan @ Srinivas @ Seena @ Tialor Seena VS St. of Karn. (2021 SCC Online SC 1233)
4. N. Vijayakumar VS St. of T. N. (2021) 3 SCC 687
5. Kali Ram Vs St. of H. P., (1973) 2 SCC 808
6. Upendra Pradhan Vs St. of Orissa, (2015) 11 SCC 124
7. Golbar Hussain & Ors. Vs St. of Assam & anr., (2015) 11 SCC 242
8. Rajesh Yadav & anr. Vs St. of U.P., reported in 2022 SCC OnLine SC 150
9. Arjun & anr. Vs St. of Chhattisgarh reported in (2017) 3 SCC 247
10. Masalti Vs St. of U. P., AIR 1965 SC 202
11. Balaka Singh Vs St. of Pun., AIR 1975 SC 1962
12. Ugar Ahir & Ors. Vs St. of Bihar, AIR 1965 SC 277
13. Arvind Kumar @ Nemichand & ors. Vs St. of Raj. (2021 SCC Online SC 1099)
14. (1971) 3 SCC 192 (Balakrushna Swain Vs St. of Orissa)
15. (1976) 4 SCC 288 (St. of Orrisa Vs Mr. Brahmananda Nanda)
16. (1978) 4 SCC 371 (Ganesh Bhavan Patel & anr.Vs St. of Mah.)
17. (2016) 16 SCC 418 (Harbeer Singh & anr.Vs Sheeshpal & ors.)
18. Noor Khan Vs St. of Raj. (1964) 4 SCR 521

19. Janak Singh Vs St. of U.P. (1973) 3 SCC 50
20. A.N. Chandra Vs St. of U.P. (1990, Supp SCC 717)
21. Swaran Singh Vs St. of Pun.(2000) 5 SCC 668
22. Criminal Appeal No. 25 of 2012 (Ram Niwas Vs St. of Haryana).
23. Krishnegowda & ors. Vs St. of Karn., (2017) 13 SCC 98

(Delivered by Hon'ble Attau Rahman
Masoodi, J.)

A. Introduction

1. Both the State and the de-facto Complainant are before this court challenging the order of acquittal of all the four accused/ respondents by the Trial Court in Sessions Trial No. 518/2001, under section 302, 302/34 IPC, wherein the Trial Court, while acquitting these accused persons of all the charges concluded vide an order dated 29.03.2004, as inter-alia:

“123. On the basis of above attempted discussion, prosecution has utterly failed to prove its case and it does not inspire any confidence. Presence of the eye witnesses on the spot is not proved and prosecution story had been developed from stage to stage to give colour to the prosecutions story. Prosecution story is inconsistent to medical evidence and prosecution story which has come later, is not in support of the FIR and for these reasons, I am of the opinion that prosecution story and evidence led in this support at all not credible and all the accused persons in this case must be acquitted of all the charges levelled against them in this case.”

While the state has filed Criminal Appeal No. 1624 of 2004 under section 378 of the Criminal procedure Code, the de-facto complainant has preferred Criminal revision No. 221 of 2004 under section 397 r/w 401 of the Criminal procedure Code.

Since, both the proceedings engaging the attention of this court, arise out of the same impugned order and lead to the same facts & circumstances, they are being dealt and disposed of vide this common judgment.

B. Facts of the case

2. The appeal at hand filed by the State under Section 378 CrPC relates to the murder of one Prabhat Gupta alias Raju of which FIR was lodged by one Santosh Gupta (father) at Tikonia Police Station, District Lakhimpur Kheri on 8.7.2000 at 3.30 pm. The hearsay information giving rise to the FIR shows presence of four culprits at the time of incident mentioned in the FIR who were identified by two eye witnesses named therein. The information states that the deceased had left from the house of the informant at 3 pm on 8.7.2000 for going to the shop. On reaching the main road, the deceased was done to death by the two named culprits and the death occurred on the spot.

3. The eye witnesses in the FIR were stated to have seen the occurrence in broad day light which according to the informant was probable in the background of some political rivalry and enmity. The registration of the FIR by the scribe Shri Krishna (HM-53) on 8.7.2000 at 3.30 pm had set the machinery of law in motion.

4. The action that followed immediately after lodging of the FIR was visiting the scene of occurrence by

Investigating Officer and drawing up the site plan with reference to the dead body, noticing recovery of some articles inclusive of two empty cartridges, a pair of footwear and thereafter inquest report was prepared from 3.40 pm to 5 pm in presence of panchas. The inquest report significantly notices the injuries on the dead body and takes note of the site plan from where two empty cartridges etc were recovered. The oozing blood and the direction of fire arm injuries from right to left was also mentioned. The inquest report mentions handing over of the sealed dead body at 5 pm on 8.7.2000 to two police personnel for obtaining the postmortem report to definite the cause of death which according to the panchas had occurred due to fire arm injuries.

5. The postmortem was conducted on 9.7.2000 at 11 am and the report was accordingly drawn. The deceased had sustained two gunshot wounds of entry and only one exit wound. Besides the deceased, who lost his life, no one was injured.

6. According to the doctor, death occurred due to shock and haemorrhage as a result of ante mortem injuries and one bullet was recovered from the dead body.

7. The investigation was conducted in piecemeal by different officers. SI T.B. Singh conducted the investigation of the case from 8.7.2000 to 15.7.2000 and from 16.7.2000 to 18.7.2000 investigation was done by the team constituted under the order of the IG Zone and investigation was headed by Balvir Singh SIS (Security and Investigation Services). On assumption of investigation by the SIS team, on one day i.e. 19.7.2000 investigation was done by Hemant Singh, member of SIS team, however, from 20.7.2000 to 28.9.2000

investigation was conducted by R.P Tiwari of CBCID. The proceedings of investigation, if any, conducted between 28.9.2000 to 6.11.2000 are not clear from the record available before this Court. It is though apparent from the record that from 6.11.2000 to 13.12.2000 another R.P. Tiwari of SIS who after collection of evidence concluded the investigation with the submission of charge sheet against the accused persons.

8. Until the stage of investigation many aspects shock to normal prudence like if the timing of FIR was so prompt then why the postmortem report was prepared a day later and why the recording of statements under Section 161 CrPC was delayed.

9. The delay in the arrest of culprits and shifting of investigation from one agency to another speak large. The investigation officer in order to bring accuracy in the matter of place of occurrence prepared a second site plan on 26.11.2000 but the recovery made was not taken aid of to explore the truth for the two cartridges and one bullet recovered were not subjected to any ballistic report. The measured distance in footsteps from the house of informant upto the point of occurrence in the two site plans stands at variance and the directional route also varies.

10. After cognizance, when it came to the stage of framing the charge before the court of session, charge simplicitor under Section 302 IPC was framed only against the two accused persons attributed the role of fire arm injuries whereas, the other two were tried for the same offence with the aid of Section-34 IPC. The place of occurrence in the frame of charge is mentioned within

the limits of Tikonina town and is not circumscribed within either of the two site plans.

11. The accused persons abjured their guilt and claimed trial. The case was thereafter transferred to the court of Addl Sessions Judge/Fast Track Court No. 4 and by order of this Court passed on 23.2.2004, the trial was transferred to the court of Sessions Judge where day to day hearing was done and the same concluded on 24.3.2004.

12. The prosecution in order to prove the guilt, has examined as many as 12 witnesses. The informant, Santosh Gupta (PW-1), father of the deceased; the eye witnesses mentioned in the FIR Vinod Gupta, (PW-2) and Sanjeev Gupta (brother of the deceased i.e. PW-3). The other eye witnesses discovered during investigation viz. Shiv Kumar (PW-4) and Jagdish Prasad Yadav (PW-10); Gopal Verma (PW-5) and Atul Gupta (PW-6) were examined as witnesses of Panchayatnama. Dr S.K. Maneer (PW-7) who conducted postmortem, HC 53 Sri Krishna (PW-8) who prepared chik, T.B. Singh (PW-9) IO, R.P. Tiwari-I (PW-11) IO and another R.P. Tiwari (PW-12) who also investigated the case were examined as official witnesses.

13. In their statements recorded under Section 313 CrPC the accused respondents denying the charges of murder, stated that they have been implicated due to political rivalry and enmity erupted due to panchayat elections. They denied the prosecution story and submitted that the witnesses have given false statements in order to implicate them in the case.

14. The case set out by defence in extenuation of the charges, as already

stated, is that the accused-respondents have been falsely roped in the case. They, however, adduced no evidence in support of their defence.

C. Appeal / Revision

15. The Sessions Judge after scrutinizing and appraisal of evidence, recorded the verdict of acquittal of the accused-respondents of the charge under Section 302 IPC read with Section 34 IPC, giving rise to this State appeal under Section 378 CrPC which on leave being granted was admitted by order dated 3.2.2005.

16. Sri Umesh Chandra Verma, learned AGA has argued this appeal for the State whereas the complainant who had instituted the criminal revision no. 221 of 2004 against the same very judgment having passed away during the pendency of criminal revision, was heard through his legal representatives as victims. This opportunity was granted by passing an order on the connected criminal revision on 13.2.2023 and the relevant part of the same is reproduced as under:

“.....In the present case, however, the connected appeal i.e. Criminal Appeal No.1624 of 2004 instituted by the State is pending against the same very judgment, therefore, the consequence of abatement of the present revision is inconsequential and does not leave the legal heirs of the revisionist as remediless. The legal heirs of the revisionist have an opportunity of participating in the pending criminal appeal instituted by the State as victim, for which, a similar application has been made by the applicants in the connected criminal appeal.

Having regard to the scope of Section 397 read with Section 401 CrPC juxtaposed to Section 394 CrPC, we dispose of this application permitting the legal heirs or any one of them to participate in the connected criminal appeal as victims to which there is no objection by the accused respondents.”

17. Learned AGA for the State argued the matter very ably and taking us through the material on record, has reprehended the trial court for not having proceeded with the case in the correct perspective. The appreciation of evidence according to the prosecution being seriously faulty, renders the acquittal of the accused respondents as illegal and perverse.

18. According to the learned counsel for the State, it was a case of broad daylight murder, duly witnessed by eye witnesses and the prosecution having successfully proved the evidence as wholly reliable, therefore, the acquittal recorded by the trial court is against the weight of evidence.

Learned counsel for the prosecution, however, conceded to the proposition that an acquittal through the process of law safeguards the presumption of innocence doubly and the prosecution in order to make out a case for conviction, is duty bound to prove its stand beyond a reasonable doubt and show that the acquittal recorded by the trial court was not a possible view.

19. The frame of the prosecution case having been set on the testimony of star-witness Sanjeev Gupta (PW-3) brother of the deceased, it is argued that the corroborative evidence when read correctly does not leave any doubt in the pyramid of

prosecution case and the resultant opinion in any view of the matter is none other than the conviction of culprits spotted at the place of occurrence, therefore, the judgement of the trial court deserves reversal.

20. Elaborating on the foundational testimony of Sanjeev Gupta (PW-3) who was the real brother of the deceased, it was argued that his oral testimony being natural was wholly reliable and the corroborative evidence fully supports the case of prosecution.

This Court while dealing with the case is conscious of the fact that the commission of an offence and complicity of the offenders are two different realities. The complicity of an offender must provenly be established connected to the commission of charged offence, then only it is permissible for a court of law to derive the product of conviction failing which the acquittal is the rule.

D. Analysis of evidence

21. The law stands settled that any acquittal order cannot be lightly interfered with by the Appellate Court, though this Court has wide powers to review the evidence and to come to its own conclusion. However, the power to grant leave must be exercised with care and caution because the presumption of innocence is further strengthened by the acquittal of an accused. The Apex Court in **Chandrappa & Others v. State of Karnataka** (2007) 4 SCC 415, this Court held:

“(1) An appellate court has full power to review, reappreciate and

reconsider the evidence upon which the order of acquittal is founded.

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

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

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

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

22. The Hon'ble Apex Court recently in the case of **Ravi Sharma V. State (Government of NCT of Delhi & Anr. (2022 SCC Online 859) and Jafarudheen**

and Others V. State of Kerala (2022 SCC Online SC 495), which was passed after following earlier precedents like (i) **Mohan alias Srinivas aliwas Seena Alias Taialor Seena V. State of Karnataka (2021 SCC Online SC 1233)**, (ii) **N. Vijayakumar V. State of Tamil Nadu (2021) 3 SCC 687**), reiterated the scope of section 378 of the Code of Criminal Procedure while dealing an appeal against acquittal by the High Court in the following words;

"25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters."

23. Further, it is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. [*Vide Kali Ram Vs. State of*

Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan Vs. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015) 11 SCC 242].

24. Keeping in mind the aforesaid position of law, we shall examine the arguments advanced by the parties as also the evidence and the materials on record and see whether in view of the nature of offence alleged to have been committed by the Respondents, the findings of fact by the Trial Court call for interference in the facts and circumstances of the case.

25. Now coming to the case at hand it is to be noted that the very presence of the eye witnesses for the purposes of proving complicity of the accused at the place of incident begins from the residential place of the informant. The star witness (PW-3) according to the story of prosecution shows his presence started from his father's residence alongwith Vinod Gupta (PW-2) and were following the deceased Prabhat Gupta alias Raju who had left the same house, after having meal, for shop nearly about the same time in the afternoon. It was from a close distance from the place of occurrence that they spotted all the four accused possessed with small fire arms and saw two of them firing on the body of the deceased in the day light at 3 pm on 8.7.2000. For proving the presence of these two eye witnesses, the prosecution owes a burden of proof not only to establish that the two witnesses were present at the place of occurrence but they were also present at the residential place of the informant where they joined together. The definite allegation of togetherness of two witnesses in the FIR

read with the examination in chief of PW-3 shows that both of them started together from the house of informant and had followed the deceased up to the place of occurrence when they saw the deceased shot at by the two named accused and thereafter brandishing their weapons alongwith two more known accused, all ran away from the place of incident towards old kotwali in the west. It is significant to note that when the two eye witnesses reached the deceased, they found him dead.

26. It was nowhere stated by the witness PW-3 in his examination in chief that any other person had witnessed the occurrence and no such person was named.

27. The whole story of complicity of the accused persons revolves around the oral evidence of PW-1, PW-2, PW-3, PW-4 and PW-10 who are the witnesses of facts to establish the complicity of the four accused. The rest of evidence is the corroborative evidence.

28. The togetherness of the informant (PW-1), the eye witness (PW-3) and the deceased at their home on the date of occurrence is natural as they all were residing in the same house but once it is stated that PW-3 accompanied Vinod Gupta (PW-2) from the same very house upto the place of incident, the burden of proof multiplies and accords equal respect to the testimony of PW-2.

29. The informant in the first place altered his version in his examination-in-chief regarding the purpose of going out of the deceased. The statement of going to shop was altered and to attend the 'dharma' instead of shop was introduced but such a diversion deserves scrutiny and the purpose thereof needs to be understood. This

diversion was introduced to establish the presence of Pw-2 whose presence otherwise at the house of the informant was unnatural. The informant in order to explain the presence of PW-2 at his house on 8.7.2000 introduced this fact of which there is no explanation by PW-3 in his testimony. It is in order to justify the contradiction that a new version was introduced by the informant contrary to what was stated in the FIR. The improvement of '*dharna*' was liable to be proved to free the testimony from being untruthful. This contradiction has a bearing on the movement and presence of witnesses PW-2 & PW-3 together which clouds the truthfulness of testimony of PW-1 and PW-3 both. The presence of PW-2 and PW-3 when analysed from the oral testimony of PW-3 in depth does not give any clue as to how PW-2 reached the place of informant and as to when the two witnesses joined each other so as to follow the deceased on that fateful day.

30. As per the case of the prosecution, the statement of PW-4 and PW-10 was significant to prove the guilt but there is no justification as to what prevented the eye witnesses named in the FIR to disclose the identity of above witnesses before lodging the FIR and to introduce them at the time when, prima facie it appeared to the prosecution that the evidence on record was not strong enough to bring home the guilt. It is though trite that an eye witness is not necessarily to be named in the FIR but the circumstances in which these two witnesses have been introduced put a question mark on the manner of investigation and it may clearly be inferred that these witnesses have been brought in to strengthen the prosecution case which otherwise may have weakened the story set up by them and the same could not be of any assistance to get

the accused implicated and convicted. Such an act cannot be said to have been taken in natural course in a bona fide manner as the same goes to the root of the matter with an intention to fill the loopholes in the investigation.

31. Having focused on the aforesaid fact, it is extremely doubtful that the alleged eye witnesses have either seen the occurrence or were present at the spot.

32. PW-3 Sanjeev Gupta, brother of the deceased, who is the star witness and whose evidence alongwith PW-1 and PW-10 has been heavily relied upon by the prosecution, deposed in his statement that on the date of occurrence i.e. 8.7.2000, there was '*dharna*' organised by a political party (Samajwadi Party) alongwith the Vyapar Mandal and he alongwith the deceased brother (Prabhat Gupta) left the home at about 3 pm after having meals. The deceased was ahead proceeding towards his shop whereas he alongwith Vinod Gupta were walking behind while having a chat. When the deceased reached the main road from the lane (Gali), he suddenly saw all the four accused there. All of them were holding in their hands small size weapons which either were revolver or pistol. At the spur of moment Ajay Misra Teni fired gunshot on the temple of the deceased. Immediately Subhash alias Mama fired on Kokh (between stomach and chest). Deceased collapsed after sustaining two gunshots and succumbed to death on the spot. Rakesh alias Dalu, Shashibhushan alias Pinki displaying their weapons uttered, let Prabhat be not spared and if anyone comes in between, fire gunshot on him too. The assailants ran towards old Kotwali. When he and Vinod Gupta reached upto the deceased, he had already died. Thereafter he alongwith

Vinod Gupta came back to his house and informed his father that Prabhat has been killed by Teni and went to the place of incident alongwith his father and narrated him the entire incident on the way.

33. He also deposed that on the date of incident his shop was closed due to dharna. He, however admitted that there was no call for closing the market by the Traders' Association. He also stated that he had informed this fact to IO T.B. Singh but had no idea as to why this fact was not mentioned in his statement. Though holding of dharna on the date of incident was a crucial fact, he submitted that he does not remember as to whether he stated this fact before the CBCID officers when the investigation was taken over by them, or not. He also expressed his inability to recollect as to whether he informed the CBCID officer that his shop was closed that day and that he was going towards the place of demonstration from his house. With regard to the presence of Vinod Gupta at his place on the date of incident, he deposed that Vinod Gupta had come to his house at 1-2 pm and after having meals he, Vinod Gupta and deceased Prabhat left together. Vinod Gupta was residing at Lakhimpur city and that he had not met Vinod Gupta before the date of incident.

34. Replying to the query made by the Court PW-3 stated that the site of dharna was at a distance of 40-50 steps from the place where gunshot was fired and the place of dharna was partially visible from the place of gunshot. He further stated that at the protest site 100-150 persons were present. Regarding audibility of the gunshot, he prudently deposed that the sound of fire shot was neither very loud nor low. According to the learned counsel for the appellant, to strengthen his stand that

the sound of gunshot could not have reached the place of protest. he has also deposed during his statement that all the assailants immediately after firing left the scene and ran towards one and the same direction and that no one chased or went after them. It is no where mentioned that any person tried to raise alarm so as to reach to the place of dharna where according to the own statement of PW-3, 100-150 people were present and was at a distance of 40-50 steps, moreso when most of the persons belonged to the same political party of which the deceased was a designatory. Even a man of ordinary prudence would have raised an alarm in order to gather some people and defend himself particularly when, as is the case of the prosecution, a dharna at a very short distance was being staged by a large number of persons. In the above background the very holding of dharna on the date of occurrence becomes doubtful. The fact regarding dharna being held on the date of occurrence also stands specifically belied by the statement of PW-8 HC 53 Shri Krishna discussed onwards.

35. It is thus clear that PW-3 while replying the query of the court has stated that he was at a distance of 40-50 steps from the place of occurrence whereas in the cross examination he has stated that he was at a distance of 20-25 steps from the place of occurrence which though may be said to be a minor discrepancy but since both the versions were recorded on the same day and during a continued statement hence such an anomaly cannot be a natural variation of guess but may be due to pressure and zeal of making the statement in order to prove his case.

36. Likewise, the statement of PW-8 HC 53 Shri Krishna who prepared chik

may also be relevant for unraveling the intricate evidence and bring home the true facts. PW-8 in his statement has clearly stated that on 8.7.2000 i.e. the date of occurrence he was posted as Head Moharrir at PS Tikonia and that on the same day he registered the chik FIR as Case Crime No. 41-200 under Section 302 against the accused persons on the basis of written complaint of Santosh Gupta but has not stated anything about protest or dharna being organised on the date of occurrence. He, however, during cross examination has stated in unambiguous terms that the Rail Roko Dharna (protest) was called at Tikonia Railway station on a day before i.e. 7.7.2000 and in order to ensure law and order, SI R.N. Singh, SI C.P. Bahuguna, Manoj Pandey etc were deputed for duty at the place of protest. To buttress his statement, he stated that this fact is stated by him by duly verifying and going through Report No. 12 registered at 10.05 on 7.7.2000 which is a part of the original GD. He further clarifies the scenario by stating that after the protest at Tikonia railway station was concluded, he had registered his return on the same day i.e. 7.7.2000 in Report no. 19, at 18.30. He denied the suggestion that FIR was registered after long gap of time and was shown after making improvement therein.

37. The above statement of witness of prosecution itself which is proved by documentary evidence, encompasses the entire story set up by the prosecution in the zone of strong suspicion regarding holding of dharna on the date of occurrence.

38. Now coming to the testimony of PW-1, if it is believed that the inquest report was drawn on 8.7.2000 at 5 pm whereafter the dead body was handed over to two police constables who alongwith the

said witness left by tractor to reach the District Hospital at a distance of 80 km, the witness has revealed surprises in response to the queries in the cross examination than truth.

39. The untruthfulness multiplies when we look at the statements of hostile witnesses viz. PW-2, PW-4 and the statements of the inquest witnesses.

40. PW-2 Vinod Gupta the hostile witness in his deposition has stated that he was acquainted with the accused Ajay Misra alias Teni, Subhash alias Mama, Dalu and Pinky before the occurrence in question took place. He stated that Ajay Misra was a worker of Bhartiya Janta Party and other three persons were engaged in business at Tikonia. The house of Ajay Misra was situated in Tikonia and his Mill (factory) was situated in vilage Banbirpur. Before the incident he was State Secretary of Samajwadi Yuvjan Sabha and the deceased Prabhat Gupta was State Secretry of his own party.

41. Narrating the incident he stated that at 3 pm he went to Tikonia in connection with his business but he changed his mind and decided to meet deceased Prabhat Gupta whom he found on the road itself while going to shop from his house and he was also proceeding towards deceased's house to meet the deceased. He further deposed that before he met the deceased, he had seen the accused walking near the State Bank. As soon as when Prabhat came on the road, the accused persons started abusing him and they all exhorted to kill the deceased. According to him all the accused were carrying fire arms. Now the deposition which, at the first instance, seems to have led the prosecution to declare him hostile is that he in

unambiguous terms stated that two gunshot were fired on the deceased by Subhash alias Mama while others were abusing and exhorting to do away the deceased. According to him the accused-assailant had also abused him and threatened to life. After sustaining the gunshot, he stated that Prabhat collapsed on the spot only then out of the four assailants two ran away in one direction and two towards other direction.

42. A bare reading of the aforesaid deposition, it is apparent that PW-2 who is claimed to be a eye-witness of the prosecution has stated that it was Subhash Mama who had fired both the gunshots on the deceased which caused fatal injuries to him and he was done to death on the spot. In the entire prosecution case, there is no mention of any third gunshot fired by anyone, though it is said that all the assailants were armed with guns. On the other hand, the informant who was admittedly not an eye witness deposed in his statement that first gunshot was fired on the temple of the deceased by Ajay Misra alias Teni while the second was fired by Subhas alias Mama. This statement was based on the information received from Sanjeev (PW-3) and Vinod (PW-2). Now as aforesaid Vinod Gupta (PW-2) the eye witness who is alleged to have given the information of the incident to PW-1 himself has stated that both the gunshots were fired by Subhash Mama and this fact has very conveniently been discarded by the prosecution by declaring the PW-2 as hostile. Thus, there appears to be material discrepancy in the testimony of the both the named eye-witnesses, be it in terms of the no. of accused, who gave the gunshots or the manner and direction in which they ran away in the presence of these witnesses.

43. In a recent judgement rendered in the case of Rajesh Yadav and another v.

State of U.P., reported in 2022 SCC OnLine SC 150, the apex court has dealt with the term 'hostile witness' and has specifically observed that a court is well within its powers to make an assessment of the matter, which includes the statement of a hostile witness for reaching to a correct conclusion. Relevant paragraphs 21 and 22 of the judgement are reproduced as under:

“21. The expression “hostile witness” does not find a place in the Indian Evidence Act. It is coined to mean testimony of a witness turning to depose in favour of the opposite party. We must bear it in mind that a witness may depose in favour of a party in whose favour it is meant to be giving through his chief examination, while later on change his view in favour of the opposite side. Similarly, there would be cases where a witness does not support the case of the party starting from chief examination itself. This classification has to be borne in mind by the Court. With respect to the first category, the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief examination could be termed as evidence. Such evidence would become complete after the cross examination. Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an assessment, being a matter before it and come to the correct conclusion.

22. On the law laid down in dealing with the testimony of a witness over an issue, we would like to place reliance on the decision of this Court in *C. Muniappan v. State of T.N.*, (2010) 9 SCC 567:

“81. It is settled legal proposition that:

“6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.” (*Vide Bhagwan Singh v. State of Haryana*, (1976) 1 SCC 389, *Rabindra Kumar Dey v. State of Orissa*, (1976) 4 SCC 233, *Syad Akbar v. State of Karnataka*, (1980) 1 SCC 30 and *Khujji v. State of M.P.*, (1991) 3 SCC 627, SCC p. 635, para 6.)

82. In *State of U.P. v. Ramesh Prasad Misra* [(1996) 10 SCC 360: 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra* [(2002) 7 SCC 543: 2003 SCC (Cri) 112], *Gagan Kanojia v. State of Punjab* [(2006) 13 SCC 516: (2008) 1 SCC (Cri) 109], *Radha Mohan Singh v. State of U.P.* [(2006) 2 SCC 450: (2006) 1 SCC (Cri) 661], *Sarvesh Narain Shukla v. Daroga Singh* [(2007) 13 SCC 360: (2009) 1 SCC (Cri) 188] and *Subbu Singh v. State* [(2009) 6 SCC 462: (2009) 2 SCC (Cri) 1106].

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

44. Similarly in the case of ***Arjun and another v. State of Chhattisgarh reported in (2017) 3 SCC 247***, following observations have been made in paragraphs 15 and 16 of the judgement:

“15. Though the eye witnesses PWs 1, 2, 7 and 8 were treated as hostile by the prosecution, their testimony insofar as the place of occurrence and presence of accused in the place of the incident and their questioning as to the cutting of the trees and two accused surrounding the deceased with weapons is not disputed. The trial court as well as the High Court rightly relied upon the evidence of PWs 1, 2, 7 and 8 to the above said extent of corroborating the evidence of PW-6 Shivprasad. Merely because the witnesses have turned hostile in part their evidence cannot be rejected in toto. The evidence of such witnesses cannot be treated as effaced altogether but the same can be accepted to the extent that their version is found to be dependable and the court shall examine more cautiously to find out as to what extent he has supported the case of the prosecution.

16. In *Paramjeet Singh alias Pamma vs. State of Uttarakhand (2010) 10 SCC 439*, it was held as under:-

“16. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at

different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony. (Vide State of Rajasthan v. Bhawani (2003) 7 SCC 291.)

17. This Court while deciding the issue in *Radha Mohan Singh v. State of U.P.* (2006) 2 SCC 450 observed as under: (SCC p. 457, para 7) “7. ... It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof.”

18. In *Mahesh v. State of Maharashtra* (2008) 13 SCC 271, this Court considered the value of the deposition of a hostile witness and held as under: (SCC p. 289, para 49) “49. ... If PW 1 the maker of the complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness for no plausible and tenable reasons pointed out on record, will give rise to doubt the testimony of the investigating officer who had sincerely and honestly conducted the entire investigation of the case. In these circumstances, we are of the view that PW 1 has tried to conceal the material truth from the Court with the sole purpose of shielding and protecting the appellant for reasons best known to the witness and therefore, no benefit could be given to the appellant for unfavourable conduct of this witness to the prosecution.”

19. In *Rajendra v. State of U.P.* (2009) 13 SCC 480, this Court observed that merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. This Court reiterated a similar view in *Govindappa v. State of Karnataka* (2010) 6 SCC 533 observing that the deposition of a hostile witness can be relied upon at least up to the extent he supported the case of the prosecution.

20. In view of the above, it is evident that the evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.” The same view is reiterated in *Mrinal Das and Ors. vs. State of Tripura* (2011) 9 SCC 479 in para (67) and also in *Khachar Dipu alias Dilipbhai Nakubhai vs. State of Gujarat* (2013) 4 SCC 322 in para (17).”

45. The use of term ‘small weapons’ is also a vague and calculated, just in order to create corroboration between the statement of PW-1 and PW-4 and also to show ignorance about the name and description of the firearm. Though PW-4 has stated that the firearm could be a revolver or pistol but in the statement of PW-2 regarding the identity of weapon, he only used the term ‘pistol’. The declaration of PW-2 as hostile insofar as the identity of the persons who had fired gun shot is concerned, also creates suspicion in the wake of the fact the empty cartridges recovered from the site of occurrence were not sent for forensic examination which could have revealed the firearm from which they were shot. Now the use of term small weapon by PW-1 and PW-3 becomes more interesting as in the case of identification of the firearm, the term small weapon or

expression of uncertainty regarding the type of the firearm could have helped in controverting the report but the Mention of “pistol” by PW-2 by a certain degree of certainty has further complicated the issue. Although, PW-2 stated that Subhas Mama has fired two pistol shots, but apparently there is no recovery of any fire-arms from the said Subhas Mama or for that matter from any accused person. We need not comment on the aspect that non-recovery of weapon is sine-quo-non for proving the guilt of any accused, but the fact remains that there is huge contradiction in the version of oral witness as to whether the gun-shots could be attributable to one accused or two accused. Further, admittedly, two empty cartridges were found on the spot and there is no investigation on the point as to whether they were fired by same weapon or by different weapon. Obviously, a ballistic report would have played wonders in that regard and would have cliched the issue as far as the prosecution story is concerned, however the same was not obtained and the only explanation comes from PW-9, that the investigation was transferred from him to some other Investigator.

46. With respect to the dharna/demonstration having been held on the date of occurrence, PW-2 has very specifically stated that there was no such demonstration on 8.7.2000 i.e. the date of occurrence and the protest which was continuing last several days had ended on 7.7.2000 itself and on that very day he and various designatories from the districts reached there and returned to Lakhimpur in the night. There is one more fact narrated by PW-2 which controverts the deposition of PW-3 is that the PW-3 in his statement had stated that all the accused assailants after committing the murder of the

deceased ran towards one and the same direction whereas according to the statement of PW-2 out of the four assailants two ran away in one direction and two towards other direction.

47. PW-1 in his statement has also stated that he had informed the CID inspector that Anurag Patel and Vinod Gupta had come to participate in the dharna on 8.7.2000 and if T.B. Singh and the IO deputed after T.B. Singh had not mentioned the fact regarding Rail Roko Dharna on 8.7.2000 in his statement, he cannot tell the reason. It thus appears that the dharna was not called on 8.7.2000 but on 7.7.2000 and this truth rolled off his tongue in a minute after he said that Anurag Patel and Vinod Gupta had come to participate in dharna on **8.7.2000**.

48. This fact is also fortified by the statement of IO T.B. Singh discussed in the earlier part of the judgement as well as the statement of PW-2 as aforesaid.

49. PW-4 Shivkumar who on his statement under Section 161 CrPC being read over to him, has flatly refused to have given any such statement and expressed an ignorance about the reason for such a statement being recorded and placed on record. However, the statement of PW-4 recorded under Section 161 CrPC said to have been discarded by him, is not on record before us nor there is any explanation regarding this omission. This also creates a suspicion as in the absence of the 161 CrPC statement, it cannot be brought to light as to what PW-4 initially deposed and what facts he denied in his cross-examination.

50. In his statement before the court he has stated that he knew the accused Ajay

Misra alias Teni, Subash alias Mama, Rakesh alias Dalu and Shahibhushan alias Pinky but he has denied to have witnessed any of the accused murdering the deceased. He stated that at the time of incident he was present in his hotel. He deposed that he had heard about the murder but had not seen the deceased sustaining any gunshot.

51. In order to cover up the story regarding the distance of 90 kms to Lakhimpur having been covered in a long 12 hours journey on tractor trolley for the purpose of autopsy of the dead body of the deceased, PW-1 has deposed that after getting the dead body loaded on the tractor trolley after 5 pm he came with the dead body and reached Lakhimpur at 5 am and the reason as specified by PW-1 was that the since the driver of the tractor had worked in the fields throughout the day, he started taking rest. The deposition regarding the delay having been caused as the driver had taken rest on the way with the dead body loaded on the tractor does not inspire confidence, more interestingly, when PW-1 stated that he did not know as to who was the driver driving the tractor trolley. He also showed ignorance about the fact that the driver was resident of Tikonia or any other village. He also had no knowledge whether it was brought on rent or not. He stated that the tractor was brought by his son, however, neither his son nor the Constable who accompanied the dead body were produced or examined. He also admitted that he has not told this fact to anyone nor anyone asked about it. The statement of the PW-1 to the above extent also stands controverted by the statement of PW-2 who had stated that dead body of Gupta (the deceased) was sent to Lakhimpur for postmortem on a DCM or Mazda Mini truck, as also supported by the

testimony of both panchayatnama witnesses (PW-5 & PW-6).

52. From the above it is clear that ample time was consumed on the way while travelling to Lakhimpur and during this period the witnesses sketch out the narration to be deposed by them so as to avoid any contradiction and to make out a foolproof case to entrap the accused Ajay Misra @ Teni in the commission offence but to their dismay PW-2 spilled the beans and their annoyance with the PW-2 resulted in declaration of PW-2 as a hostile witness.

53. From consideration and appraisal of the statements of the hostile witnesses PW-2 and PW-4, it appears that the facts deposed by the hostile witnesses which were not in keeping with the statement of other witness and were not in keeping with the case set up by the prosecution could have, in all probabilities, weakened the implication of convict respondent Ajay Mishra alias Teni and in order to allay this apprehension the two key witnesses were declared to be hostile.

54. The hostile witness PW-4 who is stated to be running a hotel near the place of occurrence had taken a somersault and went even to the extent of denying the fact that his statement under Section 161 was ever taken. He might have done so under some threat or in order to save his skin and distance himself from a case of murder involving major political parties.

55. In the above scenario, it would be apt to refer to a judgement rendered by the apex court in the case of **Masalti v. State of Uttar Pradesh, AIR 1965 SC 202**, wherein the Court observed as under:

"... under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true; but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable."

56. Likewise in the case of **Balaka Singh v. State of Punjab, AIR 1975 SC 1962**, the apex court observed as under:-

"It is true that, as laid down by this Court in *Zwinglee Ariel v. State of Madhya Pradesh*, AIR 1954 SC 15, and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

57. In another case, namely, **Ugar Ahir & Ors. v. State of Bihar, AIR 1965**

SC 277, Hon'ble the Supreme Court while dealing with the maxim 'falsus in uno, falsus in omnibus', has made the following observations :

"The maxim falsus in uno, falsus in omnibus (false in one thing, false in every thing) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest."

58. To the same effect is a recent judgment passed by the Hon'ble Apex Court in **Arvind Kumar @ Nemichand & Ors. vs. State of Rajasthan (2021 SCC Online SC 1099)** , wherein Justice M.M. Sundresh J. speaking for the bench crystallized this principle as follows:

"49. The principle that when a witness deposes falsehood, the evidence in its entirety has to be eschewed may not have strict application to the criminal jurisprudence in our country. The principle governing sifting the chaff from the grain has to be applied. However, when the evidence is inseparable and such an attempt would either be impossible or would make the evidence unacceptable, the natural consequence would be one of avoidance. The said principle has not assumed the status of law but continues only as a rule of caution. One has to see the nature of discrepancy in a given case.

When the discrepancies are very material shaking the very credibility of the witness leading to a conclusion in the mind of the court that is neither possible to separate it nor to rely upon, it is for the said court to either accept or reject.”

E. Findings

59. On a careful analysis of the evidence available on records, we do not find that the statement of star witnesses PW-3 about the meeting of PW-2 at his house can be believed to be true, therefore the testimony of PW-3 to have met at home and accompanied with PW-2 by following the deceased, after having meal, remains doubtful. The facts of dharna was introduced to make the presence of PW-2 at the house of the informant as natural but the truth of the matter is that no such dharna was called on 08.07.2000 as is corroborated by the statement of PW-8.

60. Further, PW-3 was present along with the informant/PW-1 at the time of lodging of FIR and this fact has been noted in G.D, however his statement was not recorded at that time, but only on 10.07.2000. Although delay in recording of statement of eye-witness may not be fatal to the prosecution story, however the delay in recording of his statement would have to be viewed cautiously in the wake of other overwhelming factors like the statement of PW-2, another eye-witness named in the FIR, which is at stark difference to the testimony of PW-3. The statement of both these eye-witness are at variance to each other, relating to the gun-shots, as PW-3 names both Ajay Misra @ Teni and Subhas Mama as assailant, whereas PW-2 names only Subhas Mama as assailant. Further, there is material discrepancy in the version of how these accused persons flee away

from the place of occurrence. PW-3 says that four accused persons ran away toward the Old kotwali, whereas PW-2 says that two accused flee away on one direction and the other two flee in the opposite direction. It has also come in evidence of PW-2 that it was he who had told about the incident to PW-3 and that PW-3 reached the spot after the deceased was done away. Further, PW-3 claimed that he along with the deceased and PW-2 had meals at the house of the deceased, whereas PW-2 says that he met the deceased at the place of occurrence and never went to the deceased house for meals. This court cannot be oblivious of the fact that the story of having meals as put forth by PW-3 and PW-1 is also at variance to the testimony of PW-8 and the post mortem report, which says that nothing was found in the stomach of the deceased and stated that the deceased would had meals at least 5-6 hours before he sustained the fatal injury. Thus, the story of having meal together by PW-2 & PW-3 with the deceased at the house of PW-1 is also highly unlikely.

61. Besides, PW3 & PW-2, the other eye witness of the incident as per the prosecution story is stated to be PW-10. Admittedly, PW-10 is not named as an eye witness in the FIR, although his name was known to the informant prior to lodging of the FIR. It has come in the testimony of PW-1 that on the spot of occurrence of incident, some persons including Shiv Kumar (PW-4) & Jagdish prasad (PW-10) told him about the said incident. Apparently, the statement of PW-1, makes both PW-4 & PW-10 as an eye witness to the incident but both of them were not named as an eye witness in the FIR nor their statement was recorded immediately. PW-4 has stated in his evidence that he reached the place of occurrence after 20

minutes and did not support the case of the prosecution and as such was declared hostile, whereas PW-10 as being found to be working for the last 20 years on the shop of the real brother-in-law of the informant supported the case of the prosecution. However, the statement of both PW-4 & PW-10 came to be recorded only after two months on 03.09.2000. The said delay is unexplainable and it is also not explained as to why PW-10 was not named in the FIR as an eye witness. Further, PW-10 in his statement says that he saw PW-3 along with one other person coming at the place of occurrence and on seeing the gun shot ran away to their house, whereas PW-3 has deposed that after the gun shot, he came to the spot and saw that his brother is dead and thereafter he rushed to his house to tell the informant (PW1). Thus, there are marked variance in the testimony of the witness. All these facts does not inspire any confidence in the statement of PW-10, which also shows that he was not present at the time of incident. Inordinate delay in recording his statement vitiates the investigation and creates serious doubt about correctness of his statement. Reliance is placed on **(1971) 3 SCC 192 (Balakrushna Swain vs. State of Orrisa), (1976) 4 SCC 288 (State of Orrisa vs. Mr. Brahmananda Nanda), (1978) 4 SCC 371 (Ganesh Bhavan Patel & another vs. State of Maharashtra), (2016) 16 SCC 418 (Harbeer Singh & another vs. Sheeshpal and others).**

62. Apparently, the Trial court has returned a finding that the FIR is ante-timed for cogent reasons. Anurag Patel, the scribe of the FIR & PW-2 are resident of Lakhimpur, which is at distance of 80 Km from the place of incident. The theory of Dharna pradashan on 08.07.2000 could not be proved by the prosecution. The presence

of Anurag Patel and PW-2 is attributable to dharna pradashan, otherwise their presence at the place of occurrence would be highly unlikely. Thus, when the theory of dharna pradashan failed, obviously both PW-2 and Anurag Patel would had been called from Lakhimpuri after 3 PM i.e after the incident. Hence, FIR could not had been lodged at 3:30 PM, whose scribe is Anurag Patel.

63. Further, both panchayatnama witnesses i.e PW-5 & PW-6 have stated in their testimony that the panchayatnama was prepared in gas light at 11 PM in the night as the informant was somewhere outside. PW-6 has also repeated the same story and additionally told that at the time of panchayatnama the MLA of Lakhimpur Kaushal Kishore and several other leaders including PW-2 arrived from Lakhimpur. He also told that after the panchayatnama the body of the deceased was taken for post mortem on a vehicle, which belonged to the deceased. Evidently, it has come on record that the time of reaching of the body at Lakhimpur for post mortem was 5 AM on 09.07.2000. However, when the PW1 was asked as to the aspect of taking of the body for post mortem, although he says that the body was taken after the panchayatnama at about 5 PM on a tractor, however he was neither able to recall the name nor the manner in which the said vehicle was brought to take the said body. Even this fact seems to be a made up story of PW1 as firstly, both PW5 & PW6 have stated that PW1 was somewhere outside and the panchayatnama was delayed because of delay in coming of PW1 and certain politician who had to come from Lakhimpur. Secondly, the distance of the place of occurrence and Lakhimpuri is 80 KM and PW1 could not explain as to how and in what manner the tractor could have

taken 12 hours to travel a short distance of 80 km and that too with a dead body. There is no cogent reasons to not believe the testimony of PW-5 & PW-6.

64. Further, from the testimony of PW-5 & PW-6, the presence of PW-2 at the place of occurrence also become highly improbable as it has come in evidence that PW2 is a politician based in Lakhimpur and he did not have any business to be done at the place of occurrence on the fateful day, especially when there was no dharna pradashan on that particular day. The entire facts apparently seemed to be a cooked up story. PW-2 apparently seems to be planted as a witness and that is why the story of dharna pradashan was brought into the picture, which miserably failed. Unfortunately, PW2 although declared hostile, but he has already spilled the beans and he stated in his evidence that PW-3 was not on the spot of occurrence, but it is he who has told PW-3 about the incident when he reached the place of occurrence. When the very presence of PW-2 becomes doubtful the entire story of the prosecution based on the testimony of hearsay evidence of PW-3 and PW-1 also crumbles down.

65. Further, according to the site-plan, the gun-shot fires were made from the range of within one step by the accused persons. If the same is considered to be correct, then certainly blacklining and charring must had been on the deceased, but the post mortem report does not reveal any such blackening or charring. According to statement of PW-7, fires were not made from close range because around the wounds there was no blacklining and charring. According to him, gunshot ought to have been fired from a distance. Thus, the testimony of PW-2, PW-3 and

PW-10 relating to firing of gunshot falls flat as they are at variance to the scientific report.

66. Moreover, it has come in evidence that one bullet was found inside the body of deceased. If bullet could not pass through the body, this shows that velocity of bullet was not very high. This further shows that it was not possible to cause such injury from a distance of 1 step or for that matter from 3-4 steps. Apparently, if fire is made from a close range of one step, the entrance wound would be big whereas a fire made from distant range the wound would be smaller in size. In the present case, as per statement of P.W.9, the entry wound is of two categories, one being of 0.5 x 0.5 cm and another of 1 cm x 1 cm in size which demonstrates that story of firing from a distance of merely one step is highly unlikely and impossible. The test regarding close range gunshot wound was considered in catena of judgments. In **Noor Khan Vs. State of Rajasthan (1964) 4 SCR 521** it was held as under:-

"10. There is discrepancy between the estimates given by the witnesses about the distance from which the fatal shot was fired by Noor Khan. Witnesses have estimated this distance as varying between 8 and 15 poundas - each pounda being equal to a step, or two feet. It appears however from the appearance of the injury and especially the charring and blackening of the wound of entry that the barrel of the gun could not have been at a distance exceeding 3 or 4 ft."

67. Similarly, in **Janak Singh Vs. State of U.P. (1973) 3 SCC 50** it was opined as under:-

"13. The third contention was the one which Mr Dixit elaborated. His proposition was that the medical testimony contradicted the eyewitnesses' version and that contradiction rendered their account unacceptable. According to Dr. Ghosh's evidence, none of the three entry wounds showed any blackening or tattooing. Obviously, therefore, the firing did not take place from a very close range but from some distance at least. No doubt, the three eyewitnesses gave different distances ranging from two to six paces. But they could hardly be expected to have marked at the time the precise distance at which the person shooting the firearm was. They, therefore, gave an estimate of the distance at which he was from the victim. It is no wonder that the distances they deposed varied. Nothing can therefore, turn on such variation."

68. In **A.N. Chandra Vs. State of U.P. (1990, Supp SCC 717)** the Supreme Court held that :-

"8.... If the gun was fired from such a close range, there should have been blackening and tattooing but the doctor has not noted any such sign around the injuries. Further the direction of the injuries was from upside to downward and there was a dispersal of the wounds. If the gun was fired from a close range there could not have been such dispersal of the wounds. Further, we are unable to understand as to why the gun was kept loaded already."

69. The Apex court in the case of **Swaran Singh vs. State of Punjab (2000) 5 SCC 668** in para 25 held that:-

"The evidence of PW 1 and the post-mortem reports was to the effect that

the single wound on the right side of the chest of Shamsher Singh and several wounds on Amar Singh were blackened. "Blackening is caused by smoke deposit. Smoke particles are light. They do not travel far. Therefore, smoke deposit, i.e., blackening is limited to a small range." [See Forensic Science in Criminal Investigation & Trials (3rd Edn.), p. 280; Fisher, Svensson, and Wendel's Techniques of Crime Scene Investigation (4th Edn., p. 296).]"

70. In the instant case, the entry wound of deceased does not show of any blackening, the doctor had opined that gunshot must have been caused from a distance. If we examine this finding on the basis of analysis made by the Apex Court, we will not be able to hold that the story of prosecution that gunshot injury was caused from a distance of merely one step to be trustworthy. Thus keeping in view the aforesaid observations of the apex court vis-a-vis the opinion of the doctor, the gunshots must have been made from a distance of more than six feet.

71. Apparently, it has also come on record that Dharna pradarshan had been introduced at a later stage, just to show presence of Anurag Patel and Vinod Gupta (PW-2). PW-3 Sanjeev Gupta stated that shop was not opened due to Dharna Pradarshan. Hence, case of FIR that deceased was going to shop, becomes untrue and since the happening of Dharna Pradarshan has also not been proved, the presence of both the ocular witness PW-3 Sanjeev Gupta and PW-2 Vinod Gupta with the deceased on the spot is not proved as the manner in which this presence has been told, is not proved.

72. Hence, the presence on the spot of both the witness PW-3 Sanjeev Gupta and

PW-3 Vinod Gupta is doubtful and not proved. So, hardly their statement can be taken into account. Deceased was done to death on the spot. Thus, the theory which has come that some unknown assailants came and fled after committing murder of the deceased on motor cycle as has come in evidence of PW-9 and also stated by PW-4 & PW-10 to PW1 at the time of Panchayatnama as has come in the testimony of PW-1, appears to be a probable story and implication of the accused persons may be on account of Ranjish (rivalry) and also on the basis of suspicion that these accused person may have hand in the murder. However, suspicion cannot take place of proof. Recently, vide a Judgment dated 11.08.2022, a bench of Justice B R Gavai and P S Narasimha, held that *"It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proven guilty beyond a reasonable doubt."* in the case of **Criminal Appeal No. 25 of 2012 (Ram Niwas Vs State of Haryana)**.

73. Thus, the Trial court rightly disbelieving the prosecution story has acquitted all the accused persons. It would be profitable to quote a judgment of the Hon'ble Apex Court in the case of **Krishnegowda & ors Vs state of Karnataka, (2017) 13 SCC 98**, wherein the apex court held as herein under:

"32. It is to be noted that all the eyewitnesses were relatives and the prosecution failed to adduce reliable evidence of independent witnesses for the incident which took place on a public road in the broad day light. Although there is no

absolute rule that the evidence of related witnesses has to be corroborated by the evidence of independent witnesses, it would be trite in law to have independent witnesses when the evidence of related eyewitnesses is found to be incredible and not trustworthy. The minor variations and contradictions in the evidence of eyewitnesses will not tilt the benefit of doubt in favor of the accused but when the contradictions in the evidence of prosecution witnesses proves to be fatal to the prosecution case then those contradictions go to the root of the matter and in such cases accused gets the benefit of doubt.

33. *It is the duty of the Court to consider the trustworthiness of evidence on record. As said by Bentham, "witnesses are the eyes and ears of justice". In the facts on hand, we feel that the evidence of these witnesses is filled with discrepancies, contradictions and improbable versions which draws us to the irresistible conclusion that the evidence of these witnesses cannot be a basis to convict the accused."*

Conclusion:

74. This court finds that all the aforesaid aspects have been considered threadbare by the Trial Court. The evidence recorded in the present case has been appreciated in its correct perspective and the Trial court has at no point of time missed the woods of the tree. Thus, we do not find any perversity in the order of acquittal passed by the Trial Court and in any case, the law presumes double presumption in favour of the accused after a due adjudication by the trial Court. Further, on recording of the findings as aforesaid, we find that the prosecution has utterly failed to establish the chain of

events which can be said to exclusively lead to the one and only conclusion, i.e., the guilt of the accused persons. In that view of the matter, we find that the judgment and order of the learned Sessions Judge to be a plausible and sustainable view, especially when the Trial Court had the advantage of seeing and assessing the demeanour of witnesses.

75. This court has also recorded its independent finding and holds that the theory put forth by prosecution that the four accused persons were liable for causing death of the deceased is unconvincing and shorn of evidence proved beyond reasonable doubt.

76. As a sequel to above, the appeal as well as the revision are therefore dismissed. The judgment and order of acquittal dated 29.03.2004 rendered by Sessions Judge, Lakhimpur Kheri in Sessions Trial No. 518/2001, under Section 302, 302/34 IPC, Police Station Tikunia, District Lakhimpur Kheri, acquitting accused/respondent no. 1 Ajay Misra alias Teni and accused/respondent no. 2 Subhash alias Mama under Section 302 IPC and accused-respondent no. 3 Rakesh alias Dalu and accused-respondent no. 4 Shashi Bhushan, under Section 302 IPC read with Section 34 IPC is upheld in the light of the discussions and findings recorded hereinabove. The bail bonds, if any, shall stand discharged.

(2023) 5 ILRA 1988

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 05.04.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Crl. Misc. Anticipatory Bail Application No. 3037
of 2023
(u/s 438 Cr.P.C.)

Sovaran Singh Adhti & Ors. ...Applicants
Versus
State of U.P. ...Respondent

Counsel for the Applicants:
Sri Ram Badan Maurya

Counsel for the Respondent:
G.A.

Criminal Law –Criminal Procedure Code, 1973 - Section 438 CrPC- Sections 147, 148, 149, 307, 435, 436, 332, 353, 427, 341 & 186 - Public Property Act,1984 - Section 3/4 - Criminal Law Amendment Act,2013 - Section 7–incident involved huge crowd-vandalism and stone pelting-chargesheet against 64 persons-processes issued by the trial court to procure appearance of the accused applicants-under Sections 82 and 83 CrPC-declared proclaimed offenders- preliminary objection-accused persons not entitled to bail-after having been declared proclaimed offenders- if a person seeking anticipatory bail himself creates situation-that his arrest becomes inevitable-he makes exit from the protection area of Section 438 CrPC-absconding in violation of the order of the court is a grave violation of personal liberty.Bail Application rejected. (Paras 7, 9, 10, 13, 15, 16 and 17)

HELD:

It has been further held therein that anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

It has been further held by the Hon'ble Apex Court that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while

considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion. (Para 7)

The conduct of the applicants falls within the ambit of the law promulgated by Hon'ble Apex Court in Prem Shankar Prasad Vs St. of Bihar & anr., 2021 SCC OnLine SC 955. In the facts of the aforesaid case, charge-sheet was filed under Sections 406, 420 IPC against the accused and thus it was explicit that a prima facie case against the accused was found. From the record, it revealed that the arrest warrant was issued by the Magistrate against the accused and thereafter proceedings under Sections 82, 83 Cr.P.C. had been initiated pursuant to the order passed by the Magistrate. Only thereafter the accused moved an application before the trial court for anticipatory bail, which was rejected by the Sessions Court. (Para 9)

In fact this is the reason to believe that one may be arrested on accusation of having committed a non-bailable offence, that brings a person to seek a specific protection of anticipatory bail but if such a person himself creates a situation which places him under such condition where his arrest becomes inevitable, he makes an exit from the protection area of Section 438 Cr.P.C. The issuance of process under Section 82/83 Cr.P.C. reflects that the accused was not complying with the earlier process issued by the trial Court and he let it go in vain by showing his disrespect to it. In normal circumstances, a Court does not start with the process under Section 82 and 83 Cr.P.C. firstly summons are issued to the accused and then in an ascending order bailable warrant, nonbailable warrant are issued and if even then the accused remains absconding he becomes a proclaimed offender and process under Section 82 and subsequently under Section 83 Cr.P.C. are issued against him. (Para 10)

In the Sibbia case (supra) where the Hon'ble Apex Court had an occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail, it was observed that Section 438 CrPC is an extraordinary provision where the accused who apprehends his/her arrest on accusation of having committed a non-bailable offence can be granted bail in anticipation of arrest which, indubitably depends upon the

discretion of the Court but such discretion should be exercised with due care, caution and prudence on the facts and circumstances of the case. It can no doubt be continued after filing of charge sheet till end of trial. (Para 15)

The idea of anticipatory bail strengthen the theory of personal liberty of a person but if it is explicit before the Court that such person is likely to otherwise misuse or has misused his liberty, the negation to grant of anticipatory bail to such a person is never violation of the provisions of personal liberty. Absconding in violation of the order of the Court is a grave misuse of personal liberty and that is why, " if any one is declared as an absconder/ proclaimed offender in terms of Section 82 Cr.P.C.", as held in St. of M.P. Vs Pradeep Sharma (2014) 2 SCC 171, " he is not entitled to grant of anticipatory bail. (Para 16)

Bail application rejected. (E-14)

List of Cases cited:

1. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr., (2020) 5 SCC 1
2. Prem Shankar Prasad Vs St. of Bihar & anr., 2021 SCC OnLine SC 955
3. Gurbaksh Singh Sibbia Vs St. of Pun.(1980) 2 SCC 565
4. Siddharam Satlingappa Mhetre Vs St. of Mah. (2011) 1 SCC 694
5. Lavlesh Vs St. (NCT of Delhi) (2012) 8 SCC 730

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

1. This application has been moved on behalf of the applicants **Sovaran Singh Adhti, Shivanand Shakya, Brijesh Kumar, Santosh, T.R. Shakya @ Tulsidas and Shyam Sundar** seeking anticipatory bail in Case Crime No.231 of 2006 (Case No.6183 of 2011) under Sections 147, 148, 149, 307, 435, 436, 332, 353, 427, 341, 186

IPC, Section 3/4 Public Property Act and Section 7 Criminal Law Amendment Act, Police Station - Bhogaon, District-Mainpuri.

2. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

3. From perusal of the FIR it appears that in the case in hand a huge crowd of several persons was raising slogan and the roads were jammed demanding the arrest of some accused wanted in case crime no.226 of 2006 under Section 376 IPC and when the police force came at the spot, several persons including the present accused-applicants, being excited, started stone pelting upon the police force and some persons also opened fire upon the police with intention to kill. Roadways buses, bearing registration nos. UP75-B-9429, UP14-W-9707 and UP84-C-9487 and UP84-C-9171, were damaged and set to fire and public order was completely disturbed. The police with the view to disburse the crowd used force and in defence fire was also reciprocated by the police and some miscreants were arrested on spot. F.I.R. was lodged and investigation started. After investigation, charge-sheet was filed against 64 named accused-persons. Processes were issued by the Court to the accused-persons for appearance including the present accused-applicants, but they did not appear before the Court and the trial Court, in order to procure the appearance of the accused-applicants, issued processes under Sections 82 & 83 Cr.P.C. and they were declared proclaimed offender.

4. The preliminary objection has been raised by the learned State counsel that if the accused-applicants have been declared

proclaimed offender, they are not entitled for the benefit to anticipatory bail.

5. It has been argued by the learned counsel for the applicant that applicants are innocent and they have apprehension of their arrest in the above-mentioned case, whereas there is no credible evidence against them. Allegations levelled against the applicants are false. After completion of the investigation, charge-sheet has been filed and cognizance has been taken by the Court concerned. It has been submitted that in case the applicants are granted anticipatory bail, they shall not misuse the liberty of bail and would obey all conditions of bail.

6. Learned A.G.A. opposed the prayer for anticipatory bail.

7. In this matter, it reveals that after completion of investigation, charge sheet has been submitted and cognizance has also been taken by the Court concerned. Summons were issued to the accused-applicants. Since the accused-applicants did not appear before the Court concerned, despite service, coercive processes were issued against them as they were absconding. In **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1**, the Hon'ble Apex Court has settled the controversy finally by holding the anticipatory bail need not be of limited duration invariably. In appropriate case, it can continue upto conclusion of trial.

It has been further held therein that anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

It has been further held by the Hon'ble Apex Court that while considering an

application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

8. However, in the case in hand, process under Section 82 and 83 Cr.P.C. have been issued against the accused-applicants. The rejection order of the Sessions Judge, Mainpuri dated 19.12.2022 also corroborates this fact.

9. The conduct of the applicants falls within the ambit of the law promulgated by Hon'ble Apex Court in **Prem Shankar Prasad Versus State of Bihar and Another, 2021 SCC OnLine SC 955**. In the facts of the aforesaid case, charge-sheet was filed under Sections 406, 420 IPC against the accused and thus it was explicit that a prima facie case against the accused was found. From the record, it revealed that the arrest warrant was issued by the Magistrate against the accused and thereafter proceedings under Sections 82, 83 Cr.P.C. had been initiated pursuant to the order passed by the Magistrate. Only thereafter the accused moved an application before the trial court for anticipatory bail, which was rejected by the Sessions Court. However, subsequently anticipatory bail was granted to the aforesaid accused by the High Court and when the matter came

before the Hon'ble Apex Court, it was observed like this.

"19. Despite the above observations on merits and despite the fact that it was brought to the notice of the High Court that respondent No. 2 - accused is absconding and even the proceedings under sections 82-83 of Cr. P.C. have been initiated as far as back on 10.01.2019, the High Court has just ignored the aforesaid relevant aspects and has granted anticipatory bail to respondent No. 2 - accused by observing that the nature of accusation is arising out of a business transaction. The specific allegations of cheating, etc., which came to be considered by learned Additional Sessions Judge has not at all been considered by the High Court. Even the High Court has just ignored the factum of initiation of proceedings under sections 82-83 of Cr. P.C. by simply observing that "be that as it may". The aforesaid relevant aspect on grant of anticipatory bail ought not to have been ignored by the High Court and ought to have been considered by the High Court very seriously and not casually.

20. In the case of State of Madhya Pradesh v. Pradeep Sharma (Supra), it is observed and held by this court that if anyone is declared as an absconder/proclaimed offender in terms of section 82 of Cr. P.C., he is not entitled to relief of anticipatory bail."

10. In fact this is the reason to believe that one may be arrested on accusation of having committed a non-bailable offence, that brings a person to seek a specific protection of anticipatory bail but if such a person himself creates a situation which places him under such condition where his arrest becomes inevitable, he makes an exit

from the protection area of Section 438 Cr.P.C. The issuance of process under Section 82/83 Cr.P.C. reflects that the accused was not complying with the earlier process issued by the trial Court and he let it go in vain by showing his disrespect to it. In normal circumstances, a Court does not start with the process under Section 82 and 83 Cr.P.C. firstly summons are issued to the accused and then in an ascending order bailable warrant, non-bailable warrant are issued and if even then the accused remains absconding he becomes a proclaimed offender and process under Section 82 and subsequently under Section 83 Cr.P.C. are issued against him.

11. The Constitution no doubt guarantees protection of life and personal liberty of a person and this guarantee is enshrined in Article 21 of the Constitution of India, which pronounces that :

"21. Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty except according to procedure established by the law".

12. The prevention of any encroachment upon life and personal liberty of a person is the goal of Article 21 and the rule embodied therein is meant to ensure the recognition, respect and enforceability of the rights of the people and should be treated as continuing mandamus with ultimate object of social justice in true sense and the provisions of bail are connotative to avow this philosophy but the question of bail arises only when the person is in custody. The custody of a person starts when on account of being an accused of an offence he is arrested and brought or surrenders before the Court and thus is deprived of his personal liberty; but this deprivation comes within the ambit of the

words used in Article 21 i.e. "except according to procedure established by law".

13. At the same time, when we enter into the sphere of 'anticipatory bail' we find that the said term is not used under Section 438 Cr.P.C. which embodies the enabling provision. It can be taken as an anticipation of being arrested. In the landmark judgement of the Constitution Bench of Hon'ble Apex Court in **Gurbaksh Singh Sibbia Vs. State of Punjab (1980) 2 SCC 565**, it was that "a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail".

14. In the Case of **Siddharam Satlingappa Mhetre Vs. State of Maharashtra (2011) 1 SCC 694** It was held as under:

"14. It is clear from the Statement of Objects and Reasons that the purpose of incorporating Section 438 Cr.P.C. in Cr.P.C. was to recognize the importance of personal liberty and freedom in a free and democratic country. When we carefully analyze this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court".

15. In the Sibbia case (supra) where the Hon'ble Apex Court had an occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail, it

was observed that Section 438 CrPC is an extraordinary provision where the accused who apprehends his/her arrest on accusation of having committed a non-bailable offence can be granted bail in anticipation of arrest which, indubitably depends upon the discretion of the Court but such discretion should be exercised with due care, caution and prudence on the facts and circumstances of the case. It can no doubt be continued after filing of charge sheet till end of trial.

16. The idea of anticipatory bail strengthen the theory of personal liberty of a person but if it is explicit before the Court that such person is likely to otherwise misuse or has misused his liberty, the negation to grant of anticipatory bail to such a person is never violation of the provisions of personal liberty. Absconding in violation of the order of the Court is a grave misuse of personal liberty and that is why, " if any one is declared as an absconder/ proclaimed offender in terms of Section 82 Cr.P.C.", as held in State of M.P. Vs. Pradeep Sharma (2014) 2 SCC 171, " he is not entitled to grant of anticipatory bail.

17. The Hon'ble Apex Court in **Lavesh Vs. State (NCT of Delhi)(2012) 8 SCC 730** has clarified the legal position by holding that "12.....Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

18. Hence, no anticipatory bail may be granted to the present accused-applicants.

19. The anticipatory bail application is hereby **rejected**.
